THE MEDIATOR IN THE PRE-INSOLVENCY REHABILITATION PROCESS

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I. Introduction

The Article 12 of the Law 4013/2011 regarding the pre-insolvency procedure of rehabilitation, which modified the articles 99 of the Bankruptcy Code (hereinafter BC) stipulates a particular form of mediation that follows a detailed, routine and strict process1. This article is about a collective pre-insolvency procedure that aims at businesses reparation without overlooking the collective satisfaction of creditors2, since a natural or a legal person with a bankruptcy capacity is in present or threatened inability to fulfill their pecuniary obligations (Articles 99 par. 1&2 of the BC).

II. Optional and Obligatory Appointment of a Mediator

The Article 102 of the BC regulates the possibility of a mediator's appointment. The fact that the appointment of a mediator is not obligatory3 consists an innovation4. Thereby, the law stipulates that the insolvency court has the ability to appoint a mediator in order to facilitate the attainment of a rehabilitation agreement between the debtor and their creditors. That can happen either with the decision regarding the opening of the rehabilitation procedure or with a subsequent decision upon an application by the debtor or the creditors or ex-officio, in accordance with article 102 par.1 of the BC. The debtor may be either a natural or a legal person. But if the latter happens, then the legal person can appoint a representative under article 106 par.1 of BC.

In accordance with article 102 par.2 of the BC, a person from the list of article

1 *Maniotis*, Regarding the delimitation of the freedom of private will in the alternative forms of dispute resolution, Civil Procedure Law Review, page 711 after, especially 712-713.
2 Justification Report (from 14/7/2011) of the draft law ''Creation of uniform independent agency of public contracts and centralized electronic record of public contracts – replacement of the sixth chapter of Law 3588/2007 (Bankruptcy Code) Pre-insolvency rehabilitation procedure, Bankruptcy Law'', Editing *Rokas*, Sakkoulas Publications, page 253 after, especially page 256.
3 Justification Report of Law 4013/2011, as above, Article 102, page 259.
4 *Perakis*, Insolvency Procedure, Bankruptcy Code, Nomiki Bibliothiki Publications, 2nd Edition, 2012, page 70.

63 par.1, of the BC, who is selected freely by the court, which takes into account the suggestions of the debtor or the creditors, may be appointed5 as a mediator. That includes lawyers with at least five years of working experience, taken from the Member Register's from the local bar association, as well as the expert of article 100 par.3 of the BC. Of these two choices, the latter may save time and money6. The mediator of Law 3898/2010, in accordance with par. c of article 4 of the same Law7, can be appointed as a mediator, independent from both parties and accredited8 as a mediator of Law. The mediator will be asked to mediate in an appropriate, successful and impartial way.

Moreover, the article 106i, par.1 of the BC states that the mediator should be independent from the debtor, with the meaning of article 63 par.2 of the BC[9], not be their creditor or person associated to the debtor or creditors, with the meaning of article 42 E par.5 of Law 2190/192010 and not have acted as an auditor of the debtor in a period of five years. The appointment of public servants as mediators, who serve in financial services is not allowed.

Finally, according to the provision of par. 4 of the article 102 of the BC, the appointment of the mediator is mandatory upon the debtor's request. The debtor is, in this case, obliged to do so, if they[11] ask the convening of the creditors meeting, in accordance with the article 105 of the BC, in order for the mediator to organize the procedure of the convening and chair the meeting, according to the articles 105 and 106 of the BC.

III. Legal nature of the position of the mediator

The legal nature of the position of the mediator is not defined directly by the law. Since the rights and obligations of the mediator are defined by the law[12] and not

5 The enumeration is indicative, as noticed by *Perakis*, as above, page 70.

6 *Perakis*, as above, page 70.

7 Of Law 3898/2010, as replaced by subparagraph IE2 of paragraph IE of the first article of Law 4254/2014 (A' 85/7.4.2014).

