

# Bankruptcy and a fresh start: stigma on failure and legal consequences of bankruptcy

## GREECE

### TITLE 1. INTRODUCTION

In Greece, as in other countries the commercial legislation of which was influenced by the French Commercial Code, bankruptcy law is one of the few fields still regulated directly by the Commercial Code (articles 525 – 596). Bankruptcy is governed by the Act of 12 December 1878, which replaced Book III of the Commercial Code and was amended by a Law of 22 February 1910 and by N.L. 635/1937.

Bankruptcy does not constitute a principle for the satisfaction of several claims but a collective enforcement procedure aiming at the proportional satisfaction of all creditors by reference to the amount of their claims. In other words, it benefits all the bankrupt's creditors, indiscriminately and regardless of their will, in order to attain the proportionate satisfaction of all. In this context, bankruptcy does not aim at the winding-up of the bankrupt's assets and the distribution of profits but at the proportional satisfaction of the creditors *per se*. All of the debtor's property is placed under supervision so as to be safeguarded and possibly distributed for the creditors' compensation. In contrast with other legal systems, the bankrupt's trading capacity is the starting point and pre-requisite for the application of insolvency rules.

However, inasmuch as companies may be connected with other interests worth-protected (e.g. of creditors, workers, minority shareholders etc.), the prevention of bankruptcy in certain companies is socially necessary. Still, the prevention of a company's bankruptcy may be also necessary for financial reasons purely (e.g. when insolvent enterprises are of a particular social and financial interest, when serious problems are created in companies having constant transactions with a bankrupt one and the former is may be led to bankruptcy etc.).

Therefore, in parallel to bankruptcy law, a set of rejuvenation law provisions has been developed concerning the conditions, types and consequences of mechanisms aiming at the prevention of bankruptcy, rescue of indebted companies, continuation of their affairs and – through this objective – at the satisfaction of their creditors.

The development of Greek rejuvenation law went through the following phases: *a*) the «on a case-to-case basis» legislation, e.g. for the big railway companies (Law 2378/40, LD 2577/53, LD 3023/54), *b*) LD 3562/56 on «*placing of companies limited by shares under the administration and management of creditors and placing under special winding-up*», as amended and as in force, *c*) the compulsory rejuvenation of L 1386/83 on «*Organization for economic reconstruction of enterprises*», which is no

longer in force, *d*) the new regulatory legal frame of Law 1892/90 on «*Modernization and development and other provisions*» (articles 44, 45, 46, 46a, 46b) and of Law 2601/98 on «*Financial aid to private investments for the economic and regional state development*».

Bankruptcy law and rejuvenation law have different aims. Nevertheless, they are not purely in opposition, but they may complement one another on the basis of the companies' dynamics. Through rejuvenation, the dissolution of viable companies (where the bankruptcy law leads) is deterred and their continuation (either under the same or another body) may be achieved. In practice, the phenomenon of succession of bankruptcy and rejuvenation is quite frequent: a bankrupt company may be placed under rejuvenation regime, provided that all legal prerequisites are met. During the company's placing under rejuvenation regime, the works of bankruptcy are suspended.

## TITLE 2. DEFINITIONS AND TERMINOLOGY

**General Partnership** («*omorrytmhi eteria*») – A commercial personal-oriented company with a legal personality. The most distinctive attribute of the general partnership is the joint and several unlimited liability of each of its partners for the debts of the company's legal person. The latter remains also liable for its obligations.

**Limited Partnership** («*eterorrytmhi eteria*») – A commercial personal-oriented company with a legal personality. The most significant feature of the limited partnership is that one or more partners have unlimited liability (general partners) and one or more partners are vested with limited liability (limited partners). The legal person of the partnership remains also liable for its obligations.

**Company limited by shares** («*anonymi eteria*») – This form of company is the most genuine form of a capital-oriented company, in which the predominant element is the invested capital. The formation of a company limited by shares must comply with certain requirements provided by the law (e.g. adoption of the Articles of Association by way of a notarial deed, registration, publicity etc.) and is subject to the approval of a State authority and the issue of a respective license. A company limited by shares becomes a legal entity only after certain publicity formalities have been observed. The law provides for a minimum capital that is divided into shares. During its operation the company is also supervised by the State.

**Company with limited liability** («*eteria periorismenis euthinis*») – The Greek Company law confers upon this form of company both capital and personal characteristics. The former is represented by the company capital (the law provides for a minimum), which acts as a counterbalance to the limited liability of its members; this liability does not exceed their contribution nor does it cover their personal property. The formation of a company with limited liability must comply with certain requirements provided by the law (e.g. the Articles of Association are adopted by way of a notarial deed, court-registration etc.) A company with limited liability becomes a legal entity only after certain publicity formalities have been observed. Instead of shares, the company with limited liability may issue «parts» («*meridia*»). The decision-making procedure reflects the dual nature of this form of company as well,

since both the individual member's participation and the participation of members *en bloc* in terms of majority etc., are taken into account. No State supervision is required during its formation and operation.

**Cessation of payments** («*pausi pliromon*») – ? permanent, actual and real inability of the indebted merchant to pay off his due and claimable commercial debts.

**Suspect period** («*ipopti periodos*») – The so-called period between the time of the bankrupt's cessation of payments and the date of issuance of the Court's decision.

**Administrator or Receiver or Syndic** («*sindikos*») – The lawyer charged with the management, maintenance or liquidation of the bankrupt's estate and the distribution of its proceeds for the proportional satisfaction of the bankrupt's creditors.

**Judge Rapporteur** («*isigitis dikastis*») – The Judge responsible for the monitoring of the bankruptcy procedure being empowered to request the Administrator's replacement, verify the creditors' claims and call their General Meetings.

**Creditors' General Meeting** («*simvoulia pistoton*») – The meeting that is formed by all creditors prior to the verification of their claims or by the creditors the claims of whom have been found successful after such verification, aiming at the reaching of a settlement with the bankrupt.

**Judicial composition** («*ptocheutikos simvivasmos*») – The settlement reached between the creditors and the bankrupt following a proposal by the latter.

**Union of creditors** («*enosi pistoton*») – All creditors the claims of whom have been verified, who are entitled to proceed to the liquidation of the bankruptcy estate and distribution of its proceeds amongst them, should a judicial composition is not effected.

### **TITLE 3. WARNING LIGHTS AND PREVENTION OF INSOLVENCY**

Despite the fact that under the Greek legal system no specific screening procedures have been enacted in order to detect companies facing financial difficulties and help them further avoid insolvency, a number of provisions regulating the operation of companies limited by shares and companies of limited liability may be well deemed to pursue the above.

In particular, article 4 par. 3 of Law 2190/1920 on «*Companies Limited by Shares*», as currently in force, introduces a precautionary measure relating to the decrease of the company's share capital and the protection of creditors. The purpose of a possible decrease as well as the method of its realization must be clearly specified, under the penalty of nullity, in both the invitation for the convocation of a General Assembly and the relevant decision of the latter. The above decision must be accompanied by a report of a chartered auditor, wherein the possibility of the company to satisfy its creditors should be certified, unless said decision for the decrease provides for a simultaneous increase of an equal amount. The Minister of Development may not

approve the decision for the capital's decrease, if the chartered auditor's report does not certify that sufficient guarantees remain for the satisfaction of creditors following the reduction.

Furthermore, the legislative publicity requirement concerning the financial statements of companies limited by shares, as provided in article 7a par. 1(g) and (h), article 7b par. 1(b) and article 27 par. 1 of the above Law, enables the internal and external financial control of them, contributing to the identification of the financially unhealthy ones. The company is obliged to file certain data with the Registry of companies limited by shares as kept at every Prefecture, which is later published in the Official Governmental Gazette. This data includes annual financial statements, initial or modified by General Assemblies (balance sheet, profits and loss account, table of distribution of profits and appendix), relevant Board of Directors' and Auditors' reports, as well as the accounting statement on the company's property whenever there is a decision for distribution of interim dividends. Most importantly, each shareholder is entitled to get informed on the financial situation of the company receiving the annual financial reports and the relevant Board of Directors' and Auditors' reports ten (10) days prior to an Ordinary General Meeting.

Moreover, the determination of the amount of 60.000 € as the minimum share capital of a company limited by shares, pursuant to article 8 par. 2 and 6 of the above Law, and the possible revocation of the company's operation should its share capital decrease beyond the abovementioned fixed lower limit, constitutes a measure for the financial control of a company. The Ministerial decision whereby a company has been established may be also revoked if the total of the company's own funds is lower than 1/10 of the share capital.

Additionally, the role of Auditors or Chartered Auditors in the operation of a company limited by shares is designed to contribute to its thorough financial screening. According to article 36 par. 1, article 37 par. 1, 2 and 3, article 38 par. 1 and 2 of the above Law, the General Meetings may decide validly on the annual accounts (annual financial statements), should the latter be previously audited by two (2) auditors at least. Companies exceeding certain limits set by the law are obliged to elect their auditors amongst the members of the Body of Chartered Auditors, as set up by Law 3329/1955. During the financial year the auditors shall monitor the accounting and administrative position of the company having the right of access to any book, account or document including the minutes of the General Assembly and Board of Directors. At the end of the financial year they shall examine the Balance Sheet and the Profit and Loss Account further submitting a report on their audit's results to the Ordinary General Assembly.

Pursuant to article 43a par. 1 (f) and (g) of Law 2190/1920, other information required to be given in the appendix of the financial statements include the amounts of obligations the redemption period of which is greater than five years from the closing day of the balance sheet, as well as the amounts of the obligations for the security of which the company has granted real surety. Furthermore, the total amounts of financial commitments deriving from agreements, guarantees and other contractual or legal obligations, which do not appear in the «class accounts» of the balance sheet, should be provided.

Unlike companies limited by shares, in the case of companies of limited liability no state supervision during information or operation is required. However, in article 8 par. 2 of Law 3190/1955 on «*Limited Liability Companies*» the precautionary measure of the financial statements' publication is provided. Moreover, article 14 sets out that the balance sheet and distribution of profits should be approved by the partners' meeting, whereas article 23 regulates the auditing of company's annual financial accounts. Lastly, pursuant to article 34, each partner is entitled to get informed on the company's ongoing affairs and financial running of the business.

Within the spirit of securing predictability when detecting companies in financial distress and flexibility in the rehabilitation or rescue procedures, other broader mechanisms have been adopted, such as the granting of loans, the replacement of the management, the merger of companies, and the increase or even decrease of the share capital especially when the latter is accompanied by the retirement of shareholders affecting negatively the financial state of the company<sup>1</sup>.

From the abovementioned, it seems that companies limited by shares are systematically screened by their supervising authority, the Ministry of Development, but in practice screening procedures very little offer to the avoidance of insolvency procedures. For this specific reason a dialogue has been initiated very recently on the need to modify the companies' screening procedures mainly in view of the forthcoming amendment of insolvency procedures.

## **TITLE 4. LEGAL POSSIBILITIES TO CONTINUE ECONOMIC ACTIVITIES**

### **Chapter 4.1. Reforming procedure under article 10 par. 2 of Law 2601/1998 on «*Financial aid to private investments for the economic and regional state development*».**

#### *§ 1. Description of the regime as well as its underlying philosophy*

1.1. Law 2601/1998, modifying the Law 1892/1990, offers several financial incentives to both healthy and problematic enterprises so as to proceed to investment planning in Greece. Said incentives are provided to both «new» and «old» beneficiaries, «new» being the recently established companies (capital or personal), as well as those applying to benefit from Law 2601/1998 prior to the completion of a five (5) years period from their establishment or commencement of activity, whereas «old» are the ones applying after the completion of the above period. More specifically, pursuant to article 10 par. 2 of Law 2601/1998 companies facing serious financial problems may submit a complete restructuring Business Plan so as to achieve their technological, administrative, organizational and business reforming and modernization<sup>2</sup>.

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<sup>1</sup> *L.N.Georgakopoulos*, Handbook of Commercial Law, Volume 1 – The traders, Part 3 – Bankruptcy and Rejuvenation, 1987, pp. 211 – 212.

