

Business Rescue in the Shadow of Greek Insolvency Law

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Abstract

This article analyses the capacity of statutory and non-statutory tools to rescue a distressed company and is focused on Greece where state policies including excessive taxation, interventionism and excessive borrowing drove many companies to failure. It proposes that a corporate rescue culture be cultivated in Greece to tackle the excessive failure rates and the development of intensive care units in the banks which can indicate corporate failure early on.

Introduction

It could well be a matter of historical research. After almost 10 years of recession and eight years of strict financial control by the International Monetary Fund (IMF) and the European institutions, it would be rational to hypothesise that the Greek economy has gained momentum and the macro-economic and microeconomic indicators would have started to present signs of recovery. However, the problems are not an issue of the past, at least for Greece. While the particularities of the ongoing macro-economic complexities are not the subject of this article, the failure of the critical mass of Greek enterprises to find ways to revitalise their operations and to avoid collapse, is something that causes increasing concern. It is too simple to just blame macro-economic issues. A rethink is necessary regarding the way we deal with troubled businesses in Greece.

Considering this, we present the alternative of “informal re-organisation” as opposed to formal, i.e. judicial re-organisation procedures. We believe that finding ways to deviate from inflexible and mostly ineffective formal procedures can be of great interest to lawyers, entrepreneurs, managers, bankers and civil services as it will help more businesses to survive and (again) thrive.

An “informal re-organisation” can be defined as follows:

“a reorganization route which takes place outside the statutory framework with the objective of restoring the health of a company in financial difficulties within the same legal entity”.

Within an informal re-organisation, it will often be necessary to reach agreement with the company’s lenders (usually banks) and sometimes other stakeholders (e.g. trade creditors, employee representatives/unions, tax authorities) about changing agreements made earlier and/or new agreements on financing or employee lay-offs. When such an agreement is effected on a voluntary basis, we have a “workout agreement” while the process to come to this point is often called “informal workout”. With a view to the following study, the definition of an “informal workout agreement” is described as follows:

“an agreement concluded between the interested parties of a business in distress within an informal reorganization with regard to the review of conditions pertaining to funds made available and the way forward regarding the necessary turnaround measures, without resorting to legal procedures to effectuate this”.¹

We structure this article as follows: first, we describe some relevant historical factors of corporate failure in Greece, well before the macro-economic crisis erupted. Then we describe internal causes of corporate distress and ensuing bottlenecks of business rescue efforts in Greece. Following that, we pay attention to the role of the banks in Greece in distressed-lending situations. After that, we introduce some dogmatic foundations of business rescue procedures and we introduce the concept of informal workout/re-organisation principles, based on the so-called “London Approach”. Next, we will advocate the promotion and adoption of a new “rescue culture” in Greece based on the London Approach principles. We call it the “Athens Approach”. We will further discuss the advantages and possible obstacles of such new way of dealing with financial distress.

Defining “financial distress”

A “company in financial distress” (distressed company) can be defined as follows: “... [it is] a company where the current and/or future cash flow is insufficient to fulfill the current and/or future obligations”.² Hence, a company is in distress when one can speak of imminent financial difficulties or we have a situation where, according to the assessments of those involved, financial difficulties will occur in the short or long term if no intervention (re-organisation) takes place. According to the law in Greece, a company is eligible for applying for rescue procedures when it faces present or probable impossibility of fulfilling its due financial obligations in a general

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¹ See J.A.A. Adriaanse, “Restructuring in the Shadow of the Law: Informal Reorganisation in the Netherlands” (Leiden: Kluwer, 2005).

² See Adriaanse, “Restructuring in the Shadow of the Law” (2005), p.12.

manner.³ As said, we propose a paradigm shift for companies in financial difficulties from using law-based rescue procedures towards informal rescue procedures “in the shadow of insolvency law”.

The environment of business rescue—macro issues

The 1980s and 1990s have been particularly tough for Greek entrepreneurship and turnaround efforts. This is due to a fundamental change in Greek politics as the then new Government (after the elections of 1981) decided to encourage a greater engagement of labour unions in the economy. Notwithstanding the political rationale—which can well lie in the “eye of the beholder”—the undisputed result is that there has been an upsurge of strikes throughout the 1980s and 1990s. It can easily be understood that this caused significant disruptions to the smooth function of many businesses, dropping their productivity to non-viable levels. Additionally, necessary restructuring processes were often perceived in a strange way as employees of distressed companies demanded to actively participate and have an effective say. These practices were rarely successful as employees often had only a restricted view and tended to over-stress the importance of their claims.

Indeed, in many cases, labour unions and employees demonstrated a certain dislike of change which took the form of an unwillingness to participate in common meetings, requests for excessive provisions of information and dragging the whole process to delays in order to satisfy demands that could have easily been settled had there been (more) goodwill and trust. Moreover, in a framework of increased state intervention policy, many foreign investors experienced pressure to admit state representatives on to the boards of their domestic businesses. Also, the state perceived healthy businesses as a source of tax revenue and corporate taxation indicators have been generally increased throughout the 1980s, 1990s and 2000s while, at the same time, there was no genuine and organised state policy boosting economic and entrepreneurial growth.