8 As defined in article 7 of Law 3898/2010.

9 Not to be identical to the trustee in bankruptcy.

10 Referring to the cases of businesses where a relation exists between the parent and the subsidiary business.

11 In referencing gender, "he/she," "his/her," and similar combinations should be avoided, it is recommended that they, them, or their, be used (APA, 2001, sec. 2.13), American Psychological Association. (2001) - Publication manual of the American Psychological Association (5th ed.), Washington, D.C.

12 Since the mediator's tasks are described in the law, it is not deemed necessary to be mentioned at the decision of their appointment, according to Multi-member Court of First Instance of Thessaloniki 28664/2008, Commercial Law Review (2008), page 911.

by any contract, the position of the mediator resembles the one of the trustee in bankruptcy, without having the same degree of authority. The mediator, therefore, constitutes a legal instrument of the rehabilitation procedure, providing a service that is assigned by the court and defined by the law[13].

Furthermore, even if the mediator is not an "expert", with the meaning of articles 368 of the Civil Procedure Code, and, as a result, is not obliged to take an oath in advance according to the article 385 of the Civil Procedure Code. The application of some clauses of the Civil Procedure Code by analogy, in case of replacement or exclusion of a mediator, is not precluded14. In case the appointed mediator denounces the appointment, the current (provisions) are applied regarding the disclaimer of the appointment of a trustee, according to article 64 of the BC15.

IV. The authorities16 of the mediator

The mission of the mediator is to conclude an agreement between the debtor and their creditors, who represent at least the majority of the claims against him, as these claims emerge from the commercial books of the debtor, with a view to lifting the financial hardship of the debtor, in order to continue their activity, maintaining employment and suggesting solutions for the rescue of the company, specifically through the reduction of claims, by extending their due date, restructuring of the business, turning the claims to shares, selling the business or taking any other proper measure[17].

In order to fulfill their duties, the mediator asks for the cooperation of the debtor concerning the provision of information of financial nature, by receiving copies of the commercial and accounting books of the debtor, under article 102 par. 4, quotation a' of the BC. The banking[18], stock estate and tax secrecy, by apply-

13 *Psychomanis*, Bankruptcy Law, 5th Ed. (2012), pages 99, according to which the position of the mediator is mainly governed by the provisions of the sixth chapter of the insolvency procedure for the pre-insolvency rehabilitation procedure and complimentarily, by applying the provisions for the trustee in bankruptcy by analogy (article 63 of the BC) and the provisions of the Civil Code regarding the mandate.

14 *Psychomanis*, as above, page 99.

15 *Michalopoulos*, The Pre-Insolvency Procedure of the Bankruptcy Code, from mediation back to rehabilitation, Series of Studies of Business Law Number 23, Nomiki Bibliothiki Publications, 2013, page 75.

16 During the mediator's performance of duties appointed by the court, the court recognizes to the mediator authorities analogous to the ones of the mediator during the (preexisting) mediation process. *Kotsiris*, The Mediation Procedure of the Bankruptcy Code – An introduction to the Pre-Insolvency Rehabilitation Procedure, 2nd Edition, Sakkoulas Publications (2011), page 155.

17 Multi-member Court of First Instance of Piraeus 1570/2013, Dikaiosini 2013, page 1123.

18 This is about lifting the general banking secrecy, not the special banking secrecy of deposits that

ing the principle of analogy, abate[19] in order for the mission of the debtor to be accomplished. The above mentioned entities, meaning the state, social security organizations, credit and other financial institutions, are obliged to provide within 10 days, after the submission of a relevant request by the mediator, free of charge, a detailed statement of obligations owed to these, for capital, interests and costs, under article 102 par. 4, quotations c-e' of the BC. In case of their culpable failure to comply, the Bank of Greece may impose sanctions[20].

The mediator has also the authority, as well as the debtor or the creditors, to apply to the president of the insolvency court for the extension of the period, as mentioned on the decision for reaching an agreement, for up to a month, as it is concluded[21] by the quotation of article 101 par. 1 of the BC.