<sup>2</sup> *Euthimios Ch. Anagnostou*, Law 2601/1998 on «*Financial aid to private investments for the economic and regional state development*», 1998-1999, Ipirotiki Publications, pp. 257-261.

1.2. Unfortunately, the above procedure remains inoperative, since no Ministerial Decisions have been issued clarifying the existing legal framework. As a result, the analysis below is of a rather theoretical value. In any case, the success of Law 2601/1998 will highly depend on the companies' compliance with its terms and conditions, so as to avoid any possible incident of unfair competition between them.

*§ 2. Classification of the procedure among branches of law, competent jurisdictions, overview of the procedure followed before these jurisdictions, implications of international private law*

2.1. The reforming procedure of article 10 par. 2 of Law 2601/1998 is of an administrative nature. Companies satisfying the criteria described herein below under 3.1 are entitled to submit to the Ministry of National Economy an application so as to benefit from to the reforming regime of said Law.

2.2. The administrative nature of this reforming procedure shows that the public domain is strongly involved in the decision-making process. This may lead to lack of objectivity when applying the procedure, as it has been the case in the past when due to political or economic interests certain companies have been treated on a «preferential» basis.

*§ 3. Criteria to benefit for the regime*

3.1. A company may benefit from the reforming regime of Law 2601/1998 when:

- a) it exercises manufacturing (processing) or mining activities, namely activities of a high importance for the economic development of the country;
- b) it belongs to the category of «old» enterprises, as specified above;
- c) it is under economic distress, as estimated by an Advisory Committee and the competent department of the Ministry of National Economy;
- d) it employs 150 persons at least, so that its dissolution creates serious employment problems at the relevant region; and
- e) an opinion is received by a bank as the main creditor of the applying company, on the viability of the latter's reforming business plan.

3.2. Despite the fact that pursuant to article 8 par. 10, the bank's opinion is not compulsory for the application of the Law, it plays a crucial role for the taking of the final decision by the Ministry of National Economy.

*§ 4. Specification of the possible initiators of the procedure*

4.1. The interested companies meeting the above criteria may initiate the procedure by submitting an application to the Ministry of National Economy.

4.2. The fact that a company with financial hardship is entitled to initiate this procedure gives it an extra incentive and opportunity to recover avoiding the opening of bankruptcy, the latter usually being to the detriment of the company and its creditors.

## *§ 5. Administration of the procedure*

5.1. The Advisory Committee and the competent department of the Ministry of National Economy are obliged to complete the examination of the file within six (6) months starting from the date the application is submitted. The evaluation of the reforming Business Plan is assigned to independent evaluators experienced in liquidations, mergers and acquisitions. These submit their evaluation report to the competent department of the Ministry, which further reports to the Advisory Committee. Finally, the Committee suggests to the Minister of National Economy whether the submitted Business Plan should be accepted or rejected.

5.2. The six (6) months deadline for the examination of the file by the competent authorities is rather far in time. A shorter deadline would lift the economic uncertainty prevailing in the interested company permitting it to speed up its financial restructuring.

## *§ 6. Restructuring plan*

6.1. The duration of the required Business Plan should be 2 to 3 years, while: a) including elements of technological, administrative and operational modernization, b) contributing to the reforming and development of the interested company, and c) describing the necessary measures for the training of the employees.

6.2. Since the whole reforming procedure depends on the Business Plan, it should be prepared quite carefully reflecting the company's ability to overcome the crisis. Moreover, once approved, it should be fully respected and followed by the company, otherwise several sanctions are threatened against it, as set out below under point 7.1., for the protection of its creditors and the credibility to the entire system.

## *§ 7. Degree of protection of the actors implied in the procedure*

7.1. Law 2601/1998 provides serious sanctions against the beneficiaries should they abandon the realization of the reforming Business Plan. In particular, pursuant to article 11 par. 1, if the investment is interrupted before completion time and no extension has been officially granted by the Ministry, the approving decision is considered never issued and the amount already paid to the investor is immediately returnable. This is to say that the approving decision is retroactively revoked from the date of its issuance.

7.2. Even though revocation of the approving decision is the main sanction threatened against the company, Law 2601/1998 also sets some limits concerning the company's right to transfer or lease assets been subsidized under the reforming procedure or to enter into an ordinary or special liquidation procedure.

## *§ 8. Termination of procedure*

8.1. The Minister of National Economy should issue a decision within thirty (30) days from the delivery of the Advisory Committee's opinion. Once the company's application and reforming Business Plan have been approved, the benefits enjoyed by the company under Law 2601/1998 include: a) loans, b) interest subsidies, c) leasing

subsidies, d) partial or total tax exemptions, or e) other benefits defined by a joint decision of the Ministers of National Economy, Development, Employment and Social Security.

8.2. The above benefits are provided directly to the applicant company as investor and should not be assigned to a third party. The above prohibition does not apply to banks due to the granting of loans of an equal amount to the investor. For the purpose of clarity, the amount received by the investor is registered in its books under the form of special reserves.

#### *§ 9. Degree of information on the development of the procedure towards creditors*

9.1. Summary of the approving decision of the Minister of National Economy is published in the Official Governmental Gazette, so that all third parties, creditors involved, get informed that the company has been subject to the reforming regime of Law 2601/1998.

9.2. Despite the above, the extent of information and protection offered to creditors is not complete, since the publicity requirement does not apply to decisions amending the initial approving one or the one granting to the companies extensions to implement their business plan.

#### *§ 10. Costs related to the procedure*

Since the system is still inoperative, there is no real indication of the costs required. However, it is anticipated that these costs will not be significant and will be mainly related to the preparation and submission of the application.

#### *§ 11. Competence of insolvency courts*

As mentioned above, under point 2.1, the procedure under examination is of an administrative nature and, therefore, no insolvency courts are involved.

#### *§ 12. Publicity conditions, if applicable*

12.1. Summary of the decision is published in the Official Governmental Gazette, as indicated above under point 9.1.

12.2. Insofar as the protection of creditors is concerned, please see our comments under point 9.2.

### **Chapter 4.2. Restructuring as per article 44 and winding-up or special liquidation as per article 46a of Law 1892/1990, of companies in financial crisis**

#### *§ 1. Comprehensive description of the regime as well as its underlying philosophy*

1.1. The legal framework of restructuring and winding-up of companies in financial distress is determined by Law 1892/1990, and more particularly by articles 44, 45, 46, 46a and 46b, as currently in force. This law provides mainly two stages.



The first stage, as provided in article 44, concerns the conclusion of the Agreement amongst the creditors and the company, having as content the settlement or reduction of the company's debts and aiming to its rescue and restructuring. The company owners are given the possibility to rescue their company, provided that the creditors believe that this is feasible. In case the creditors do not reach an agreement or the terms of said agreement are not fulfilled, the company is put under the winding-up procedure provided in article 46 hereunder.

The second stage concerns the special winding-up procedure functioning in two particular ways. The first way of article 46 provides for the sale of the company's assets under the usual procedure of compulsory auction. This procedure is equivalent to bankruptcy aiming mainly to the satisfaction of the creditors. The second way of this stage, as set by article 46a, introduces the compulsory for the liquidator sale of the company as a whole, under the procedure of a public tender to be awarded to the higher bidder. The above provision establishes the legal framework for the company's rescue and not its owners. The aim is to sell the company's assets as a whole released from its debts.

1.2. Law 1892/1990 is based on the concept of denationalization of companies in financial crisis. It pursues the reforming and rescue of such companies which are still viable, so as to safeguard the employment and national economy. The reforming of the companies can be realized only voluntarily by virtue of a creditors' agreement (article 44), referred above as first stage. In the special winding-up, referred above as second stage (articles 46, 46a), both procedures aim in principle to the satisfaction of the creditors through the sale of the company's property. The sale of the company as a whole may lead to its reforming and rescue under the ownership of the bidder.

*§ 2. Classification of the procedure among branches of law, competent jurisdictions, overview of the procedure followed before these jurisdictions, implications of international private law*

2.1a. Restructuring procedure (articles 44 – 45). In order to pursue the agreement amongst the creditors and the company the following four conditions should be met: a) The conclusion of their agreement, b) The consensus of the majority of the company's shareholders or stakeholders, c) The non-sale (existence) of the operative assets of the company, d) The ratification of the agreement by the Court of Appeal after a petition of the company or one of the creditors, who is also a contracting party of the agreement. The contracting creditors should represent the 60% of all the claims, as these appear in the records and balance sheet of the last financial year before the agreement. At least 40% of the creditors secured by mortgage, lien or pledge should be included in the above percentage. Non-implementation of the Agreement leads to the company's liquidation<sup>3</sup>.

According to article 45, after a petition of a creditor or creditors representing the 51% of the credits, the Court of Appeal shall set the company under trusteeship until the parties reach the Agreement. According to article 45, upon the publication of the court decision nominating the trustee, all personal prosecutions and interest bearing of the

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<sup>3</sup> Piraeus Court of Appeal 132/1996, Commercial Law Journal, 1996, p. 1087.

claims are suspended. The above suspensions are in force until the end of the term of the trustee and cease once the decision of the Court of Appeal ratifying the Agreement is issued. The nomination of the Trustee is just a short-term structure, which neither changes the conditions of the conclusion of the Agreement of article 44 nor produces any alterations to the legal character and content of the Agreement<sup>4</sup>. The Agreement may provide that the personal prosecutions against the debtor shall be suspended from its judicial ratification. However, it is questionable whether the suspension of personal prosecutions may be part of the Agreement. The company may be submitted to the regime of articles 44 and 45 at any stage of the bankruptcy procedure, given that the operative assets of the company are not sold. It is strongly supported that the Agreement can be accomplished even at the stage of bankruptcy judicial composition, as the outcome of this Agreement may be more favorable than the one of the above composition. The Agreement may be also concluded during the liquidation or winding-up procedures. Its ratification does not automatically suspend the company's liquidation or winding-up.

Concerning tax law issues, article 44 par. 3 provides that Agreements concluded between the company and its creditor which areas ratified by the Court of Appeal as well as other actions and deeds performed for the fulfillment the above Agreement are exempted of any tax, duty, tariff, charge imposed in the favor of the State or third parties.

2.2b. Winding-up procedure (Articles 46a, 46b). Pursuant to article 46a, the winding-up of a company is ordered by the Court of Appeal after the lodging of a petition by the creditors representing 51% of the outstanding claims against the company. The sale of the company is effected by the procedure of a Public Tender to be awarded to the better bidder. The tender is awarded by a contract between the Bidder and the Liquidator. The procedure of winding-up of article 46a is applied under two main conditions: a) the company must be in an financial crisis, and b) a petition by the creditor or creditors representing 51% of the total outstanding claims against the company, is lodged before the Court of Appeal. Article 46b provides for the winding-up of very big companies having excessive debts exceeding the amount of 50 billion GRD, or around 147 million € and requires a petition of creditors representing 60% of the outstanding claims against the company. The State, financial institutions, social security organizations should be included amongst these creditors. The provisions of article 46b may apply also to the companies already submitted to the regime of article 46a, as long as they meet the above conditions.

The above petition entails the following effects as from the next day of its filing: i) prohibition of taking any measures of compulsory auction as well as of injunction against the company, ii) prohibition of adjudication of bankruptcy; iii) Suspension of personal prosecutions. As from the next day of the publication of the Court decision the following are taking place: a) continuation of the company's operation, b) cease of the powers of the company's bodies and representation by the Administrator judicially or extra judicially, c) in principle *ipso jure* termination of all the employment contracts, with the possibility to provisionally keep the company's

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<sup>4</sup> L. Kotsiri- R. Hatzinikolaou, The Restructuring and Winding-up Law of enterprises in crisis, p. 74.

personnel (if there is a justification report of the creditors and the winding up interest imposes it<sup>5</sup>).

Concerning tax law issues, article 44a par.13 provides that the contract of transfer as well as any other relevant transfer, sale, action and deeds performed for the fulfillment the above transfer are exempted of any tax, duty, tariff, charge imposed in the favor of the State or third parties. The Buyer is also exempted from the tax imposed on real estate. Regarding labor law it is provided that the provisional stay of the personnel is automatically terminated, upon the signing of the contract by the Bidder, except if he decides to continue employing them. An offer, which provides for the maintaining of the personnel of the company, is estimated in a positive way. It should be noted that sometimes a relevant term is included in the tender, while in article 46b it is explicitly provided that the decision about winding-up does not result to the termination of the employment contracts.