Papadakis and Papoulias⁴ provide a classification of macro-reasons of distress and “sabotage” of restructuring efforts. First, they mention the political environment (i.e. governmental stability, environmental legislation). Since the crisis erupted in 2009, Greece has seen six different governments. Secondly, the financial environment,

especially regarding (the lack of) investment financing. Thirdly, the social environment. Fourthly, the technological environment (i.e. lack of research and development (R&D), patents, capacity of innovation). A chronic deficiency in Greece is the underfunding of research in its universities and its other research institutions. The crisis made things much worse in general and in particular for corporate R&D departments.⁵ Lastly, the demographic environment.

Unfortunately, as has been repeatedly observed, the above-mentioned public pathogens tend to be extended to the choice of tools and methods with which the Greek state handles public and private debt that do not adequately address the substantial problems: superficial manipulations, piecemeal measures with proven short-term character and a general reluctance to institutionalise and adopt substantial sections.⁶ Regrettably, the majority of Greek governments during the last 40 years did not really support corporate restructuring and workouts in an organised and long-term manner. The primitive effort of the 1980s with the Organization for Business Restructuring (OAE) proved unsuccessful. Even when relevant measures were decided, they were delayed.⁷

To summarise, the external environment for Greek businesses to re-organise or to be rescued has historically been bad. This calls for a new view on business rescue.

Main internal causes of corporate distress and ensuing bottlenecks of turnaround efforts in Greece

Undertaking bibliographic research to address the domestic reasons of corporate distress relates to the notions of “bad” and insufficient management.⁸ In Greece, this usually has the meaning of management without depth and diversity and this is, mostly, the case when only one person is in charge. Thus, the critical decisions concerning business choices, when made by only one executive, have certain deficiencies like a one-sided view and being prone to get out of control. The sole manager is, for instance, not able to cross-check his decisions in a solid and objective framework, something that would be the case if he or she could take advantage of a diverse, capable, experienced and well-educated composition of a board of directors.⁹ This part is particularly important for our aim to dig out one of the most critical and decisive

³ Article 99(1) of the Greek Insolvency Code (GIC).

⁴ See A. Georgopoulos, “Restructuring and Management of Change in Business” (kallipos.gr: Greek academic e-books), p.19. See also B. Papadakis, *Business Strategy*, 6th edn (Athens: Benou Publishing, 2012) and D.B. Papoulias, *Strategic Business Administration and Changes* (Athens: Kastaniotis Publications, 2002) (all in Greek).

⁵ Eurostat 2015a, calculations by DIW Econ.

⁶ Union of Greek Industrialists, “Business Environment Observatory: The insolvency framework in Greece; A second chance or slow death?” (Athens, November 2017), p.7 (in Greek).

⁷ Olga Tsolka, *Problematic Companies; Should they be Closed or Continue their Activities?* (Athens: Ant. N. Sakkoulas Publishers, 1987), pp.32, 43.

⁸ J. Argenti, *Corporate Collapse: The Causes and Symptoms* (London: McGraw-Hill, 1976).

⁹ A. Giotas, “Corporate Insolvency, Theoretical Analysis and Empirical Research” (Thessaloniki: Department of Accounting and Finance, University of Macedonia, 2015), p.20 (in Greek).

reasons for corporate failure in Greece: the one of “self-governance” (to avoid misunderstanding: this is not unique for Greece, it also applies in other jurisdictions).¹⁰

A quite relevant issue in this context is also the problem of inadequate attention paid by the Government, universities and other educational institutions to the creation of an education system for managers with particular attention to “turnaround management skills” and, most importantly, the apparent lack of interest of many companies to employ capable and competent management professionals (this too is a universal problem that becomes more acute in times of distress). Navrozidou puts it this way (translated): “what can be seen in many Greek businesses is that corporate directors often seem to indulge in a kind of corporate nepotism”.¹¹ This is the case even in the aftermath of the macro-economic crisis that has created so many pitfalls for businesses in Greece. Many companies confine their recruiting processes to a small group of executives and supervisors, serving only the interests of the major shareholders which—ironically—often leads to a detrimental situation for the latter.

Executives who are not actually anxious for the corporate buoyancy but are more interested in the functionality of the “golden parachute” of their boss can play a destructive role from the misinterpretation of the early warning signs to the handling of creditors’ claims. A closely related aspect is that in many Greek companies a lack of honest and effective co-operation exists between the lower and upper echelons of corporate staff. In such cases, management is unable to take heed of the warning messages of the workforce relating to business failure risks experienced on the shop floor.¹²

In addition, it is unfortunately widely observed in Greece that, due to fear of stigma and due to harbouring hopes of recovery, company leaders are rarely willing to initiate judicial let alone informal business rescue proceedings. These kinds of initiatives are often left to creditors with the risk of company management losing control; these companies are often referred to as “zombie” companies as immediate and radical turnaround management is necessary yet not enough effort is initiated from the inside.¹³

Another quite important aspect that unfortunately drove many Greek companies recently to distress is the under-representation of the finance function on the board. This means that, in many cases, there is an issue of lack of required control on basic key-performing indicators. Insufficient information on accounting issues is one category of such failure. Moreover, according to Sarvani,¹⁴ companies often tend to focus on annual financial statements while not paying enough attention to daily financial performance and actual market developments (not surprisingly, this is also a universal problem).