V. The mediator's obligations

The main task of the mediator is to convene and preside over the creditors' meeting, under par. 4 of article 106 of the BC as well as to decide about the adjournment of the meeting, for a date that may not exceed ten days. The mediator has as a mission to achieve the successful conclusion of an agreement between the debtor and their creditors, meaning a conclusion of the agreement within the provided time that can be ratified by the court[22], under par. 4 of article 102 of the BC. The agreement that combines the sound expectations of success of an attainable agreement, without the collective satisfaction of creditors being impaired, will be validated.

The role of the mediator to facilitate the conclusion of an agreement presupposes the accommodation of the negotiation process[23]. At this stage, the mediator provides the creditors with a full and accurate briefing, either upon their, or even

needs a special legislative provision. *Kotsiris*, the Mediation Procedure of the Bankruptcy Code, Sakkoulas Publications (2010).

19 *Michalopoulos*, as above, page 76.

20 According to article 55A of the Statute of Bank of Greece, (Law 3434/1927, A' 298, as applicable).

21 *Psychomanis*, as above, page 100.

22 Therefore, if the mediator reaches an agreement that has flaws that prevent the validation, then the mediator does not fully fulfill their duties.

23 *Michalopoulos*, as above, page 105 · Rokas, The Pre-Insolvency Procedure of the Rehabilitation Procedure, International Tendencies and Comparative Observations, The recommended reform of the Mediation Process (Article 99 of the BC), Sakkoulas Publications, page 51 and after, especially pages 52 – 53, where it is stressed that in the case of choosing as mediator the mediator of Law 3898/2010 (under article 102, par. 2 of the BC), their negotiation abilities constitute the mediator's work successful, thus setting aside the required insolvency specialization.

without a request, if the non- provision could create a misleading picture of the company and provoke damage to the creditors. All the necessary information for the assessment of the situation and the prospects of the business must respond, each time, to the kind and the extent of the mission of the tools of the process, to whom the information are addressed.

The plan of the rehabilitation agreement, signed by the debtor and accompanied by the list of creditors entitled to attend the meeting, must be made available to creditors, at least ten days prior to the meeting, as well as an expert's report under article 105 par. 5 quotation c' of the BC. The expert's opinion must be expressed in relation to the fulfillment for the conditions of the rehabilitation agreement under article 106, par. 1 – 3 of the BC.

One of the primary tasks of the mediator is to chair the meeting of the creditors. As a chairman, the mediator presides over the meeting and the discussions, in general, and is responsible to keep transcripts, checks the legal standing of the participants, whose legality to be present may result from the commercial books of the creditors or any other decision of a court, under article 105 par. 2 – 3 of the BC. The mediator can submit compromising suggestions, hold and supervise the meeting, announces the results, attends to the signature of the agreement, under the law, and reaches an understanding with the debtor for the appointment of an expert whose mission is to draft the necessary second progress report for the verification to conclude[24].

The law imposes an extra task25 on the mediator, one that underscores the mediator's contribution to the process. If the mediator finds that an agreement is unattainable, or that the debtor abandons the effort to reach a rehabilitation process, they inform, without delay, the president of the insolvency court, who enters, without delay, the case to the court, in order to revoke the decision that opened the procedure and put an end to the mission of the mediator, under article 102 par. 5 of the BC.

One of the tasks of the mediator is to apply to the insolvency court[26] for the ratification of the rehabilitation agreement within the time period of up to two months as it is defined by the decision of the opening of the procedure, or within the provided extension of this period for up to a month, under article 101, par. 2 of the BC.