2.2. The above procedures may meet the scope of the law. Nevertheless when it comes to the winding-up of strategic companies, the relevant provisions are constantly modified to be adjusted to the needs of these companies, which serve very important financial and social interests.

### *§ 3. Criteria to benefit for the regime*

3.1. The following companies may benefit from the regime of articles 44 or 45: a) companies which have suspend or discontinue their operation for financial reasons; b) companies which are in the situation of cessation of payments; c) companies which are bankrupt, or under the administration of the creditors, or under provisional administration, or liquidation; d) the total of their debts is 5 times more than the sum of their share capital and the reserves, and they also obviously unable to pay their debts.

The following companies may benefit from the regime of article 46a: a) companies which have suspended or discontinued their operation for financial reasons; b) companies which are in the situation of cessation payments, while the total of their debts amounts to up to 880.411€ c) companies, which are under liquidation, as long as its operative assets are not yet sold; d) companies, which are – obviously – unable to pay their debts.

The main criterion to benefit for the company is the continuance of its operation. The sale of the company as a whole or the conclusion of the Agreement usually proves more profitable. Concerning the sale, it is essential for the selection of the buyer not only the higher price but mainly the solvency of the buyer and the interests of the creditors<sup>6</sup>. The strict procedure imposed by the law reassures the transparency and the adequate information of the potential investors - buyers<sup>7</sup>, as defined in the Preamble of the Law. At the same time they will benefit from the tax and charge exemptions, as described above.

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<sup>5</sup> Thessalonica Court of Appeal 915/1997, which decided to keep all the personnel.

<sup>6</sup> *I.Mpratsioti*, Company Law, 1995, p.720.

<sup>7</sup> *L. Kotsiri- R. Hatzinikolaou*, op. cit. 4, p. 174.

3.2. The company, as an operative unit, may continue to exist, given that the efforts aiming to conclude the Agreement of article 44 or accomplish the sale as in article 46a succeed. Moreover, the above regime facilitates the finding of a buyer, leads to the rescue of the company and avoids the breaking to pieces, which finally adds value to the company.

#### *§ 4. Specification of the possible initiators of the procedure*

4.1. Initiators of the procedure are the company itself and the legal majority of the creditors. The petition to the Court for the ratification of the Agreement may be lodged by the company, the contracting creditors, the State, the social security organizations, financial institutions if they are also creditors (article 44). In this case, the initiators are the creditors who represent the 51% of the outstanding debts (article 46a).

4.2. It becomes obvious that the law scopes to reassure mainly the interests of the creditors, who are in any case one of the most important factor of the procedure.

#### *§ 5. Restructuring plan*

5.1. Law does not provide for a restructuring plan.

5.2. The absence of such provision creates obstacles to the rescue of these companies, as the above procedures usually result in a short-term survival of the company than a long-term rationalized development.<sup>8</sup>

#### *§ 6. Administration of the procedure*

6.1a. The company during this procedure is still governed by its proprietor or the competent bodies. Only failure of the fulfillment of the Agreement shall lead to administration of the Trustee. The company as well as all the other involved parties shall follow and keep the ratified Agreement (article 44).

6.1b. As from the next day of the publication of the Court's decision the company's bodies cease to exercise their powers. The creditors who file the petition must indicate the person of the Liquidator, who must a Bank, operating legally in Greece, or a subsidiary of such Bank. The Bank indicated by the creditors as Liquidator, must also produce a declaration of acceptance to the Court.<sup>9</sup> The Liquidator represents the company and his duty is to proceed to the inventory and evaluation of all the assets of the company, to sell it as a whole in a public tender and distribute the proceeds to the creditors (article 46a).

After the opening of the offers, the Administrator shall make out a report of evaluation of the offers and proposes the acceptance to the best bidder. This report together with the proposal for the bidder is submitted to the creditors. Once the creditors representing the 51% of the outstanding claims approve the report and the

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<sup>8</sup> E. Mastromanolaki, *Enterprises' and Companies' Law*, 2/1999, p. 133.

<sup>9</sup> Athens Court of Appeal 1083/1993; Athens Court of Appeal 3089/1993.

bidder, the Administrator is entering into the contract with the bidder before a notary public. In case the creditors do not approve it in one-month period, their approval is presumed. In the above term the creditors must submit their remarks, or ask for clarifications, or ameliorations of the offers. In the event that the creditors declare to the Administrator that none of the offers is considered profitable, the Tender is repeated in fifteen (15) days. If the new Tender fails, then the company is sold partially by auction, or a third tender may take place providing the possibility to sell autonomous operative units of the company.

6.2. As it is already mentioned hereinabove, the main factors in the proceedings are the creditors and the Administrator, where the latter is legally provided. To which extend the claims of the creditors will be fulfilled mainly depends on the effective management of the creditors and the Administrator, as their role is crucial for the selection of the bidder and the terms of his offer.

*§ 7. The degree of protection of the actors implied in the procedure*

7.1a. Once the agreement is ratified by the Court, it binds all the company's creditors, secured or not, preferential or not, as well as the non-contracting ones. It also binds the State, the Social Security Organizations, the Banks and other financial institutions. It does not bind the employees, the creditors of the short-term and current claims, so as to facilitate the operation of the company. The creditors secured by pre-notation or mortgage are equated with any other creditor, as long as the Court of Appeal ratifies the Agreement. Their securities of lien do not supply them any longer with a privilege. Even the creditors, whose claims have been recognized by irrevocable Court decisions, are bound by the Agreement. The Court of Appeal does not examine whether or not the non-contracting creditors (the minority) are suffering any damage. However, these creditors may seek protection to the courts according to the contentious jurisdiction<sup>10</sup> (article 44).

The non-contracting creditors, who have not also participate to the trial, may object to the Court decision according to article 583, 773 of Code of Civil procedure. Concerning the guarantors of the company, counter to the bankruptcy provisions, their liability is limited to the extend of the «new» claim, as it is fixed after the ratification of the Agreement<sup>11</sup>. The guarantor can also invoke any other provision of the Agreement that may reduce the claim, the interest-bearing *etc.* In case the claims as have been defined in the Agreement, are paid, then the guarantors are liberated. The majority of the shareholders have to approve the Agreement in writing. Usually they sign the Agreement, or submit a declaration attesting also their percentage of participation in share capital. In case the creditors are also founders or members of the Board of Directors, or General Managers, then according to Greek law (Law 2190/20, article 23a), a resolution of the general meeting shall be taken with special quorum and majority<sup>12</sup>.

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<sup>10</sup> Athens Court of Appeal 6093/1994, Commercial Law Review, 1996, pp. 392 - 394, Patras Court of Appeal 53/1997, Enterprises' and Companies' Law, 1997, p. 978; K. Pampoukis, Commercial Law Journal, 1997, pp. 884 - 892.

<sup>11</sup> L. Georgakopoulos, Enterprises' and Companies' Law, 1995, p. 147.

<sup>12</sup> L. Kotsiri- R. Hatzinikolaou, op. cit. 4, p. 35.

7.1b. The creditors in this procedure are satisfied by the proceeds of the public tender (the price of the sale of the company to the bidder). For any remaining balance of their claims, the creditors are not entitled to seek any satisfaction against the company itself or its guarantors. Both the company and the guarantors are released from any debts that have not been paid during the procedure of winding-up<sup>13</sup>. Under specific conditions, the guarantors who have offered personal guarantees in favor of the State, are released, as soon as the company is under the regime of the winding-up of the above article. There are no other special provisions governing the protection of the involving parties (article 46a).

7.2a. The interests of the creditors after the Agreement have to be evaluated and appreciated with regard to the beneficial result for the national economy, the company and its personnel<sup>14</sup>. The creditors, who have a leading role in the procedure, have to confine themselves with the proceeds of the public tender. The above also serves the aims of the winding-up procedure and the company's rescue (article 44).

#### *§ 8. Termination of the procedure*

8.1a. The restructuring of the company is terminated by fulfillment of the Agreement amongst the creditors and the company, as the Court of Appeal ratified it. The restructuring is completed in case of failure of the Agreement. Failure is considered to be the non-execution of the whole or terms of the Agreement. After a petition of any creditor, regardless of the amount of his claim, the Court of Appeal ascertains the non-execution of the Agreement, revokes the former decision about the ratification of the Agreement and orders the enforcement of article 46. If a decision ordering the enforcement of the winding up according to article 46 is not issued, then the creditors, may file a petition to the Court of Appeal demanding the revocation of the Agreement and proceed to any other legal measure for the protection of their rights (article 44).

8.1b. The winding-up is concluded by the full payment of the proceeds of the public tender by the bidder and the distribution of this to the creditors. Even if the law does not provide for the time within the process of the winding-up has to be terminated, it must be defined in the sale contract of the company. The Administrator is granted with five (5) years or at the most ten (10) years period of time to accomplish his work<sup>15</sup>. The end of the winding-up procedure is not ascertained by a court decision. Another way for the winding up to terminate is the revocation of the Court decision. This provision applies only in the event that, two at least public tenders becomes unsuccessful. The same Court that ordered the company's winding-up also issues the new decision after a petition of the 51% of the creditors. In that case, the winding-up is annulled retroactively. However, the actions of the Administrator completed until the revocation remain in force (article 46a).

8.2 a. The scope of the law is to reassure the execution of the Agreement in short-time period. The fact that any creditor may «annul» the restructuring of the company, in case of non-execution, may serve as a way for all the involving parties to do their best

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<sup>13</sup> K, Pampoukis, Issue of the Association of Companies Limited by Shares and Companies of Limited Liability, pp. 487-488

<sup>14</sup> L. Kotsiri- R. Hatzinikolaou, The Restructuring and Winding-up Law of enterprises in crisis, p. 31.

<sup>15</sup> Kotsiris, Enterprises' and Companies' Law, 1995, pp. 1027-1028.

for the accomplishment of their undertaken obligations according to the Agreement (article 44).

8.2.b. The revocation of the decision is considered as a way for the company to exit from the regime of the winding-up, in the case that no qualified bidder can be found. Then the creditors may turn to any other procedure provided by law, such as the Agreement of article 44, the bankruptcy or the compulsory auction (article 46a).

#### *§ 9. Degree of information on the development of the procedure towards creditors*

9.1. The creditors, as it has been already mentioned, have a leading role in these procedures, usually are also the initiators of the procedure. Consequently, those who participate in the procedure of the restructuring or the winding-up are well informed about the development of the procedure. The other creditors may be informed according to the publicity provisions described in paragraph 12 hereby.

9.2. Law provides explicitly and in detail the procedure concerning the majority of creditors, whose approval and participation is indispensable. It is evident that in such a procedure the satisfaction of every possible creditor is quite impossible. Accordingly, the degree of information depends on the fact of participating or not in the procedure as well as whether a creditor belongs to the majority required by law. It could be considered that further notifications or publicity conditions than the ones legally provided may result to delays in the procedures with very negative effects to the company, the interests of the majority of creditors and the economy.

#### *§ 10. Costs related to the procedure*

All the expenses of the winding-up are deducted from the proceeds of the public tender prior to its distribution to the creditors. The rights and fees of notary public, lawyers, bailiffs, and land registrar are limited to the 30%. The Court by the same decision that orders the winding-up of the company defines also the fees of the Administrator. The petition of the creditors shall also include a relative term about the amount of his fees.

#### *§ 11. Competence, knowledge and functioning of insolvency (bankruptcy) courts*

11.1. Exclusively competent is the Court of Appeal, where the company or the debtor has its registered office. The Court shall examine the legitimacy of the Agreement and not its usefulness<sup>16</sup>. It must consider though the feasibility of the Agreement<sup>17</sup>. The lodging of an appeal before the Supreme Court against this decision is not provided.

11.2. The exclusive competence of the Court of Appeal reassures the fact the restructuring or winding-up of companies, usually of great significance for the public interest and the national economy, is entrusted to well-experienced judges. Besides, the provision that no other judicial remedies or appeals exist in principal responds to the need for effective and definite settlement of the case.

