# Clawing back assets in Greek insolvency proceedings

Yiannis G. Sakkas and Yiannis G. Bazinas examine the provisions in the Greek Insolvency Code for the avoidance of asset depletion

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**Asset depletion is predominantly driven by the debtors' tendency to place significant parts of the insolvency estate beyond the reach of creditors.**

Especially in strained economic times, to which Greece is no stranger, asset-stripping at a diminished or no value, as well as the preferential treatment of creditors, are frequent in cases of debtors nearing insolvency. In these conditions, the avoidance provisions of the Greek Insolvency Code[1] (the "IC") have an important role in the efficient operation of insolvency proceedings. By express stipulation in the Code, the insolvency is terminated if there are no more assets to finance its operations[2]. Therefore, it is crucial for the revocation framework in place to be effective in clawing back assets to the estate, to ensure both the continuation of proceedings and the collective satisfaction of creditors. Even more so, under domestic rules, impeachable dispositions may even lead to the *de facto* avoidance of an ill-intended debtor's insolvency.

The setting aside of antecedent transactions is regulated in articles 41-51 IC. As a main requirement, avoidance depends on the fact of insolvency. This means that the commencement of insolvency proceedings is a necessary prerequisite to overturn asset depletion. However, the Court will not declare the insolvency if the assets of the estate do not suffice to cover the expenses of the procedure. Past empirical evidence has shown that 80-85% of the domestic insolvency proceedings could not be concluded because of insufficient assets to cover costs[3]. Thus, the IC purports to avoid the overcrowding of the courts with cases that could not proceed much further. At the same time though, depriving the estate of valuable assets could in fact prevent the very opening of insolvency proceedings because the court can reject the insolvency petition for insufficient assets. However, the debtor's details are entered into the Insolvency Register as a red-flag warning for any interested party. Although this is by no means equal to insolvency, the debtor does not escape all repercussions. The debtor risks an imprisonment sentence of at least two years, as well as a pecuniary fine, if during the suspect period[4] he or she strips the insolvency estate of its assets or enters precarious transactions, etc[5].

Of course, Greek law offers ways to curb fraudulent acts outside the context of insolvency by means of an *actio pauliana*. In fact, both insolvency revocation and the *actio pauliana* share a common background and trace their roots to Roman law. Nevertheless, the *actio pauliana* cannot substitute the IC provisions for setting aside transactions. The statutory rules for fraudulent acts are not drafted to deal with the complexities of commercial default[6], which is often extensive and intricate[7]. More importantly, in avoidance proceedings under the IC, the court assumes exclusive jurisdiction over the undoing of all transactions and the claw back rights of creditors. Otherwise, revocation proceedings for the same debtor could in all likelihood be scattered around different venues, given that competence would have lain with the court which would have jurisdiction *ratione loci* and *ratione materiae* under the applicable provisions of the Code of Civil Procedure[8].

At the same time, the application of article 41 IC ensures that the undoing of transactions will, in theory at least, also benefit from the expedited nature of all insolvency trials[9]. This translates to a hearing within twenty (20) days as of the filing of the legal action for the revocation with the insolvency court and a ruling within fifteen (15) days after the trial[10]. Unfortunately, in many of the country's overloaded courts this is merely wishful thinking and realistic times exceed the timeline stipulated in the Code.

## Who can challenge the transactions?

Avoidance under Greek law is an action *ad personam* brought by the insolvency practitioner[11] against the transferee. This falls in line with one of the main pillars of the IC, which provides that as of the declaration of insolvency,

the power to administer the insolvency estate is vested with the insolvency practitioner. Domestic legislation follows the German example, whereby transactions are not *ipso facto* null and void but must be voided by a judgment of the insolvency court.