Finally, it may be assigned to the mediator to perform special acts that are mainly

24 *Psychomanis*, as above, page 103.
25 *Perakis*, as above, page 70.
26 Multi-member Court of First Instance of Aleksandroupolis 102/2013, Armenopoulos 2013, p. 3125.

responsibilities of the special mandatee, defined by the court, safeguard the debtor's assets, conduct special administrative acts or supervise the execution of the rehabilitation agreement, under article 102 par. 6 of the BC

VI. General principles and values that define the work of the mediator

Under the article 106i par. 2, quotation a' of the BC, the mediator must fulfill their duties diligently, objectively and impartially. Complementarily, in article 106i par. 6 of the BC, the duty of the mediator to confidentiality is foreseen. Therefore, the mediator is not obliged to release information which became known to the mediator during his appointment, since this information is not deemed to be necessary for the conclusion of the agreement. In case of a mediator, appointed under Law 3898/2010, similar provisions are foreseen in the quotation c' of article 4 and in the article 10 (of Law 3898/2010), as well as to article 2 of the Code of Conduct of Certified Mediators of Law[27].

VII. Liability of Mediators

In accordance with the article 106i par. 2, quotation b' of the BC, the mediator is liable to the creditors for any direct losses. The mediator is held responsible for any misdemeanor28 to the above mentioned. The expert, on the other hand, is liable for malice or gross negligence, so as not to create counter measures that prevents the experts from undertaking their duties[29]. So, compared to the mentioned provisions in article 80 par. 1 of the BC, according to the opinion of the writer, the will of the legislator to equally deal with the mediator and the trustee is evident regarding the burden of responsibility.

Meanwhile, since the position of the mediator resembles the one of the trustee, without having the same degree of authority, deprived of the management or representative of the debtor's powers30, it is considered more appropriate, according to the writer's opinion, in case of the appointment of a mediator in law of Law 3898/2010 as a mediator, especially after the amendment of this law with Law 4254/2014, which removes the lawyer properties of the mediator from the prerequisites of accreditation, their responsibility during the pre-insolvency rehabilitation process is ruled by the provision of par. 4 of article 8 of the above mentioned law31, as the restrictive interpretation of the article 106i par. 2, quotation b' of the

27 Ministerial Decision 109088/2011, Official Government Gazette B' 2824/2011.
28 *Michalopoulos*, as above, page 76.
29 Justification Report of Law 4013/2011, article 106i, as above, p.267.
30 *Perakis*, as above, p. 90.
31 Without ruling out the enforcement of fines, according to article 5 of the Code of Conduct of

BC excuses. This comes as a result of the deprivation of the required specialization of insolvency procedures[32], but possibly the law education in general. So, the mediator in law will be chosen based on their negotiating abilities, upon which their success depend on.

Finally, even if the Bankruptcy Law is governed by the fundamental principle of proportional satisfaction of the creditors, which consists the core of it, the pre-insolvency procedures of the BC aim chiefly at the resurrection of the businesses. It has been argued[33], on the one hand, that bankruptcy comprises a purely legal procedure with provision of powers and respectively, the undertaking of responsibilities, whereas the rehabilitation process is mainly a business action, the success of which presupposes careful planning, courageous decision and implementation, elements that depend on the freedom of movement on behalf of the agents and minimum responsibility in case of a failure.

VIII. Conclusion

The pre-insolvency procedure of rehabilitation, although its systematic incorporation in the Bankruptcy Law, as it has been properly pointed out, consists primarily a business action, the success of which presupposes freedom of movement on behalf of the agents and minimum responsibility in case of a failure. As a result, it is deemed more appropriate, according to the opinion of the writer, based on the previous teleological weights, the restrictive interpretation of the provision for responsibility of par. 2 of article 106i of Law 4013/2011, so as not to include the case of choosing a mediator in law of Law 3898/2010 as a mediator in the pre-insolvency rehabilitation procedure, whose responsibility is governed by par. 4 of article 8 of the same law, as a solution more convenient to the promotion of the almost inactive Law 3898/2010, and especially of Law 4014/2011. The latter law utilizes the negotiation abilities of the specifically trained mediators of Law 3898/2010 in a tense climate between the debtor and their creditors during the pre-insolvency period and faces increasing possibilities to successfully rehabilitate the business.

Mediators.

32 *Rokas*, as above, pages 51 and after, especially pages 52-53.

33 *Kotsiris*, Bankruptcy Law, 7th Edition, Sakkoulas Editions (2008), page 88.