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<sup>16</sup> L. Georgakopoulos Handbook of Commercial Law, op. cit. 3, p. 260; Th. Liakopoulos, Restructuring and Winding-up Law of enterprises, p. 51; K. Pampoukis Commercial Law Journal, 1997, p. 884.

<sup>17</sup> L. Kotsiri- R. Hatzinikolaou, op. cit. 4 , p. 56.

## § 12. *Publicity conditions*

12.1a. According to this article, the petition before the Court should be notified to specific creditors of the company who have not entered the Agreement. These creditors are the State, social security organizations, legal entities belonging to the State, financial institutions which have lien on the company's property. Otherwise the Court shall reject the petition (article 44).

12.1b. The Administrator shall observe two publicity conditions (article 46a):

- a. The publication of the Invitation for the expressing of interest at least twice in two daily political newspapers and one financial, issued in Athens and in a foreign financial newspaper. The above newspapers should be considered of wide circulation.
- b. After at least 35 days from the publication of the Invitation and no longer than 60 days from the publication of the Court decision for the appointment of the Administrator, the Declaration for the conducting of the Public Tender shall be published in the abovementioned newspapers.

12.2. Pursuant to article 44, by virtue of the petition's notification to the non-contracting creditors, the latter are given the possibility to intervene at the trial, demanding the non-ratification of the Agreement or the rejection of the petition<sup>18</sup>. The absence of provisions for individual notifications is due to the fact that the present procedure of tender is different from the compulsory auction provided in the Code of Civil Procedure<sup>19</sup>.

### **Chapter 4.3. Placing of companies limited by shares, general partnerships and limited partnerships either under the administration and management of their creditors, or under special liquidation (LD 3562/1956 and RD 22/28.12.1956).**

#### *§ 1. Comprehensive description of the regime as well as its underlying philosophy*

1.1. LD 3562/1956 *«for the placing of companies limited by shares under the administration and management of creditors and for their placing under special liquidation»*, as modified by the LD 1159/1972 and as in force, is included in the frame of the post-war effort for the rectification of the Greek economy<sup>20</sup>. By virtue of RD 22/28.12.1956 the provisions of LD 3562/56 were also extended to the general partnerships, as well as to the limited partnerships. The basic axis of LD 3562/56 is the placing of companies having exclusively the aforementioned legal forms, either under the administration and management of their creditors (articles 11 – 16) or under special liquidation (articles 17 – 23). Starting from a preliminary stage (*«provisional management»*, articles 2 – 10), these two alternative processes (*«administration and*

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<sup>18</sup> *M. Aggelakis* Bulletin of the Association of Greek Banks 1996, p. 62, E. Perrakis as above p. 71.

<sup>19</sup> *L. Kotsiri- R. Hatzinikolaou*, op. cit. 4, p. 158, *Kerameus and Kozyris*, Introduction to Greek Law, 1998, p. 254 - 255.

<sup>20</sup> *L.N.Georgakopoulos*, op. cit. 3, pp. 146 – 147, where it is reported that the objective of LD 3562/56 was the deterring of the declaration of bankruptcy and the rescue of the enterprises, which had been financed by the American help to Greece and they were unable to correspond to their obligations, *P. Vafeiadou – E. Giannopoulou*, Bankruptcy Law, Rejuvenation and Special Liquidation of Enterprises, 1997, p. 397.



management», «special liquidation») may be put into effect either successively or disjunctively by virtue of a judicial decision that is awarded following a petition by the majority of the claims' size of the creditors provided that certain essential and formal conditions are met.

1.2. LD 3562/56 aimed at a more rapid satisfaction of the company's creditors and the taking of the corresponding initiative by the creditors themselves, with a parallel effort for the conservation of the company as economic and social unit<sup>21</sup>. The legislator instituted a unified process for obligatory rejuvenation (*see below par. 2*) with three stages («provisional management», «administration and management», «special liquidation») that may succeed one another, so that the return of the debtor to the provisions of the common law during the period intervening between these stages is excluded. The extent of the application of LD 3562/56 existed limited<sup>22</sup>. Although said LD has not been repealed, its procedures tend to fall (if not already fallen) in disuse.

*§ 2. Classification of the procedure among branches of law, competent jurisdictions, overview of the procedure followed before these jurisdictions, implications of international private law*

2.1. LD 3562/56 is classified under private commercial law, and more specifically under the law for the companies' rejuvenation<sup>23</sup>, whereas the differences arising from its application belong to the jurisdiction of the ordinary civil courts.

In order for the placing of a company under any of the mechanisms provided therein, the filing of a respective petition<sup>24</sup> is required (*see below par. 4*) which is submitted before the bankruptcy court judging under the rules of voluntary jurisdiction of the Greek Code of Civil Procedure. Conditioning to all the formal and essential conditions provided by LD 3562/56, the Court, accepting the petition of the creditors, places the company under the requested form of rejuvenation appointing the «provisional manager». With regard to the possible implications of international private law, LD 3562/56 does not contain any specific provisions. Therefore, the general provisions of the Greek Civil Code would be applicable accordingly.

2.2. The judicial movement of the process presents the advantages of every trial, since it makes the institution of LD 3562/56 accessible on conditions of equality in all the similar cases, presenting however the disadvantage of slowness.

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<sup>21</sup> *One-member Court of First Instance of Lamia 532/1987, Commercial Law Review, 1988, p. 67.*

<sup>22</sup> *Th. Liakopoulos, Questions of Commercial Law, 1985, 397, J.P.Mpratsiotis, The establishment of the special liquidation of article of 46a of the L. 1892/90, the innovations, the field of application and the priority relations for the application of articles 44, 46 and 46a of Law 1892/90, Companies' and Enterprises' Law, 1995, p. 718.*

<sup>23</sup> *L. Kotsiris – R. Hatzinikolaou – Aggelidou, op. cit. 4, p.1, P. Vafeiadou – E. Giannopoulou, op. cit. 20, p. 393, E. Perakis – Introduction in the law of rejuvenation of companies, 1987, p. 7.*

<sup>24</sup> *The LD 3562/56 provided for the establishment of a special committee to the Bank of Greece (article 3) with administrative duties on preliminary proceedings, which is not active any more. K. Pampoukis, Questions from the rejuvenation of enterprises – Integration of the institution in the frames of common law, Commercial Law Review, 1986, p. 158, L.N.Georgakopoulos, op. cit. 3, p. 172 where the special committee of article of 3 of the L.D. 3562/56 is reported as repealed.*

### *§ 3. Criteria to benefit for the regime*

3.1. Qualified for the placing under the field of application of LD are, exclusively, companies limited by shares, general partnerships and limited partnerships that cease their payments (article 1 par. 1 LD 3562/56, article 1 of R.D.22/28.12.1956). Pursuant to article 1 par. 2 of LD, the «cessation of payments» occurs upon the moment that the company becomes overdue for the payment of a debt because of financial difficulties.

3.2. According to article 28, the provisions of LD 3562/56 may be extended also to «companies with limited liability» by virtue of a respective decree, which has not been enacted yet. The cessation of payments and the qualification are supposed to exist also at the time of the hearing before the Court.

### *§ 4. Specification of the possible initiators of the procedure*

4.1. According to article 2 par. 2 of LD 3562/56, for the initiation of the procedure a petition is required to be submitted before the Court by the creditor/s having the absolute majority (51%) of the claims' size (either due or not), as these claims are presented into the commercial books of the company one month prior to the submission of the petition<sup>25</sup>. The petition must contain a request for the placing of the company under «provisional management» and a further stage, either its placing under the «administration and management» of the creditors or under «special liquidation». Pursuant to article 4 par. 2 of said Law, creditors are considered to be the ones having any claim against the company on any cause.

4.2. Privileged creditors (e.g. with a mortgage, a pledge or otherwise), as well as creditors whose claims have not expired are calculated for the required majority of the claims' size. The observation of the 1-month period may present problems in cases of marginal majorities.

### *§ 5. Administration of the procedure*

5.1. Upon the submission of the creditors' petition<sup>26</sup>, the internal managing body of the company is deprived the right to dispose of and allocate its assets, as well as the company's management in general. However, its internal managing body manages the company until the undertaking of duties by the «**provisional manager**». The aforementioned deprivations are raised if the Court finds the petition of the creditors unacceptable. Moreover, due to the submission of the creditors' petition<sup>27</sup>, compulsory execution, taking of provisional measures against the company, or its declaration as bankrupt for debts born prior to such submission is prohibited, whereas any execution process that has begun is suspended. The aforesaid prohibition is raised if the Court finds the petition of the creditors unacceptable.

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<sup>25</sup> LD 3562/56 provides for a previous submission of an application before the – already inactive – special committee of article 3 on the benefit of its consent and reports the consequences as to the company befalling from the submission of this application. Let alone, the consequences befall from the submission of the application before the Court (see, *L. Georgakopoulos*, op. cit. 3, p. 172).

<sup>26</sup> See footnote 24.

<sup>27</sup> See footnote 24.

The «**provisional manager**» undertakes the verification of the claims, the effort for the achievement of the consent of the majority of the creditors' claims' size and of the consent of the majority of the shareholders/partners of the company (this latter consent may be substituted by a decision of the Court of Appeals) for the placing of the company under the «administration and management» of its creditors, provided that the Court ordered the «administration and management» as form of rejuvenation. If the objective is achieved, then the provisional management is terminated and the internal bodies of the company undertake its administration and management. Up to this moment, the provisional manager runs the company's affairs. If the aforesaid consent for the placing of the company under the «administration and management» of its creditors is achieved (or if a decision of the Court of Appeals is issued in substitution of such a consent), the bodies of the «administration and management» (i.e. the «managing committee» and the «assembly of the creditors») continue the company's affairs.

The «**assembly of the creditors**» assumes competence for all matters and replaces the general assembly of the shareholders. The «assembly of the creditors» is entitled to adopt resolutions by simple majority of the claims' size, regarding the share capital increase and the issuance of shares and bonds. The post of the board of directors is filled by the «**managing committee**», which is elected by the «assembly of the creditors». Similar accommodations are made in case of partnerships (general or limited ones). The «managing committee» is entitled to reduce the nominal value of the shares and issue new shares covering the part of the reduced value. Furthermore, in order to indemnify the creditors, the «managing committee» distributes to them registered «titles» on par with the size of their claims. If the creditors are not satisfied within a reasonable period of time, the «managing committee» is qualified for asking the placing of the company under «special liquidation» and the appointment of a «**liquidator**» from the Court. The «**special liquidation**» begins by virtue of this decision.

The «**special liquidation**» may also begin in the following cases: **a)** when the Bankruptcy Court places the company from the very beginning under «provisional management» to the purpose of its placing under «special liquidation» (article 17 par. 1a), **b)** when the Bankruptcy Court had initially ordered the placing of the company under «provisional management» to the purpose of its placing under «administration and management» by its creditors, but further to the verification of the claims (by the provisional manager), the company denied or omitted to consent for its continuation under the «administration and management» and thus the relative dispute was resolved by the Court of Appeals in favour of «special liquidation» (articles 9 par. 5, 17 par.1b). In the aforesaid cases, the «special liquidation» is held actually by the «provisional manager» who is empowered for the auctioning of the company's assets without the Court's permission. The «**liquidator**» is entitled to proceed, through auction/s, in the sale of more or even of all the assets simultaneously belonging to the company.

5.2. LD 3562/56 does not contain provisions regarding the luck of pending contracts and more specifically of the bilateral ones. Therefore, such contracts are not terminated. The unity of the process provided in LD is facilitated due to the fact that the powers of the managing actors in each stage are retained until the time the

managing actor of the following stage undertakes powers thereof<sup>28</sup>. Despite its perfection LD 3562/56 presents a complex and inflexible mechanism of application.

#### § 6. *Restructuring plan*

LD 3562/56 does not provide for the setting up, the formation or the submission of a restructuring plan.