As a result of the above-mentioned lack of (self)awareness, disproportionate business expansion is also a key factor of corporate distress in the Greek market.¹⁵ Having an aim to prevail over a big part of the market, expanding companies increase their sales in an excessive way, while at the same time restraining profit margins or promoting their debit sales, in the interest of their expansion, makes them extremely vulnerable to distress.¹⁶

There is also the problem of excessive debt exposure in Greece.¹⁷ This is often the result of a lack of (intentionally or not) dependable studies/estimations of investment purposefulness as well as of any possible excess of investment budget. It has not been unusual for lots of Greek companies during the last 20 years to encounter default problems only two–five years after an initial lending agreement and subsequent investment.¹⁸ Things were particularly bad in cases where the most important investment steps took place amidst the latter severe economic crisis with companies’ management underestimating the costs and overestimating the revenue and profits entailed.¹⁹

It has also been found²⁰ that a common problem for Greek small and medium-sized enterprises (SMEs) in decline is the inability to compete on price due to high fixed and variable production costs and small profit margins.²¹ This creates a vicious circle putting an additional strain on rescue efforts. Moreover, high labour costs, misuse of corporate benefits and the relocation of production units to access cheaper workers in other countries, led to even lower margins.²²

¹⁰ See, e.g. T. Clarke, “Cycles of Crisis and Regulation: The Enduring Agency and Stewardship Problems of Corporate Governance—Corporate Governance: An International Review” (2004) *Wiley Online Library* [online]; G.D. Carnegie, T. Brendan and A. O’Connell, “A Longitudinal Study of the Interplay of Corporate Collapse, Accounting Failure and Governance Change in Australia: Early 1890s to early 2000s” (2014) 25(6) *Critical Perspectives on Accounting* 446; J. Lee and G. Shailer, “The Effect of Board-Related Reforms on Investors’ Confidence” (2018) 18(2) *Australian Accounting Review* 123–134; D.A. Zetzsche, “Explicit and Implicit System of Corporate Control—A Convergence Theory of Shareholder Rights” (2004) *SSRN Electronic Journal* [online].

¹¹ P. Navrozidou, *Reasons for the Phenomenon of Problematic Companies and Prospects of Rehabilitation* (Kavala: School of Management and Economy, 1997), p.10 (in Greek).

¹² See Giotas, “Corporate Insolvency, Theoretical Analysis and Empirical Research” (2015).

¹³ Union of Greek Industrialists, “Business Environment Observatory: The insolvency framework in Greece” (2017), p.48.

¹⁴ I. Sarvani, “Corporate restructuring” (Thessaloniki: Department of Accounting and Finance, University of Macedonia, 2016), p.17 (in Greek).

¹⁵ K. Charalambidis, “Recovery strategies in order to address corporate distress: A critical theoretical review and experimental investigation in the framework of Athens Stock Exchange” (Thessaloniki: Department of Accounting and Finance, University of Macedonia, November 2011), p.372 (in Greek).

¹⁶ See Navrozidou, *Reasons for the Phenomenon of Problematic Companies and Prospects of Rehabilitation* (1997), p.14.

¹⁷ See Giotas, “Corporate Insolvency, Theoretical Analysis and Empirical Research” (2015), p.22.

¹⁸ See Navrozidou, *Reasons for the Phenomenon of Problematic Companies and Prospects of Rehabilitation* (1997), p.8.

¹⁹ G. Katsos, *Distressed Companies Greece. Causes, Prevention and Rehabilitation* (Athens: Eptalofos Publications, 1988), p.61 (in Greek).

²⁰ See Sarvani, “Corporate restructuring” (2016), p.18.

²¹ N. Tzakou-Lambropoulou, “The spotting of indebtedness” in the “Treatment of Indebtedness” (23rd Conference of the Union of Greek Commercial Law Professionals, 2013), p.51 (in Greek).

²² See Sarvani, “Corporate restructuring” (2016).

Apart from the above-mentioned results of bibliographical research, recent interviews with some notable Greek lawyers, economists and public servants having relevant experience provided us with additional interesting insights in the bottlenecks of business rescue in Greece. For example, the role of shareholders was considered to be unhelpful. Greek shareholders often seem to be reticent concerning the contribution of risk-bearing capital to help their company survive particularly during a crisis.

Moreover, it was reported that turnaround efforts in Greece have frequently been affected by the departure of valued executives hired by companies as external turnaround managers, as they felt that they did not have the motivation to remain in a failing business environment—the problems of which just seem to be unsolvable. In addition to the mentioned bottlenecks of Greek rescue efforts are the large damages claims that distressed companies may face due to their inability to fulfil contractual obligations. The legal disputes (apart from insolvency ones) are unfortunately quite lengthy. The average duration of a judicial process in Greece is about 920 days.²³ In 2016, the number of pending cases only in the Greek Civil Courts was 648,947 (*Eirinodikeia, Protodikeia, Efeteia*).²⁴ This means that rescue efforts are often delayed due to the unknown outcome of disputes.

Goal

Our main goal in this article is to encourage company leaders who need to focus more on early warning signs and act accordingly, i.e. they need to be more preoccupied with business failure and be able to use turnaround management techniques as soon as the first signs of looming distress appear. This also includes having a greater capacity to utilise informal business rescue (pre-insolvency) measures in order to address illiquidity. Secondly, we encourage state representatives and legislators to pay greater attention to signs of the market regarding the need for sound business rescue mechanisms and to adapt their regulatory initiatives to this reality. Thirdly, we encourage educational institutions in Greece to pay more attention to turnaround management and business rescue training.