## The suspect period

The applicable challenge period spans between the time the debtor stopped paying its obligations as they fall due[12] ("*cessation of payments*") and the time that the bankruptcy is declared. Cessation of payments plays a pivotal role in various aspects of the proceedings so the court will mark the exact date in its insolvency judgement. However, to avoid uncertainty in transactions by express stipulation in the IC, the suspect period may not exceed a maximum of two years[13]. Nevertheless, the twilight period can be extended to five years for all transactions where the court is convinced that the debtor purported to harm the creditors (or to benefit others) and that the counterparty to that transaction had knowledge of such intent[14].

## Test applied: Void, avoidable and excluded transactions

Similar to other national laws, the Greek IC provides for the revocation of impeachable dispositions on the condition that such acts took place within the aforesaid "*suspect period*" and were detrimental to the creditors.

The code makes a distinction between transactions *per se* void (or avoidable "*ex lege*") and those subject to discretionary avoidance. For example, transactions at an undervalue, gratuitous or preferential[15] are included in the list of article 42 with void transactions and are *ipso facto* considered detrimental acts, which must be overturned. This does not mean that *ex lege* void transactions are set aside automatically. However, the insolvency practitioner must request the revocation of such acts and the Court is obliged to grant such request.

On the other hand, avoidable transactions of article 43 are broader in scope and cover any transaction carried out by the debtor within the suspect period, but the Court can only revoke them on the application of the insolvency practitioner, if satisfied that the counterparty was aware that the debtor had ceased payments at the time of the transaction and that the act in question was detrimental to creditors.

The avoidance action has a time bar of one year from the day the insolvency practitioner obtained knowledge of the act and in any case, after the lapse of two years from the declaration of insolvency. Theory suggests (mostly drawn from German jurisprudence) that this time limit only applies when exercising the right to set aside a transaction, but it does not bar the right of the insolvency practitioner to refuse performance of an obligation emanating from a revocable act[16]. Although there is no express provision in the IC to this effect, the Greek Civil Code offers ample support in article 273, which expressly states that objections are not time barred[17].

Finally, the insolvency code

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**THE CODE DOES NOT OFFER GUIDANCE AS TO WHAT CONSTITUTES THE "ORDINARY COURSE OF BUSINESS" AND THE DECISION IS MADE ON AN *AD HOC* BASIS**

sets out to exclude certain transactions from the scope of avoidance provisions. For example, Article 45 provides that transactions within the ordinary course of business or where the debtor received fair consideration in cash are not overturned[18]. This intends to put up a safety net around current transactions, which could otherwise fall under one of the categories in articles 42-44. The Code does not offer guidance as to what constitutes the "*ordinary course of business*" and the decision is made on an *ad hoc* basis, depending on the type of business and operations of the debtor. However, acts necessary for the day-to-day activities (buying and selling of merchandise, payment of salaries and taxes etc.,) would typically fall within the scope of article 45[19].

Furthermore, transactions under a reorganisation plan are protected from revocation in the event that the plan does not succeed and the debtor is subsequently wound up[20].

In addition, article 45 (2) also states that acts expressly excluded from avoidance by specific legislation cannot be overturned. This becomes particularly relevant as regards the fate of security awarded during the grey period. As previously mentioned, the law stipulates that security granted during the challenge period pursuant to a previously unsecured debt is *ex lege* void[21]. However, by way of two legislative decrees dating back to 1923 and 1959, security *in rem* and liens in favour of credit institutions cannot be set aside[22]. In practice, mortgages and liens granted to credit institutions during the twilight period for past obligations cannot be overturned by the insolvency court. Understandably, this is an option that credit institutions are keen to exercise. Finally, financial collateral arrangements are also immune from avoidance, by virtue of legislation implementing the Financial Collateral Directive.[23]

## Conclusion

Avoidance provisions survived the numerous recent reforms of the IC without significance alterations. This resilience to change is attributed to the fact that the relevant provisions are well tailored to meet a variety of circumstances and that they form a part of the legal heritage, endowed with a plethora of case law that is crucial in the sufficient operation of the law.

Improvement is of course not excluded, but the avoidance framework predominantly suffers from the overall overloaded Greek court system. Any advances in that direction will also benefit from the efficient operation of the existing avoidance framework and the rules of the insolvency proceedings. ■


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