#### § 7. *The degree of protection of the actors implied in the procedure*

7.1. Further to what is mentioned herein above (*see par. 5*), the core of LD's institution is located in the way of creditors' satisfaction, as described in articles 15 and 26 in the case that the company was placed under the «administration and management» (*see below 7.1a*) and in article 27 in the case where the company was placed under «special liquidation» (*see below 7.1b*).

a) Pursuant to article 15 of LD, the «managing committee» is entitled to provide the creditors with registered «titles» on par with the size of their claims. The nominal value of the «titles» is expressed in US dollars, whereby all the company's obligations are converted into the above currency on the basis of the exchange rate as in force on the titles' issuance date. The «titles» are transferable and grant preferential rights to: i) dividend equal to 6% of the nominal value, from the net profits of the company, per year, ii) withdrawal of their nominal value (before any distribution of the company's assets to the common shareholders), in case of the company's dissolution. The remaining net profits of the company (after the reduction of all the withholdings provided by the law and the company's articles of association, excluding depreciations and withholdings for the formation of reserve funds that are prohibited till the repurchase of the «titles» by the company) are disposed for the repurchase of the «titles» in their nominal value. After the repurchase of the «titles» the company returns, *ipso jure*, under the administration and management of its internal bodies. With regard to the repurchase of the «titles», the privileged creditors are preferred. All the repurchased «titles» are cancelled. The payment of dividends and the repurchase of the «titles» are effected in Greek currency, but based on the official US dollar price on the payment date<sup>29</sup>. In the case of a general or limited partnership, the issuance of «preferential company's portions» (article 3 of RD 22/28.12.1956) to the creditors is provided, and all the aforementioned concerning the «titles» are applied.

b) The liquidator is entitled to sell through public auction the company's assets according to the provisions of LD 17.07/13.08.1923 and LD 3562/56 (articles 18 – 23). All mortgage and/or pledge rights, as well as the privileges of the creditors remain effective until the satisfaction of all the privileged creditors. Any security in favour of the creditors is not offended (article 27). At the phase of the distribution of the liquidation's proceeds, the privileged creditors are preferred, while the ranking of each mortgage, pledge or privilege is observed (article 23).

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<sup>28</sup> L.N.Georgakopoulos, op.cit. 3, p. 166.

<sup>29</sup> Eleutherios Skalidis and Gabriel Kambouroglou – Commercial and Economic Law in Hellas, 1998, pp. 311 – 312.

7.2. The «titles» are not assimilated to share-titles, mainly because they do not represent a part of the company's capital<sup>30</sup>. Moreover, LD 3562/56 provides that the «titles» are transferable, however, without specifying the way of their transfer. Actually, this transfer has the nature of an assignment of claim taking place pursuant to the provisions of the Civil Code<sup>31</sup>.

#### *§ 8. Termination of the procedure*

8.1. The «administration and management» is terminated upon the repurchase of the «titles» (article 16 par. 2). In addition, according to article 16, three years at least from the placing of the company under the «administration and management» procedure, the latter may be terminated by virtue of a court decision awarded following a resolution of the «assembly of the creditors» (adopted by a majority of 3/5 of the claims' size represented thereat), as well as a petition of the «managing committee» for the placing of the company under «special liquidation». «Special liquidation» is terminated upon the distribution of the proceeds. Upon such termination, the company recovers the power of the administration, disposal and management of its assets and returns to the situation prevailing prior to «special liquidation»<sup>32</sup>.

8.2. The repayment of the creditors in the case of «administration and management» and the completion of the proceeds' distribution in the case of «special liquidation» terminate the rejuvenation procedure. This termination is not retrospective and the consequences of any action taken up by the rejuvenation's bodies until said termination remain intact. In the future, the company may continue its operation, or may be declared bankrupt as mentioned hereinabove if the respective conditions are met. Nevertheless, in case of bankruptcy, the cessation of the payments cannot trace back at a time prior to the termination of the rejuvenation procedure, because during such procedure the declaring of a bankruptcy is prohibited.

#### *§ 9. Degree of information on the development of the procedure towards creditors*

9.1. Pursuant to article 5 par. 7 of LD 3562/56, special public books are kept at the Court of First Instance containing information on the applications submitted before the Court for the placing of a company under the «administration and management» or under «special liquidation», the names of the appointed provisional managers and the Court's decisions. Moreover, a special file is kept by the secretariat of the Court, where copies of all legal deeds lodged with the Court, court decisions awarded, copies of the resolutions adopted by both the assembly of the shareholders and the «assembly of the creditors», as well as any other relevant information are placed. The «provisional manager», the «managing committee» and the «liquidator» should forward to the Court's secretariat copies of all the above deeds and documents.

9.2. Creditors have free access both to the special book and file kept by the Court.

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<sup>30</sup> *Th. Liakopoulos*, op. cit. 22, p. 419.

<sup>31</sup> *Th. Liakopoulos*, op. cit. 22, p. 420.

<sup>32</sup> The provision of the article 16 par. 3 of the LD 3562/56, that the company may be dissolved upon decision of the special committee of the article 3 of the LD, is not in effect, since this committee is inactive. See *L.N.Georgakopoulos*, op. cit. 3, p. 177.

## *§ 10. Costs related to the procedure*

LD 3562/56 does not provide for the nature, the determination or the handling of costs related to the procedure.

## *§ 11. Competence, knowledge and functioning of insolvency (bankruptcy) courts*

11.1. As mentioned hereinabove, the petition for the placing of a company under the provisions of LD 3562/56 is submitted before the bankruptcy court. The respective court decision, in case it accepts the petition, is binding upon any person whatsoever and is provisionally executable.

11.2. Due to the binding nature of the Court's decision a third person may raise an opposition (caveat) only if he invokes fraud or collusion of the company and its creditors<sup>33</sup>. The Court's decision may be recalled either upon the creditors' consent or their satisfaction, or even the lack of the preconditions for the acceptance of the petition by the Court.

## *§ 12. Publicity conditions*

12.1. Creditors are invited to announce their claims to be verified. The invitation must be published in newspapers designated by the Court. Besides, the «provisional manager» must draw up a list of the creditors who had announced their claims and call the assembly of the shareholders/partners by an invitation. Such invitation, as well as any other invitation for the convocation of the creditors' assembly, must be published in the Official Governmental Gazette, as well as in newspapers fulfilling the conditions set by the law.

12.2. In combination to what is set out under pars. 9.1 and 9.2, the publicity conditions provided by the law are estimated sufficient for the information of any interested person including the creditors.

# **TITLE 5. LEGAL CONSEQUENCES OF BANKRUPTCY AND POSSIBILITIES FOR A FRESH START**

## **Chapter 5.1. Bankruptcy procedure**

Pursuant to article 525 par. 1 of Commercial Law, the statutory requirements and criteria for the declaration of an individual or a company bankrupt are: a) trading capacity, b) cessation of payments of debts, and c) bankruptcy court judgment.

Regarding the first condition, only merchants/traders, which term also includes trading corporations, may be declared bankrupt. A shareholder of a company limited by shares is not a trader<sup>34</sup>. According to article 525 par. 1 (d) of Commercial Law, a

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<sup>33</sup> *Th. Liakopoulos* – Commercial Law Review, 1983, p. 206.

<sup>34</sup> Supreme Court 521/1988, Commercial Law Review, 1988, p. 593 and Supreme Court 1058/1987, Commercial Law Review, 1987, p. 455, where stated that a shareholder of such a company is deemed to be trader if he holds all or the majority of the company's shares, so that the continuation of the

person who is no longer a merchant at the time of the insolvency may still become bankrupt, provided that payments were ceased before giving up his commercial status. Pursuant to paragraph 3 of the above article, bankruptcy may be pronounced also against a deceased merchant within one (1) year from his death if he had stopped his payments prior to his death.

Apart from individuals, also companies with legal personality may be declared bankrupt, such as companies limited by shares, companies with limited liability, cooperatives, shipping companies, as well as limited and unlimited partnerships if they are engaged in commercial operations.

Cessation of payments as a pre-condition for bankruptcy refers to the permanent inability of the indebted merchant to pay off his due and claimable commercial debts<sup>35</sup>. It does not depend on the financial situation of the merchant or the company but on the non-payment of the debts<sup>36</sup>. In particular, the cessation of payments presupposes: a) the permanent nature of the merchant's inability to fulfil his obligations, b) that the failure to pay concerns a significant part of the merchant's commercial debts, c) that the cessation must be caused by lack of money, and not for other reasons, d) that the commercial debt is due and acknowledged. Thus, cessation of payments does not occur where the merchant fails to pay his debts, although able to pay, by reason of recalcitrance or because he raises an objection which he, in good faith, considers substantiated on the merits, or if he pretends to be in dire straits in order to extort a settlement from his creditors or negligently failed to deal with his current affairs<sup>37</sup>. Therefore, pursuant to established case law, permanent inability does not occur when cessation of payments is due to the general market conditions<sup>38</sup>. In such a case non-payment of one or more debts due to accidental reasons does not constitute cessation but suspension of payment not establishing a reason for bankruptcy<sup>39</sup>. Nonetheless, the payment of specific debts by the merchant may lead to his declaration as bankrupt, since such a payment is contrary to the general principle of the proportional satisfaction of all debtors<sup>40</sup>. What should be ascertained is whether the merchant fulfils his commercial obligations under the trade usages<sup>41</sup>. Under the Greek legal system, there is no specific time limit upon the lapse of which the cessation of payments is considered permanent. What is crucial is that cessation of payments must occur when the competent court initiates reviewing of the case. At this point reference should be made to the fact that in contrast with the German insolvency law the «over-indebtedness», meaning that the company's estate as appeared in the

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company would depend on his participation in the shareholding. Similarly, the Supreme Administrative Court (Simvoulio tis Epikratias) has held that the debts of a company limited by shares to the Greek State, for which a prohibition to exit Greece is applied, constitute debts of the members of the company's Board of Directors, since these members express the will of the company, Case 2567/1990, Issue of the Association of Companies Limited by Shares and Companies of Limited Liability, 1993, p. 89.

<sup>35</sup> Supreme Court 280/1969, Nomiko Vima, 1969, p.1042, Thessaloniki Court of Appeal 323/1990, Armenopoulos, 1990, p. 132.

<sup>36</sup> Polihronis Tsiridis, The bankruptcy offences, 1996, p. 33.

<sup>37</sup> Eleutherios Skalidis and Gabriel Kambouroglou, op. cit. 29, p. 111.

<sup>38</sup> Athens Court of Appeal 2555/1997, Nomiko Vima, 1998, p. 64.

<sup>39</sup> Pireus Court of Appeal, Companies' and Enterprises' Law, 2000, p. 626.

<sup>40</sup> Athens Court of Appeal 2291/2000,

<sup>41</sup> Athens Court of Appeal 44/1983, Commercial Law Review, 1983, p. 666, Thessaloniki Court of Appeal 2607/1990, Armenopoulos, 1990, p. 1202.

assets is less than the one appeared in its liabilities, does not constitute a pre-condition for the declaration of the company as bankrupt<sup>42</sup>.

Pursuant to article 528 of Commercial Law, the bankruptcy procedure is initiated either: a) by the merchant's sole application, or b) by a petition lodged by a merchant's creditor, or c) *ex officio*, on the Court's initiative.

The merchant's voluntary notification of termination of payments constitutes both a right and an obligation imposed on the merchant by law. In particular, article 526 of Commercial Law provides that each merchant who suspends payment of his debts is entitled to lodge an application or notification at the secretary of the Court of First Instance asking for his declaration as bankrupt. Such a statement reveals his incapability to fulfil his payment obligations, irrespective of the actual cessation of payments<sup>43</sup>. Pursuant to article 527, together with the notification, the merchant must submit his balance sheet or give an account of the reasons that prevented him from fulfilling his payment obligations. Moreover, within fifteen (15) days from the notification, the merchant is obliged to hand his books over the competent court clerk. The difference between actual cessation of payments and application by the merchant himself lies on the burden of proof. In the case of cessation of payments, both the actual inability of the merchant to pay his debts, as well as the occurrence of this problem in the course of his transaction must be proved. On the other hand, only the actual inability must be substantiated in the event of the notification of suspension, since its occurrence is realized by the debtor's declaration. Besides, pursuant to article 528 of Commercial Law, even the fact that the merchant pays his debts in a fraudulent way does not prevent the Court from declaring him bankrupt.