The role of Greek banks

Another reason that undermined the viability of Greek companies—also impairing any turnaround efforts—well before the crisis erupted, has been the control that the state exerted on the banking sector.²⁵ Many of the banking institutions have been state controlled for many years

(until the end of the 1990s and some of them well into the 2000s). With the banks working under such political supervision/pressure, it has proved to be quite difficult for them to assume the role of “dynamic and independent business consultant”, i.e. to push companies to turnaround if deemed necessary based on contractual rights to terminate credit facilities in case of doubt regarding the viability of the debtor-company. The banking sector also contributed to the cause and worsening of the problems by providing companies with loans without enough prior probing of the long-term profit prospects and, thus, the capacity of those businesses to refund their debts.²⁶ The banking institutions preferred to grant short-term loans in order to cover the losses of use and also the financial needs of investment programmes of the past.²⁷

In many cases, corporate directors were able to secure funding in order to start businesses or save their already existing distressed companies, without any dependable and elaborate analysis on behalf of the banks, in terms of cost analysis and prospects of success/survival. The non-documented but well-known reason for these phenomena were, in many cases, apart from unemployment policies, politically motivated. These practices, however, turned out to be a dead-end street with many such companies ending up bankrupt. The numerous empty and mostly ruined and vandalised industrial buildings in various places in Greece (already the case before the crisis erupted) are a living proof.

Lack of banking engagement and confidence

Trying to evaluate the general reflexes of banks towards the incoming crisis, as was demonstrated especially in the years leading up to the crisis, made us realise that banking institutions were not eager to become involved in the decision-making process of the company at the initial stage of difficulties (that could surely make the difference, as stated before, in exerting some kind of pressure on the otherwise uncontrolled management). However, the main reasons that allowed this situation had been, first, the lack of time available to devote to distressed SMEs and, also, in many cases, lack of knowledge, expertise, capability and support on behalf of the legal regime. Unfortunately, despite the immense problem of distressed loans in Greece, the quality of specialised “intensive care” units and the level of foreign banks’ services in case of non-performing loans is yet to be reached by the equivalent Greek units.²⁸

To make things worse, the global crisis had a serious negative impact on the confidence of bank managers to provide lending facilities or to continue the existing ones,

²³ Union of Greek Industrialists, “Business Environment Observatory: The insolvency framework in Greece” (November 2017), p.10. See ADR Center in co-operation with European Association of Craft, Small and Medium-Sized Enterprises (UEAPME) and European Company Lawyers Association (ECLA), *Survey Data Report: The Cost of Non-ADR: Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation* (2010) available at: <http://www.adrcenterinternational.com/wp-content/uploads/2016/04/Survey-Data-Report.pdf> [Accessed 11 June 2019].

²⁴ Special report of the Union of Greek Industrialists, *Greek Justice* (14 June 2017).

²⁵ M. Petousis, “The Greek Banking system and the much-advertised banking mentality” *Financial Post*, 18 July 1985, pp.23–25 (in Greek).

²⁶ See Navrozidou, *Reasons for the Phenomenon of Problematic Companies and Prospects of Rehabilitation* (1997), p.16.

²⁷ See Navrozidou, *Reasons for the Phenomenon of Problematic Companies and Prospects of Rehabilitation* (1997), p.16.

²⁸ Organisation for Economic Co-operation and Development (OECD) Economic Surveys, “Greece Overview” (March 2016), p.31.

in the way that they did before the crisis. The global financial crisis went through the real economy of all countries with adverse effects on the whole economy.²⁹ Due to macro-economic reasons that are not the subject of this article, the global financial crisis triggered the severe debt crisis of Greece. Banking throughout the world and, therefore, in Greece presented a so-called “credit crunch”, that is, the sudden aversion towards risk and subsequent reduction of lending supply.³⁰ The reluctance of banks to lend, coupled with the destruction-reduction of wealth of households and businesses, led to a huge reduction in consumption and, therefore, trade.³¹

Despite the recent position expressed by the Supreme Court of Greece concerning, first, the crucial role of banks as organisations which (should) support growth and businesses and the relevant responsibility that they bear on the interests of the companies they fund,³² things are still disappointingly different. Nowadays, banks tend to provide credit coverage with prerequisites that clearly resemble the ones of housing loans (guarantees on land/immovable assets) and they most of the time do not actually analyse the business viability of companies.³³ Bank managers are nervous and extremely alert in light of the slightest signs of corporate weakness and the result is, in many cases, the premature “pulling of the plug” (cancellation of credit). This environment of lack of confidence and lack of flexibility is clearly a heavy burden on turnaround and business rescue efforts.

An aim of our work is to underline the critical nature of this problem, ringing the alarm of the diminished cash availability in the Greek market. The Greek banks have received large injections of liquidity during the years of the crisis, not only in order to secure their solvency but also in order to facilitate greater financial safety for the corporate environment in Greece. This should be used to finance companies and with that economic growth, nevertheless, banks should also strive for sound balance sheets themselves in order to survive and thrive independently. This is a paradox that can be solved by means of more attention towards early signs of financial distress in lending relationships and using turnaround and informal business rescue mechanisms to solve issues at an early stage.

Dogmatic foundations of informal business rescue procedures

It is not difficult to understand that a company that is able to maintain a rudimentary functionality amidst financial problems (going concern) has a greater value than a company which is subject to a forced sale. In addition,

commencement of formal (public) insolvency procedures in relation to a company has, in most cases, adverse effects on the value of its business.³⁴ Therefore, stakeholders in international practice often spend time and money in order to devise (ad hoc) mechanisms that can address the aforementioned problem, which usually takes the form of private/informal business rescue procedures, often called (informal) “workouts”. This is also the case in Greece, where such efforts remain “in the shadow of the law”, not being advertised.

It is impossible to disregard the doctrinal and practical value that the concept of informal business rescue has for Greece. Greece has a purely continental law context. Therefore, its legal professionals, and particularly those who deal with law-making, often seem particularly reluctant to accept that the law itself can and should be deviated. Our point is that we do not see the deviation of the law as our goal. What needs to be proven is that informal workouts can exist in harmony with the insolvency formalities, thus they take place “in the shadow of the law”. This is probably more challenging and demanding as a legal exercise in Greece than elsewhere such as the US, the UK, Cyprus and other common law jurisdictions. At the same time, these legal systems provide us with effective theoretical insights in order to help us understand how formal and informal procedures can coexist in an effective way.

According to, among others, Segal³⁵ the usual worries of the engaged credit providers are the following: the unsecured banks may probably want to share in the security (this being connected to the issue of sharing recoveries), while the secured ones will look to ensure payback, which can be considered at least more advantageous when compared to an immediate failure of the borrower. Also, creditors cannot be forced to co-operate and with that they can even frustrate workout attempts (this is called the “hold-out problem”). Thus, it is understood that unanimous support of the creditor banks is an issue of utmost importance in the case of successful turnaround efforts but at the same time is also a challenge.

At that point, the UK paradigm offers some good advice, in our effort to decipher the actual value of informal turnaround efforts in Greece. Much of the success of informal workouts in the UK can be traced back to a phenomenon that started in the 1970s and was then called the “London Approach”. It can be described as follows:

²⁹ N. Birdsall, “How to unlock the \$1 trillion that developing countries urgently need to cope with the crisis” (Center for Global Development, 2009), pp.1–5.

³⁰ N. Chatzilefteris-Michalas, “Comparative Financial Analysis of Systemic Banks in Greece” (Thessaloniki: University of Macedonia, January 2017), p.5. See also G. Chardouvelis and N. Karamouzis, *From the International Crisis to the Eurozone Crisis: What Does the Future Hold?* (Athens: Livanis Publications, 2011) (all in Greek).

³¹ See Chatzilefteris-Michalas, “Comparative Financial Analysis of Systemic Banks in Greece” (2017), p.5; Chardouvelis and Karamouzis, *From the International Crisis to the Eurozone Crisis* (2011).

³² Supreme Court of Greece, Decision 1352/2011.

³³ S. Komninos, “NPLs and meaningless policies for the businesses” (liberal.gr, 5 August 2017) (in Greek).

³⁴ N. Segal, *Banks and Remedies* (London: Lloyd’s of London Press, 1992), p.132.

³⁵ See Segal, *Banks and Remedies* (1992), p.133.

“[The London Approach] is a cooperative basis by which lender creditors recognise individual and collective risk at a point in time and keep that balance throughout an agreed debt recovery strategy that seeks to preserve business.”³⁶

Such an approach can be seen to be closely related to the management of professional authority and not to the inflexible use of regulations, as the statutory rules themselves are too weak to bring a successful conclusion to the efforts.³⁷ According to Goffman and Harre, moral suasion and moral labour are important for the success of this kind of effort.³⁸ Flood also mentions that, at least in the UK, the notion of “practitioner’s buzz” is to be given attention.³⁹ The author defines it as “the successful management of risk, of unpredictability of people, of transience of assets and money, and the creation and establishment of trust”.⁴⁰

An important basis of the relevant argumentation is indicated by Armour and Deakin.⁴¹ According to them, it can be demonstrated that social norms can provide a basis for co-ordination among different parties, without having to resort to the formal legal rules and sanctions, which “purport to govern the relations in question”.⁴² The theoretical anxiety is clear and it has a name: “bindingness”, i.e. the circumstances under which the parties engaged get to respect what has been mutually agreed in an informal setting. Binmore⁴³ stresses the existence of common knowledge/understanding among a number of participants in a procedure, as the basis for the co-ordinating effects of the norms. The most crucial issues here are: (1) the free-rider problem (“hold-out”; see also earlier), where a creditor who decides not to participate in a workout, finally benefits from the decision of the other creditors to “reduce the face value of their claims”; (2) the collective action problem, where creditors demand a greater part of the overall returns, in order to consent to the workout⁴⁴; (3) the heterogeneous priorities problem, that usually relates to different kinds of securitisation (mentioned above); and (4) the problem relating to asymmetric information.⁴⁵

It can be said that a crucial factor here is the expected return and the cost of the procedure. In Greece, where the effectiveness of formal insolvency procedures is low, this can be a considerable advantage. It is rational for a creditor to refrain from enforcing claims through formal proceedings, if they think that the returns, in case of renegotiation, will be higher, in comparison with the case of insolvency proceedings.⁴⁶ Then each participant can see that it will be in his interests to follow the consensual agreement, given that there is a rational expectation that other participants within the pool of creditors will do the same. Once established, conventions may well be self-enforcing, with a character of “order without law”.⁴⁷

In this framework of arguments, we can also see that the role of insolvency practitioners of formal proceedings may be a factor *not* contributing to success. We cannot but remember the observation of Goldstein⁴⁸ that the insolvency profession in general (closely associated with formal proceedings) is more familiar with “burial rites” than rescue efforts. As is mentioned, “rescue always implies risk and courage”.⁴⁹

This is, most probably, also the case in Greece and this observation is reaffirmed by Liakopoulos.⁵⁰ Moreover, in Greece, most profession members do not seem to receive suitable turnaround and workout training, lack adequate corporate finance skills, constructive managerial mentality and (as a result) often pay almost exclusive attention to the practicalities of liquidation, sometimes also encouraging creditors to think that way. According to Tsolka,⁵¹ the insolvency law in Greece had, as a main principle, for many years, the issue of the creditors not paying adequate attention to the wider economic and social consequences of corporate failure. It must be said that this problem also occurs in most other European countries.