All creditors are entitled to ask the judicial declaration of their debtors' bankruptcy. The above right exists irrespective of the amount of their claim or the civil or commercial nature of it. The application should include the first name, surname, company name, home address and address of the company's registered offices. Should the application concern the bankruptcy of an unlimited or limited partnership, the personal details of the partners should be also included.

Bankruptcy procedure may be also initiated by virtue of the court's initiative. However, such an *ex officio* declaration of bankruptcy is exceptional and uncommon, as it is quite difficult for the court to obtain information on whether bankruptcy conditions occur.

The competent Court in bankruptcy proceedings is the Multi-Member Court of First Instance within whose jurisdiction the seat of the business is located. Pursuant to article 64 of Greek Civil Code, such a seat is the place where its management is carried out and not where its registered offices, as established by its articles of association, are situated. In case of cooperatives, the County Court is the competent court, pursuant to article 11 par. 2 of Law 1667/1986. The court decision rules under the procedure of voluntary jurisdiction and may determine the exact time of cessation of payments, otherwise such a time is considered to be the time of the decision's issuance (article 529 of Commercial Law). Should bankruptcy procedures are initiated

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<sup>42</sup> Judicial power in case of review of a bankrupt decision, cessation of payments and indebtedness, *Lampros Kotsiris, Companies' and Enterprises' Law*, 1999, p. 680.

<sup>43</sup> *Lampros Kotsiris, Insolvency Law*, 1998, p. 180.



by the debtor's statement, such a time of stoppage of payments is the one identified in the statement or when the statement is lodged at the court's secretary. The timeframe between the lodging of an application by the creditor or debtor and the issuance of the Court decision is around 4 to 5 months, depending on the actual facts of the case.

The declaration of bankruptcy brings about an *erga omnes* legal situation and for this exact reason the court decision is published in the Lawyers' Pension Fund Bulletin, pursuant to article 4 of Law 1198/1938. Besides, the bankrupt organisation's name is registered in a special registry. Article 531 of Commercial Law provides that an abstract from the bankrupt decision is forwarded by the court's clerk to the District Attorney, the Judge Rapporteur and the provisional administrator within twenty four (24) hours. The practical effect of such publicity lies on the inception of the time-limit for the bankruptcy caveat. The serving of the court decision signals the start of the time-limit for the appeal.

The bankruptcy decision also appoints the Judge Rapporteur and the Administrator. The Judge Rapporteur is consulted on all issues arising from the relevant procedure having the power to request the Administrator's replacement, verify the claims of the creditors and call their General Meetings. The institution of the Special Judge Rapporteur has been established exclusively for companies limited by shares suffering high liabilities and a wide group of creditors<sup>44</sup>. The Administrator, either provisional or final, is a lawyer<sup>45</sup> who represents, assists and monitors the debtor during the bankruptcy procedure. While the provisional administrator or receiver or provisional syndic is appointed by the Bankruptcy Court without necessarily obtaining the creditors' consent, the final administrator is appointed by the Court after hearing the creditors' opinion, which is not however binding. The final administrator draws up a list of assets and liabilities and manages in general the bankrupt's assets in order to be distributed amongst the creditors. Finally, the General Meeting of creditors attempts to reach a settlement with the bankrupt by means of a contract. Creditors submit their claims for inspection and those, whose cases are successful, form the Creditors' Meeting.

Once a debtor is declared bankrupt, he cannot re-declared in the future unless the first bankruptcy is fully completed and new facts may ground cessation of payments justifying the initiation of a second bankruptcy.

Upon the issuance of the Court decision declaring the merchant bankrupt, the latter's estate objects are sealed by the judge of the County Court so that no assets are separated and sold. Within three (3) days from his appointment, the final administrator requests the removal of the seals and verifies the estate's assets and the claims of the bankrupt's creditors. All creditors wishing to participate in the bankruptcy proceedings must submit their claims together with all relevant data for verification with the clerk of the court within twenty (20) days from the invitation, which is published in the daily press and communicated in writing to them. All kind of claims may be submitted for verification, even the ones recognised by a court decision<sup>46</sup>. Verification of claims duly submitted is effected by the administrator in

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<sup>44</sup> Article 6 par. 18 of Law 2479/1997 on the «Amendment of the Code of Civil Procedures».

<sup>45</sup> Article 2 par. 2 of Law 4507/1996 amending article 551 of Commercial Law, the latter not requesting the characteristic of the lawyer.

<sup>46</sup> Athens Court of Appeal 6143/1987, *Elliniki Dikaiosi*, 1989, p. 92.

the course of the Creditors' General Meeting and must be accompanied by the creditors' oath for the truth of their claims. After the acceptance of their claims, these *in concreto* creditors may participate in the General Meetings of creditors. Creditors who are secured by a mortgage or a lien are satisfied by preference and participate in the general meetings only for the unsatisfied portion of their claims.

The creditors in the bankruptcy procedure are distinguished in: a) those who have claims arisen prior to the initiation of the bankruptcy proceedings (bankruptcy creditors); b) those whose claims have arisen by the receiver's actions (group's creditors); and c) those who may have claims against the bankrupt when those claims have arisen by the bankrupt's actions after the declaration of the bankruptcy (post-bankruptcy creditors). Only the first category can be satisfied by the bankrupt's estate, which existed until the issuance of the Court's decision declaring the bankruptcy. The group's creditors can only be satisfied by the bankrupt's state if they have filed a lawsuit against the receiver enjoying priority over the bankruptcy creditors. The third category is not subject to the bankruptcy proceedings and, in principle, they can only be satisfied by the estate, which was acquired by the bankrupt after the declaration of the bankruptcy. The bankruptcy creditors are further distinguished in: a) those holding ordinary claims who follow the verification process; b) those whose claims are secured by pledge, lien or mortgage and are thus entitled to preferential satisfaction; and c) those enjoying a general legal charge on the bankrupt's assets and movables<sup>47</sup>.

Without terminating the bankruptcy proceedings, the administrator has the power to reach a compromise for every claim against the bankrupt. Special minutes are drafted for this purpose and submitted to the Judge Rapporteur for ratification.

Bankruptcy proceedings are terminated either by a) judicial composition; or b) liquidation of the bankrupt estate; or c) a court decision due to lack of assets. Following a proposal by the bankrupt and a report by the administrator on the financial condition of the bankruptcy estate, a judicial composition amongst creditors is reached only if agreed by the majority of them. Said compromise is deemed to have the legal form of a contract<sup>48</sup> and is subject to judicial approval by the Court and presupposes that the bankrupt is not found guilty for the crimes of simple and fraudulent bankruptcy (article 603). The majority required may represent a) three-fourths of the definitely approved claims if dividend offered by the bankrupt is equal to at least 60% of the claims or four-fifths of the claims if dividend offered is less than 60% but in excess of 25%, b) two-thirds of creditors representing three-fourths of said claims if dividend offered is less than 25%, c) three-fourths of said claims if bankrupt assigns to his creditors the whole of his estate. The bankrupt's wife and certain of his relatives, as well as creditors secured by a pledge or lien have no right to vote. However, it has been argued that the above creditors retain the right to vote but lose their security *in rem* as soon as the composition is judicially ratified<sup>49</sup>. Claims of post-bankruptcy creditors<sup>50</sup>, group claims of creditors and the ones secured by mortgage,

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<sup>47</sup> Supreme Court 638/1977, Nomiko Vima, 1978, p. 346.

<sup>48</sup> Georgios Rossis, Commercial Law – Insolvency Law, 1993, p. 169.

<sup>49</sup> Konstantinos Rokas, Insolvency Law, 1978, p. 301.

<sup>50</sup> Athens Court of Appeal 3632/1985, Elliniki Dikaiosisini 1985, p. 734-735 and Athens Court of Appeal 4391/1987, Elliniki Dikaiosisini 1987, p. 1455.

pledge or a lien<sup>51</sup> – provided that they have not relinquished them by joining the vote – are not bound by the outcome of the composition. Despite the fact that such a compromise is the ideal closing of bankruptcy proceedings, it is not accomplished often<sup>52</sup>. Upon release of the court decision ratifying the composition a) the bankrupt regains the right of management and disposal of his property and can reopen all legal proceedings in regard to the bankruptcy, b) the group of creditors is dissolved, c) the function of the administrator ends after submitting his report, d) the Judge Rapporteur is released from his tasks, e) the distinction between bankrupt and post-bankrupt estate is ineffective.

If no judicial composition is effected, then the creditors are considered to be *ipso facto* acting jointly (union of creditors) for the liquidation of the bankrupt estate and the distribution of its proceeds amongst them<sup>53</sup>. For the purposes of the above, either a new administrator is appointed by the court or the term of the current one is extended. The union administrator may well continue the bankrupt's commercial activities, provided that he is authorised to do so by the majority of three-fourths of the creditors. Said administrator proceeds either to the liquidation of real or personal property under the supervision of the Judge Rapporteur without prior notification of the bankrupt (article 603) or to a composition without requesting the bankrupt's consent. Should he proceed to the sale of goods, other movables and claims no authorisation by the Judge Rapporteur or court decision is required. Such a sale takes place either by public auction or privately, whereas the sale of real property is effected only by special auction. The amount gathered by the bankrupt estate's liquidation is deposited at the Fund for Deposit and Loans, which is a public fund. Prior to the distribution of the amount gathered, court expenses, administrator's fees, living expenses of the debtor's family, group claims or claims paid to privileged creditors are deducted. Payment of creditors is effected either by the administrator himself or by the Fund for Deposit and Loans on the basis of a distribution account drafted by the administrator. Group claims are first to be met, while the satisfaction of privileged creditors, those secured by a legal claim and the ordinary ones, follow. No court decision is required for the ratification of the above procedure. The distribution of proceeds and the bankruptcy procedure as above is terminated upon convocation of the union of creditors during which the administrator gives an account of the estate's management. Further to the above, the bankrupt court resolves whether the debtor has been a voluntary bankrupt or bankrupt in good faith, excluding all fraudulent bankrupts. His declaration as such precludes the imposition of physical detention on him by his creditors after the completion of bankruptcy procedures. Lastly, taking into consideration that the costs of the bankruptcy proceedings are covered by the bankrupt estate, should no funds are available for their continuation, the court may pronounce their termination upon suggestion of the Judge Rapporteur and consultation with the administrators (article 637). However, termination as above cannot be resolved in a stage following judicial composition or after the estate's liquidation by the creditors' union<sup>54</sup>. Statistics have shown that two thirds of the bankruptcy proceedings are terminated in that way<sup>55</sup>.

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<sup>51</sup> Supreme Court 652/1988, *Elliniki Dikaiosini* 1986, p. 85 and Athens Court of Appeal 2478/1977, *Commercial Law Review*, 1977, p. 470.

<sup>52</sup> *Lampros Kotsiris*, op. cit. 43, p. 534.

<sup>53</sup> *Kerameus and Kozyris*, Introduction to Greek Law, 1998, p.155.

<sup>54</sup> *Konstantinos Rokas*, op. cit. 49, p. 279.

<sup>55</sup> *Lampros Kotsiris*, op. cit. 43, p. 481.

## **Chapter 5.2. Legal effects of the initiation of bankruptcy procedures**

Under the Greek legal system, all effects deriving from the bankruptcy procedures initiate from the release of the court decision, which determines the time of the cessation of payments. The only legal consequences arising prior to the issuance of said decision relate to the debtor's voluntary notification for suspension of payments. In that case, the time of cessation of payments is the one indicated in the notification or the date such notification was lodged.

The determination of the time of the cessation of payments is highly important since the period between the cessation of payments and the date of the Court's decision is pronounced the so-called «*suspect period*», meaning that all bankrupt's acts such as payments or contracts concluded during this time may be annulled. In order to mitigate the unpleasant consequences of the above period, article 529 provides that under no conditions can this period be fixed at earlier than two (2) years from the pronouncement of the decision. The bankruptcy decision may also fix date on which payment of bankrupt's debts is deemed to have been suspended but this date may not be earlier than two years prior to judgment.