According to Georgakopoulos, some faith needs to be shown to the capacity of the parties to solve their problems without resorting to the tools of legislative imposition.⁵² Creditors can (and should) solve their collective action problems and maximise their income.

³⁶ See C. Bird, “The London Approach” (1996) 12 *Insolvency Law and Practice* 8. The “London Approach” did not have a legal or authorised basis: “... It is merely an informal codification of a set of practices that had come to be widely accepted ...”.

³⁷ Flood et al, *The Professional Restructuring of Corporate Rescue: Company Voluntary Arrangement and the London Approach*, Association of Chartered Certified Accountants (ACCA) Research Report No.4543 (London: Certified Accountants Educational Trust, 1995), p.4.

³⁸ See E. Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (Garden City, NY: Anchor Books, 1961); R. Harre, “Rules in the explanation of social behavior” in P. Collett (ed.), *Social Rules and Social Behavior* (Oxford: Blackwell, 1977), pp.28–41.

³⁹ Flood et al, *The Professional Restructuring of Corporate Rescue* (1995).

⁴⁰ See Flood et al, *The Professional Restructuring of Corporate Rescue* (1995), p.5.

⁴¹ J. Armour and S. Deakin, “Norms in Private Insolvency: The ‘London Approach’ to the resolution of financial distress” [June 2001] *Journal of Corporate Law Studies* 28.

⁴² See also, e.g. S. Macaulay, “Non-contractual Relations in Business: A Preliminary Study” (1963) 28 *American Sociological Review* 55; H. Beale and A. Dugdale, “Contracts Between Businessmen: Planning and the Use of Contractual Remedies” (1975) 2 *British Journal of Law and Society* 45; R.C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge, MA: Harvard University Press, 1991); I. Bernstein, “Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry” (1992) 21 *Journal of Legal Studies* 115.

⁴³ K. Binmore, *Game Theory and the Social Contract Volume I: Playing Fair* (Cambridge, MA: ITT Press, 1991), pp.139–144.

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⁴⁵ See Armour and Deakin, “Norms in Private Insolvency” [June 2001] *Journal of Corporate Law Studies* 28, 25.

⁴⁶ S. Gilson, K. John and L. Lang, “Troubled debt restructurings: An empirical study of private reorganization of firms in default” (1990) 27 *Journal of Financial Economics* 318.

⁴⁷ See Armour and Deakin, “Norms in Private Insolvency” [June 2001] *Journal of Corporate Law Studies* 28, 29.

⁴⁸ See Flood et al, *The Professional Restructuring of Corporate Rescue* (1995), p.17. See also M. Goldstein, “The company voluntary arrangement: twenty questions” (unpublished paper).

⁴⁹ See Goldstein, “The company voluntary arrangement: twenty questions” (unpublished paper).

⁵⁰ T. Liakopoulos, “Collective procedures of creditor repayment and corporate rehabilitation” (1983) *Greek Commercial Law Review* 185–201 (in Greek).

⁵¹ See Tsolka, *Problematic Companies* (1987), p.14.

⁵² N. Georgakopoulos, *Economic Analysis of Insolvency Law, Introduction to the Economic Analysis of Law* (Athens: Ant. Sakkoulas Publishers), p.49 (in Greek).

The importance of insolvency law can be minimised in these cases. The fact that this co-ordination takes place voluntarily and is not imposed by the legislative provisions means that it will be adapted to the particular conditions and thus can be more effective. Also, it is not only bank-creditors which can be involved in such workouts. As the process is voluntarily, it can also be used to engage trade-creditors and employee-representatives/ unions, for the latter in order to negotiate a fair number of lay-offs, all circumstances considered (simply put: it is better to save 70% of the jobs by voluntarily agreeing to a 30% lay-off agreement than having 100% of the employees losing their jobs).

Major advantages of informal re-organisation

As already mentioned, informal workouts bring major advantages as compared to formal procedures.

Secrecy

A major advantage of informal re-organisation is secrecy. The management of the company that faces difficulties can seek the help of professionals in the field without having to withstand the drawbacks of publication of their corporate distress. This comes as a matter of contrast towards formal rescue processes in Greece, which are public. The negative side of publicity is that suppliers, financiers and prospective clients may have serious doubts about engaging in a business context with a company that faces financial difficulty and this may entail more burdensome contract terms in order to tackle the increased risk, or no contracts at all.⁵³ Therefore, it is easily understood how harmful publicity can be for a turnaround process. This is often referred to as the “self-fulfilling prophecy of financial distress”.

Of course, here, a major advantage of the workout process is also the avoidance of stigma. The “insolvency stigma” means damage that relates to the harm in reputation and the violation of moral rules. “Bankruptcy is perhaps the greatest and most humiliating calamity which can befall an innocent man”, Adam Smith wrote already in the “Wealth of the Nations”.⁵⁴ The essential impact of it on the life and prestige of the debtor can be found as early as Roman times. Concerning Greece, in an early survey in the 1970s, all participating businessmen who were asked about it, claimed that they would do everything possible to avoid insolvency and that they would feel humiliated if they ended up bankrupt.⁵⁵ A recent study (2017) from Leiden University (stills) confirms these research results.⁵⁶ Moreover, it was found

that severe psychological problems (stress, burnout, suicidal tendencies etc) and physical health issues (heart attacks, insomnia) can be directly associated with financial distress among business owners. Therefore, we can see another reason that many debtors prefer not to resort to insolvency proceedings, as they believe that they are going to undergo loss of reputation or they believe that, morally speaking, they should pay their debts at any cost.⁵⁷

Flexibility

Informal re-organisations are generally deemed to lack restrictions. The re-organisation process is flexible as compared to formal procedures. Mutual agreements between creditors and companies can be reached, e.g. regarding the actions to be taken by the company (in terms of restructuring of business operations and financial restructuring) and the terms under which these take place.⁵⁸ Due to the flexible character, “tailor-made” solutions can be provided and, if this is the case, the otherwise stable positions of creditors can be deviated from, by mutual agreement.⁵⁹ In addition, it can be the subject of an agreement, in the case of informal proceedings, that new funding made available takes priority, separate from current positions and guarantees.⁶⁰

Costs and speed

In the case of formal legal proceedings, particular decisions must be drafted and argued before the bankruptcy judge at each step of the re-organisation.⁶¹ Even in the case of prepackaged rescues, like the ones that have been introduced in Greece, the problem is that the court has to validate the whole process upon completion and this means that even if the new law promises quick procedures, everything will be determined by the capacity of the judicial system to complete the process. We have already seen the statistics concerning the disappointing procedural speed of this system in Greece. An inordinate amount of time may be required to make any decision that lies outside the ordinary course of the firm’s business, and therefore when debt is restructured privately legal costs are reduced because such decisions can be made more quickly.⁶²

Possible ways to facilitate the urgently needed rescue culture: towards an “Athens Approach”

From all the above we can see that the Greek economy might benefit from a strong(er) “rescue culture”.

⁵³ See Adriaanse, “Restructuring in the Shadow of the Law” (2005), p.30.

⁵⁴ Adam Smith, “An Inquiry into the Nature and Causes of the Wealth of Nations” reprinted in Robert M. Hutchins (ed.), (1952) 39 *Great Books of the Western World* 148.

⁵⁵ L. Kotsiris, *Insolvency, Institution and Reality* (1981), p.26 (in Greek).

⁵⁶ J. van Kesteren, J.A.A. Adriaanse and J.I. van der Rest, “The Story Behind Bankruptcy: When Business Gets Personal” (2017) 17(1) *QUT Law Review* 57–73.

⁵⁷ L. Kotsiris, “The versatile notion of indebtedness” in “The treatment of indebtedness” (fn.43 above), p.7 (in Greek).

⁵⁸ See Adriaanse, “Restructuring in the Shadow of the Law” (2005), p.30.

⁵⁹ See Adriaanse, “Restructuring in the Shadow of the Law” (2005), p.30.

⁶⁰ See Adriaanse, “Restructuring in the Shadow of the Law” (2005), p.30.

⁶¹ Gilson, John and Lang, “Troubled debt restructurings” (1990) 27 *Journal of Financial Economics* 318, 319.

⁶² Gilson, John and Lang, “Troubled debt restructurings” (1990) 27 *Journal of Financial Economics* 318, 319.

Statement of Principles

The financial crisis has caused severe problems in the Greek market and, normally, the legislator should try to contribute to stability and not induce further unrest with constant and erratic law-making. However, in our opinion, the legislator should leave more space to private initiatives for corporate rescue and its interference should only have the character of a generic and abstract regulator.

Our proposal is that a new code on management of distressed loans and the activities of banking institutions should be introduced. There, the notion of informal workouts could be described, by setting an abstract outline where the parties should have a wider margin to act and they would also find their limits (i.e. cases of arbitrariness). Something like a written London Approach, an “Athens Approach”. The guarding of this integrated system of rules of non-statutory character could be done by the European Central Bank (ECB) (at least at an initial stage, with the creation of a task force), the Central Bank of Greece, the major creditors (the banks) or the turnaround and insolvency profession. Ideally, the initiative is guarded by private sector parties. INSOL International—the worldwide federation for insolvency professionals with more than 10,000 members⁶³—can also be helpful in this regard. In 2000, it introduced the so-called “Statement of Principles for a Global Approach to Multi-creditor Workouts” (hereinafter the Statement of Principles or Code) which, according to the documents at the time of publication, was endorsed by the World Bank, the Bank of England, many international commercial banks and consultancy agencies as well as the British Bankers’ Association (with 320 banks as members; established in more than 60 countries).

The core of the Statement of Principles—consisting of eight principles which can be regarded as a best practice for informal re-organisations⁶⁴—is recognised in various “local” versions.

The Statement of Principles was published in order to bring the different globally used informal procedures (“voluntary rescue frameworks”) more in line with each other and to formalise them in a consistent system. It was drawn up by more than 150 experts from as many organisations and consists, as mentioned, of eight principles which should be used during an informal re-organisation/workout in order to increase the chances of success. Table 1 below summarises the main characteristics of the eight principles.

Table 1: Principles of the INSOL International Code	
Principle	Characteristic
1	The relevant creditors voluntarily “mark time”.
2	None of the creditors takes any individual action on the condition that their relative positions remain intact.