## **Chapter 5.3. Legal effects of bankruptcy as such**

The legal effects of a court decision declaring an individual or a company bankrupt concern both their personal status and estate. The first category of consequences includes the so-called «*stigma on failure*» or «*moral stigma*» together with other personal restrictions and consequences in the professional and personal life. The «*moral stigma*» on his professional life, as specified by article 1 of Law 635/1937, derives from the fact that the bankrupt a) loses the capacity to be a civil servant in the administrative, judicial, public, or municipal sector, b) cannot become a custodian, lawyer or official administrative, c) cannot work as an employee in a Legal Entity of Public Law, and d) loses his trading capacity, is excluded from any commercial or industrial profession and cannot invoke his commercial status. Furthermore, the restrictions or legal effects concerning the bankrupt's personal freedom involve his physical detention or his house confinement (article 530), which are mainly ordered in case of a fraudulent bankruptcy. The above does not constitute a measure of enforcement or a criminal sanction but a means ensuring the physical availability of the bankrupt during the bankruptcy procedure. Further to an extensive debate on the applicability of this measure, the Supreme Court has ruled that it only concerns individuals and not representatives of bankrupt legal entities<sup>56</sup>. Besides pursuant to articles 565 and 567 of Commercial Law, the bankrupt may be also forced to appear before the administrator or the Judge Rapporteur in order to account for the contents of his commercial books or for the balance sheet. Furthermore, as provided by article 561 of Commercial Law, all letters addressed to the bankrupt must be delivered to and opened by the administrator. Consideration should be also given to the fact that the bankrupt's name is registered in the Bankruptcy' Registry kept at the competent Court of First Instance. Additionally, a bankrupt parent may be deprived of his children's

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<sup>56</sup> Supreme Court 2/1988, Nomiko Vima 1989, p. 86.

custody until a final decision declaring bankruptcy terminates the communal property system between spouses.

Regarding the legal effect on the bankrupt's estate, and pursuant to article 2 par. 2 of Law 635/1937, the bankrupt is divested of the management and administration of his entire estate, without however losing ownership of it, while said estate is entrusted to the receiver. The bankruptcy estate is comprised by all claims and assets whose ownership the bankrupt obtained up to date the bankruptcy decision was published<sup>57</sup>, apart from objects not subject to seizure, such as goods considered essential for the bankrupt and his family and basic commodities. Post-bankruptcy estate, meaning property acquired by the merchant after the declaration of his bankruptcy does not become part of his estate and cannot be liquidated for the creditors' satisfaction. As case law has established, all contracts concluded by the bankrupt reducing or increasing the size of the estate are deemed *ex lege* as inoperative and not void meaning that they may be activated either after the bankrupt's reinstatement or because the administrator consents to the conveyance<sup>58</sup>. Should a spouse is declared bankrupt, the assets obtained by the other spouse within two (2) years after the cessation of payments are deemed to belong to the bankruptcy estate.

As a procedural consequence of the bankruptcy declaration the bankrupt is deprived from so-called *legitimitio ad causam*<sup>59</sup>, meaning that all lawsuits concerning the bankrupt's estate have to be addressed against the administrator, who acts as the bankrupt's representative and for the purpose of the proportional satisfaction of all creditors. The bankrupt may only initiate trials concerning his personal affairs and issues irrelevant to the bankruptcy estate.

Besides, all proceedings based on ordinary claims against the bankrupt are suspended, the holders of which should follow the verification procedure, whereas claims secured by pledge, lien or mortgage remain actionable. The *ratio* behind that is to avoid creditors' acts of compulsory execution against the bankrupt's estate, since the bankruptcy procedure aims at the proportional satisfaction of all creditors. Furthermore, pursuant to article 535 par. 1 of Commercial Law all claims against the bankrupt become due as from the date of the decision pronouncing the bankruptcy, whereas article 536 provides that all interest ceases accruing except for the claims secured by a mortgage or a lien. Furthermore, the bankruptcy decision entitles the group of creditors to register a mortgage on the bankrupt's assets. The mortgage is registered by the receiver and is retained during the whole bankruptcy procedure.

Lastly, pursuant to article 47a of Law 2190/1920 on «Companies limited by shares», the declaration of a company as bankrupt effects its dissolution without causing either the bankruptcy of its shareholders and managers as individuals or the dissolution of the Board of Directors, the latter continuing to regulate the company under the instructions and supervision of the receiver. The above applies to declaration of a company limited by shares, company of limited liability or cooperative as bankrupt effects its dissolution.

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<sup>57</sup> Supreme Court 553/1973, Commercial Law Review, p. 96.

<sup>58</sup> Supreme Court 1216/1995, Commercial Law Review 1996, p. 147.

<sup>59</sup> *Konstantinos Rokas*, op. cit. 49, p. 134.

### Legal obstacles to a fresh start

1.	The bankrupt loses the capacity to be a civil servant in the administrative, judicial, public, or municipal sector.
2.	The bankrupt cannot become a custodian, lawyer or official administrative.
3.	The bankrupt cannot work as an employee in a Legal Entity of Public Law.
4.	The bankrupt loses his trading capacity, is excluded from any commercial or industrial profession and cannot invoke his commercial status.
5.	The bankrupt suffers physical detention or his house confinement.
6.	The bankrupt has to appear before the administrator or Judge Rapporteur to account for the contents of his commercial books or for the balance sheet.
7.	The bankrupt's letters must be delivered to and opened by the administrator.
8.	The bankrupt's name is registered in the Bankruptcy' Registry kept at the competent Court of First Instance.
9.	The bankrupt parent may be deprived of his children's custody.
10.	The bankrupt is divested of the management and administration of his entire estate.
11.	All lawsuits concerning the bankrupt's estate have to be addressed against the administrator.
12.	All claims against the bankrupt become due as from the date of the decision pronouncing the bankruptcy.
13.	The group of creditors is entitled to register a mortgage on the bankrupt's assets.

### Legal incentives to a fresh start

1.	All proceedings based on ordinary claims against the bankrupt are suspended.
2.	All interest ceases accruing except for the claims secured by a mortgage or a lien.

### Chapter 5.4. 'Excusability' following bankruptcy

According to the Greek legal system, the declaration of a business entrepreneur as bankrupt effects several sanctions, affecting both his personal status and depriving him from the administration of his property (article 2 par. 1 Law 635/1937). Despite all those negative sanctions, one could mention the fact that after one has been declared bankrupt he is still free to acquire new property and continue working. His post-bankruptcy property, namely the property acquired after the day of his declaration as bankrupt is not affected by the bankruptcy procedure<sup>60</sup>, meaning that his creditors cannot get satisfied from it<sup>61</sup>. This possibility enables in theory the business entrepreneur to make a fresh start leaving his problematical business behind. Yet, this formula does not enable him resume his rights to be a merchant and to

<sup>60</sup> Athens Court of Appeal 2841/1975, Armenopoulos, 1975, p. 610 and Athens Court of Appeal 1133/1971 Nomiko Vima, 19, p. 1279.

<sup>61</sup> With the exception of the scenario when there is refutation of the bankruptcy (article 13 of Law 635/1937) or when there is complete lack of assets.

continue his business activity<sup>62</sup>. Additionally, this formula does not apply to companies, because companies cannot continue their operation and are dissolved after their declaration as bankrupt<sup>63</sup>. Therefore, the concept of the post-bankruptcy property is to enable the bankrupt survive in society being able to make a fresh start as an individual and not as a merchant. The lifting of the stigma of the bankruptcy is only achieved under certain conditions and is not always a necessary consequence of the termination<sup>64</sup> of the bankruptcy procedure. Merely the effects on the bankrupt entrepreneur's property are raised when bankruptcy is terminated, meaning that he resumes his rights to administrate his entire property. On the other hand, all the personal sanctions imposed on the entrepreneur remain. The only way to lift these personal sanctions is to follow the procedure for the discharge of bankruptcy.

Pursuant to articles 14 - 18 of Law 635/1937, a person declared bankrupt can be discharged of all bankruptcy effects if one of the following situations occurs:

- a) A lapse of ten (10) years from the date of the bankruptcy's declaration;
- b) A judicial composition amongst the creditors validated by a Court's decision, which is not subject to appeal, and provided that the compromise has not been declared void or was not executed.
- c) Full satisfaction of all creditors as to principal and interest accrued up to the date of the bankruptcy's declaration<sup>65</sup>.

In all the aforementioned situations, and as provided in article 15 par. 1 of the above Law, an entrepreneur declared bankrupt cannot be discharged of bankruptcy, if he has been found by the Court as fraudulent bankrupt. A bankrupt may be discharged of all bankruptcy effects by a Court's decision that is not subject to appeal, following to the lodging of a petition by himself or his heirs in case of a deceased bankrupt. The Court is obliged to accept the petition if one of the three situations occurs. Only when the business entrepreneur has been convicted of plain bankruptcy (article 15 par. 2 of Law 635/1937) the Court has a choice whether it will or not discharge him of the bankruptcy. The abovementioned situation of the lapse of the ten-year period of time refers only to individuals as held by case law<sup>66</sup> and legal theory<sup>67</sup>. The lapse of those ten (10) years does not terminate the bankruptcy procedure but it merely releases the entrepreneur from the sanctions, which affect himself and not his property. The entrepreneur regains his ability to become a merchant again<sup>68</sup>.

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<sup>62</sup> According to the majority opinion despite the fact that an entrepreneur has been declared bankrupt he can still be considered to be merchant after the bankruptcy if he exercises a business. Yet, this feature can only be used by his creditors in case he does not pay his debts and he cannot use it in his favor.

<sup>63</sup> Only the General Partnership and the Limited Partnership are not dissolved, according to the opinion of the majority but as their partners are also declared bankrupt once these companies are declared bankrupt and neither the company nor its members can operate as merchants anymore, it is impossible for the company to continue its business with those partners.

<sup>64</sup> The wording "termination" comprises the end of the bankruptcy procedure: (a) when there is lack of assets, so the creditors resume their personal rights against the entrepreneur, (b) when a compromise with the creditors has been reached, (c) when there is full satisfaction of the creditors.

<sup>65</sup> This situation does not apply in case only ONE creditor appears during the procedure of verification of claims, Athens Court of Appeal 10015/1978, Nomiko Vima 1980, p. 88, One-Member District Court of Agrinio 280/1991, Armenopoulos 1992, p. 358.

<sup>66</sup> Supreme Court (Areios Pagos) 340/1977, Commercial Law Review, 1978 p. 124, One-Member District Court of Agrinio 280/1991, Armenopoulos 1992, p. 358.

<sup>67</sup> *Levantis*, "Bankruptcy Law" 1975, p. 208.

<sup>68</sup> *Kotsiris L.* Insolvency Law, Thessaloniki, 2001, p 624; Athens Court of Appeal 3780/1974, Commercial Law Review 5, p. 457.

Pursuant to article 47a par. 7 of Law 2190/1920, a company limited by shares, which has been dissolved after its declaration as bankrupt, may be reborn by a resolution of its Shareholders' General Assembly, whereas in the case of a company of limited liability a decision of its members is required.

The full satisfaction of all creditors as to principal and interest accrued up to the date of bankruptcy is the only way for personal sanctions to be raised and the bankruptcy procedure to be definitely terminated.

The results of the bankrupt's discharge depend on the reasons leading to such discharge. According to article 6 par. 3 of Law 635/1937, and in all cases, the person discharged is erased *ex officio* from the Bankruptcy's Registry by an Act of the Judge Rapporteur, noted on the margin of the Registry. Consequently, that person has the ability to become a merchant again continuing his business activity. The discharge of the bankrupt can be annulled when the entrepreneur is convicted to fraudulent or simple bankruptcy after Court's decision or when the judicial composition reached with the creditors is also refuted.

Considering all the above, one could argue that once an entrepreneur has been declared bankrupt no quick means exist for him to regain his rights making a fresh start. The only case where discharge could be obtained rather quickly is when all creditors are fully satisfied as to principal and interest accrued up to the date of the bankruptcy's declaration. It would appear though that the above is most unlikely to occur, since the entrepreneur who is declared bankrupt does not usually have enough property to satisfy his creditors. Furthermore, and as we noted above, an entrepreneur cannot be discharged from bankruptcy when he has been convicted by the Court for fraudulent bankruptcy. In this situation the entrepreneur can never resume his right to become a merchant and will always be deprived of several personal rights<sup>69</sup>. Concluding, once a failed entrepreneur is declared bankrupt, such legal and social stigma follows him for a long time barring him to make a fresh start.