Table 1: Principles of the INSOL International Code	
3	The debtor (company in financial difficulties) does not take any actions which may jeopardise the relative positions of the creditors.
4	In order to speed up the decision-making process, creditor groups are formed if possible and necessary (groups of secured, senior and junior creditors for instance).
5	In order to be able to evaluate proposals for solutions, the debtor must grant the relevant creditors timely and full access to all relevant information.
6	Proposals for workout agreements must be formulated on the basis of prevailing legislation and relative positions of the creditors.
7	All information must be available and should be treated in confidence.
8	When new financing is provided during the informal re-organisation, it must be given a priority status.

The fundamental objectives therefore are reaching a *stable situation* where none of the parties take any individual action as well as a *free flow of information* where all parties within the process can take decisions without worsening their relative positions. We stress that the Code can also be used in situations in which only one lender-bank is involved as the principles merely serve as a best practice for multi-party interaction.

Education and adoption

The Greek state should be proactive in creating the framework through which turnaround managers, bankers and lawyers with turnaround management education will be trained early on in their academic and professional life to take on a role as promotor and facilitator of informal workouts using the proposed Code (“Athens Approach”). This could mean that management schools and law schools in Greece should include in their curricula relevant multidisciplinary courses on informal business failure prevention (“turnaround management”) in which elements of economy/law/psychology play a key role to teach students how to avoid corporate failure and with that formal bankruptcy procedures.

After the point of education, on-the-job training of the above-mentioned professionals could take place in special schools in Greece or abroad, with the care of the respective professional or trade unions and Bar Associations, which should be interested in providing their members with adequate knowledge in order to tackle the challenges of informal workouts in an effective way.

The role of banks in promoting informal workouts and with that a rescue culture

Banks in Greece have been bailed out twice during the latter crisis that the country was getting through. This generous injection of fresh cash should be accompanied by greater willingness to fund new and distressed

⁶³ For more information, see the INSOL International webpage available at: <https://www.insol.org/> [Accessed 11 June 2019].

⁶⁴ See, for the full version, the INSOL International webpage under “Library”.

companies that demonstrate serious business plans. This is not a matter of morality, even though it could be perceived this way. This is, mainly, a matter of financial rationality as the economy, according to publicly expressed opinions of many members of different Greek governments, fell into a “death spiral” which also affected the liquidity of banking institutions. This vicious circle must be broken. Moreover, it is imperative that banks upgrade their rescue/intensive care units as institutionalised and central parts of their entity, with experienced turnaround managers. According to the above-mentioned Organisation for Economic Co-operation and Development (OECD) 2016 survey,⁶⁵ these units have not managed to tackle the issue of distressed loans.

In general, we feel it is important that Greek banks become more actively engaged in creating a rescue culture in Greece, including the introduction of an “Athens Approach” by way of the development of a Statement of Principles and the promotion and actual use of such a new way of dealing with distressed clients.

De-stigmatising insolvency

In any effort to argue for more lenient procedures for those who lost their ability to repay their debt, and particularly when arguing that the informal procedures are the way to solve the problem, we will encounter the disbelief of those who keep addressing insolvency as a sin. We can verify that we encountered such attitudes during the research in Greece (also in the Netherlands, by the way). After this change takes place, corporate executives will be less reluctant to seek help, to admit and share with others their concerns, and this will facilitate rescue efforts at earlier stages, when the successful outcome can be more probable.

Concluding remarks

The state of the Greek economy is not permitting even the most optimist analyst to be reassured about the future. The issue of non-performing loans (NPLs) and the alarming amount of distressed and zombie companies is probably the most worrying of the facts that determine the negative prospects. The mission of this article is to present the alternative of informal re-organisation/

workouts as a means that can be utilised in an effective way to really make the difference in the field of corporate rescue. It has been presented that there should be significance attributed to the rescue not only of companies that are strongly projecting signs of clear viability, but also those which, even though they face more problems, can be rescued by means of business restructuring.

Of course, this kind of argumentation would be incomplete if we did not mention the general background of failure, the basic reasons that drove many Greek companies to the disaster and, most importantly, doomed their turnaround efforts. It has been found that the Greek economy and its corporate life have been plagued, apart from the latter severe crisis, by many pathogens like state interventionism, hyperactive and distractive labour unions, bad management, lack of attention to financial statements, bad strategy, wrong shareholders’ perceptions and non-wise funding policy on behalf of the banks which, lately, took the form of problematic and restricted access to funding. Banking institutions have contributed to the creation of many distressed firms, yet they can also offer the key to a solution by means of actively promoting and using informal workout principles.

Then there has been an analysis on the dogmatic foundations of informal workouts to be able to provide arguments on their necessity and compatibility with a legal regime. It became clear that senior scholars and, most importantly, insolvency professionals worldwide, accept and support the idea that informal processes have merits that need to be addressed and the precedent of the “London Approach” offers a great paradigm.

Also, we have set out a framework of proposals that could be adopted as an alternative to formal insolvency procedures to introduce a real rescue culture in Greece. We also think that there should be radical changes in the field of the Greek insolvency profession, paying greater attention to the notion of turnaround management, and with that bridging the gap between legal education and business economics. Moreover, we have the opinion that banks should improve their support for the market and evolve their syndication competencies. Furthermore, we believe that the general predisposition towards insolvency and insolvents should change (“de-stigmatising insolvency”) and this could mean, apart from the above, that psychological support strategies should be introduced.

Let’s move towards an “Athens Approach”!

⁶⁵ OECD Economic Surveys, “Greece Overview” (March 2016).