## **Chapter 5.5. Responsibility of the Company's management in case of bankruptcy of a limited liability company.**

In the case of a company limited by shares, and according to the general rule of responsibility of each member of the Board of Directors, each member of it is responsible to the company (only) for any fault committed by him during the management of the company's affairs. Such liability does not occur if the Director in question proves that he has managed the company's affairs with the diligence of a wise man. However, the above shall not apply to the managing Director, who is obliged to exercise outmost diligence as well as in the case of actions or omissions supported by a lawful resolution of the General Meeting (article 22a par. 1 and 2 of Law 2190/1920). This article entitles only the company to turn against that Member of the Board of Directors or against all of them, and seek compensation for damage caused to it. Neither shareholders nor creditors have a direct right to seek damages from the member of the Board of Directors. It is the company's obligation to file a lawsuit against that member of the Board of Directors, who has caused the damage

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<sup>69</sup> Article 1 of Law 635/1937 enumerates the personal sanctions imposed on the bankrupt entrepreneur, namely: (a) inability to become a judge, or to work as a civil servant, (b) inability to exercise a public function (e.g. Guardian, lawyer etc.), (c) inability to become a merchant.



and in case of declaration of a bankruptcy, said power is transferred to the receiver or administrator. In all cases though, the company's creditors benefit only indirectly from these actions because the adjudicated amount accrues the assets of the company and consequently, also augments the creditors' chance to full satisfaction<sup>70</sup>. In practice, this article is not frequently used mainly because the body empowered to file the lawsuit is the Board of Directors itself<sup>71</sup>. Apart from these civil actions, the company's managers (Board of Directors) can be also convicted of plain bankruptcy (penal offence) when they provoked the company's bankruptcy through their faulty behavior<sup>72</sup>.

The company's shareholders or the creditors of it can only seek damages from the Board of Directors' members for behavior which caused damage to them, through the general rules on torts by virtue of article 914 of the Greek Civil Code<sup>73</sup> in combination with other sources of the Greek legislation where from one can detect an unlawful act of the Board of Directors' member. In cases of bankruptcy it has been supported<sup>74</sup> that third persons (creditors) may seek damages directly from the Board of Directors' member if they prove that this member or the Board of Directors as a whole have intentionally violated certain rules imposed on them by bankruptcy law. Although they are of a penal nature, these rules can also establish a civil claim for damages founded on the aforementioned article 914 of the Greek Civil Code, when violated.

According to article 679 par. 5 of Law 635/1937, an entrepreneur is obliged to declare the company's cessation of payments to its creditors the same day it takes place<sup>75</sup>. The omission or delay of such declaration may cause direct damage to creditors, since the latter would avoid the conclusion of a contract with the company if they were aware of the company's insolvency. The above omission also affects old creditors, who will now receive less compensation compared to the one they could have received if no other creditors had entered into contract with the bankrupt company. In this case a creditor can seek compensation directly from the Board of Directors for the damage caused to him. The creditor has the burden of proof when showing that due to the Board of Directors' omission to declare cessation of payments, he suffered damage<sup>76</sup>. The same concept applies when members of the Board of Directors violate the rule prohibiting payments to creditors after the day the company has declared cessation of payments<sup>77</sup> and prior to the company's declaration as bankrupt. In such a case, the creditor seeking compensation is obliged to prove that the specific rule has been violated, that this violation was committed through faulty behavior by a Board of Directors' member, that the payment by the company's representative was made in

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<sup>70</sup> One-member Court of Thessaloniki 19605/1995, ? rmenopoulos, 1996, 872.

<sup>71</sup> Under certain conditions the General Meeting can also oblige the Board of Directors to file the lawsuit.

<sup>72</sup> Articles 680 and 685 nr. 5 of the Greek Commercial Law.

<sup>73</sup> Article 914 reads: "A person who has caused prejudice to another through his fault in a manner contrary to the law shall be liable for compensation."

<sup>74</sup> *L. Kokkinis* Corporate insolvency and director's liability against creditors, 2001, p. 215 etc.

<sup>75</sup> Article 679 par. 5 of the Commercial Law reads: "The merchant has an obligation to declare the cessation of his payments the same day this takes place". In case of a legal person this declaration is made by the bodies of the company.

<sup>76</sup> The damage consists of the difference between what compensation they actually receive and what they would have received had the declaration taken place on time.

<sup>77</sup> This obligation is provided in article 679 par. 4 of Greek Commercial Law.

the name of the company and that this action has caused damage to the group of creditors, who will not receive the amount of money they would have had should these payments had not been made. In both cases one detects an indirect rule attempting to appoint liability to the members of the Board of Directors for the damage caused to the group of creditors of the bankrupt company. Article 3 of Law 1380/1983 on insurance companies is the only provision imposing direct liability to the managers for the company's bankruptcy. According to this article, members of the management of such insurance companies are liable to the company<sup>78</sup> for compensation if they have caused a loss in the company's assets. Said law does not consider as managers only the Board of Directors' members but also the persons operating *de facto* as representatives of the insurance company.

Concerning the company with limited liability, article 26 of Law 3190/1955<sup>79</sup> is broader in the sense that it seems to give to partners and third parties the right to seek damages from the administrator(s) of this type of company. The liability though of the managers is limited only to the indirect damage caused to the partners and third parties, meaning that the manager's actions must have caused a reduction of the company's assets resulting to its insolvency (inability of the company to pay its creditors)<sup>80</sup>.

In the context of the above, one may realize that Greek legislation does not provide the creditors with a direct claim against the managers of companies with limited liability in case of bankruptcy. Only the company itself can seek compensation for those damages caused to it by faulty actions of the company's managers. Apart from the above, even liability founded on general rules of torts (article 914 of Greek Civil Code) is merely theoretical, since such liabilities unfortunately are not frequently engaged. This is due to the fact that:

- a) The administrator usually does not act with such an enthusiasm, so as to pursue the company's managers, since the whole procedure does not affect its personal status (the company does not belong to him).
- b) In most cases, it is usually rather difficult to find evidence and prove the fact that the company's managers are liable for the bankruptcy, and even if one could prove that, the extend of damage caused by this mismanagement and the connection between the mismanagement and the damage is difficult to be proved.
- c) Finally, the administrator is not willing to jeopardize the bankrupt property by spending money on expenses for a trial, which has an uncertain outcome.

As regards the effect of insolvency on the Company's management, Law 635/1937 provides that the declaration of bankruptcy depends on whether the individual or entity is a merchant. Besides, managers of companies limited by shares and companies with limited liability cannot be declared bankrupt, as these are not

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<sup>78</sup> Only the company not the creditors of the company.

<sup>79</sup> The article reads: "The administrators are liable to compensation, and provided they have acted in common they are jointly liable vis-à-vis the company, each partner and third parties for violations of the present law (Law 3190/1955) or the articles of association of for faults to the administration." Paragraph 2 reads: "the claim mentioned in the preceding paragraph of the particular partners and the third parties may be exercised provided the meeting of partners has rejected a proposal concerning the filing of an action on the part of the company or a decision meeting has not been taken within reasonable time."

<sup>80</sup> Athens Court of Appeal 8203/1986, Commercial Law Review, 37, 1986, p. 642. Three-member Court of Athens 392/1995, Commercial Law Review, 1996, p. 540.

considered to be merchants under Greek law. They merely represent the company and although most of the times due to their wrong judgments they are responsible for the bankruptcy of a company, they are not professionally affected by the above since no legal sanctions are imposed on them. Consequently, these individuals are free to re-start a new business or even a new professional activity, be appointed as managers or employees of another company, or work as independent entrepreneurs. Concluding we may say that the legal declaration of a company limited by shares or a company with limited liability as bankrupt does not affect at all the legal status of its managers.

## **TITLE 6. PROSPECTS AND RECOMMENDATIONS**

On the basis of the analysis conducted, we estimate that bankruptcy law appears to be insufficient to correspond to a modern legal framework governing the procedure of corporate rescue. The above derives from the fact that bankruptcy a) is directed to the proportional satisfaction of creditors, b) is not concerned with the business future of the company, and c) precludes social control during the bankruptcy procedure.

The necessity to reform procedures following bankruptcy has been long recognized and should now become a clear priority. A more effective system need to be developed in a national context tackling all legal impediments to entrepreneurship and risk taking. In this context, we need proposals designed to tackle the stigma of personal bankruptcy with a view to encouraging a more entrepreneurial society. Failed entrepreneurs should be stipulated to start businesses. This requires assessing bankruptcy laws and available support to businesses in distress and re-starters.

In particular, bankruptcy law and in general legal regimes on insolvency must at any time reflect the needs of both financial and social life of the country. Like most of the European bankruptcy regulations, Greek bankruptcy law derives from the French Commercial Code of 1807 and is mainly targeted to collective enforcement procedures and proportional satisfaction of creditors. These two targets, though, are rather anachronistic for today's rapid developments on business and financial world. Moreover, the «indebtedness» criterion for the declaration of a company bankrupt is not a safe one any more due to the fact that a company characterized as such may be both viable and worth-rescue for a certain period of time. The task of rescuing such a company is never easy but is dictated due to its contribution to the growth of the gross national product. Therefore, any amendments and modifications to be made at the Greek bankruptcy law must set new targets in the light of the rescue assessment of these companies.

New legal system is needed providing for a procedure, which offers a viable solution to problematic companies giving them the chance of survival and restructuring. The liquidation provisions must include mechanisms for maximizing the outcome from the sale of the liquidated company's assets, and therefore maximizing the satisfaction of creditors. Under the current legal framework the assets of the company under liquidation are being devaluated due to the long lasting procedures. In addition, criminal provisions applicable to fraudulent bankruptcy must become stricter while at the same time they must play a rather precautionary than restraining role.

The Greek legislator has tried over the past years to face the abovementioned issues through the imposition of several special laws (*i.e.* Law 1386/1983; article 44 of Law 1892/1990; the liquidation procedure of article 46a of Law 2000/1991 etc), which have however led to a quite complex and rigid legal framework, insufficient to reflect today's business needs.

Settlement procedures for the rescue of companies must be the new target of any modification. Crucial issue and driving force should be the identification of the right time for the initiation of the relevant procedures in order for the company to avoid bankruptcy and closing of its business.

Such «precautionary settlement procedures» can only be applicable to companies with a significant economic and social role, which could be identified by applying several criteria, such as the working positions, the gross income and/or its liabilities. The future of the company can be detected through three different possibilities: a) under the same ownership and/or management; b) under a new owner, who will undertake all and every liability should he believe or estimate that the business could run in a better and more efficient way under his ownership; and c) the sale of the corporation (not only its assets) without stopping its business and activities, in case of a non-successful precautionary settlement procedure. The precautionary settlement procedure may be initiated upon request of the company's representatives, filed with the relevant Court and accompanied by an analytical list of the company's creditors, the amounts due, as well as an analytical list of its Assets and Liabilities. Any misrepresentation of the Assets must be penalized with strict sanctions.

Within a rather short period, the Court shall appoint a Judge Rapporteur as the Chairman of a Committee. Such a Committee is advisable to be consisted from a restricted number of the company's creditors and shall provide a rescue and reorganization schedule. The creditors shall meet in a short time after the filing of the application with the Court. Any shareholder or owner of the company may have the opportunity to announce at the creditors' meeting if he wishes to dispose his shares and/or ownership to an interested new owner (if any). The business of the company can be leased to third parties in order to ascertain a continuation of the corporation, until the end of the precautionary settlement procedures.

Nonetheless, the above proposal could not apply to small companies (SMEs), due to its expensive and long lasting procedures. For small companies an effective way with no delays must be found, so that devaluation of the companies' assets is avoided. Therefore, it should be questioned whether banks finance companies in the right way, and if this is not the case, the issue of banks' liability should be scrutinized.

If a rescue is not possible, one should try to sell the business as one single entity. If the business has no future, assets should be liquidated, informally if possible, otherwise through a formal procedure led by a court. In case of a formal procedure, the liquidation should be swiftly and efficiently.

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