

**PRE-BANKRUPTCY RESTRUCTURING PROCEDURE
UNDER THE GREEK BANKRUPTCY CODE
& MEDIATION UNDER GREEK LAW**

The added value of participation of an accredited mediator in the process

Anastasia Koulouriou

Attorney at Law, CEDR Accredited Mediator, LL.M.

I. Introduction

Mediation in civil and commercial matters (hereafter the ‘mediation’), was incorporated in the Greek legal system through Law No 3898/2010. Two years later¹, the legislature amended the provisions of the sixth chapter of the Greek Bankruptcy Code (hereinafter ‘GBC’) to provide the option for an accredited mediator to be appointed in the pre-bankruptcy restructuring process so that the agreement between the debtor and its creditors can be reached quicker and with less cost.

Mediation is the structured process by which two or more parties of a dispute attempt by mutual agreement to voluntarily resolve such dispute with the help of a mediator. The institutional notion of mediation has been developed and applied in many of the advanced economies of the world. This is because it has been recognized since a long time that the benefits of the mediation process are many and varied. For instance, disputes are solved faster and less costly, confidentiality and discretion are applied throughout the process which brings a spirit of trust in the whole process, and of course, the real possibility that at the end of the mediation process the business relationship between the parties in dispute could have also have been rehabilitated and even enlarged and extended.

By definition, the pre-bankruptcy restructuring process is a process which is associated with the restructure of a business with the sole aim of returning the said business to a healthy financial position. Further, this process aims to maintain and if possible enhance the business as an ongoing concern through an agreement with its creditor(s). Such agreement must not overlook the interests of the creditor(s) and should definitely satisfy to a great extend their just claims.

Through the abovementioned it becomes clear that between the process of mediation and the process of pre-bankruptcy restructuring there exist many similarities

¹ Article 234§13a Greek Law No 4072/2012: “The provisions of the sixth chapter of the Bankruptcy Code, as amended by this Act, shall apply to reorganization that has already begun at the start of the application.”

and so could be said that these two processes are concurrent and complementary. It is in this spirit that the Greek legislator allows for the participation of an accredited mediator of Law No 3898 / 2010 in the pre-bankruptcy restructuring process.

II. Mediator's appointment

According to Article 102 GBC and in order to facilitate for a mutually beneficial agreement between the debtor(s) and its creditor(s), the Greek Bankruptcy Court may appoint a mediator either via the Court's Decision that opens the business restructuring process or via a subsequent decision.

The Greek Bankruptcy Court may appoint the mediator either *ex officio* meaning using its own legal power and discretion or at the request of the debtor(s) and/or creditor(s). Should the mediator's appointment is a debtor's request, however, then the mediator's appointment is mandatory for the Court.²

It is to be noted that the debtor(s) is/are obliged to request the appointment of a mediator in case that he/she/they request to convene a meeting of creditor(s) pursuant to article 105 GBC.³ So, although it may appear that the appointment by the Court of a mediator is a voluntary process, if it is in fact requested by the debtor(s) then it becomes an obligatory act for the Court. This act of obligatoriness directed by the legislature to the Court is an important and positive step forward because agreement is more likely to occur through the participation of a third and neutral person (in relation to either the debtor(s) and its creditor(s)) and who is suitably experienced, trained and qualified.

III. Mediator's selection

Under Article 102§2 of the GBC, the selection of the mediator is left entirely at the discretion of the Court. This said, the legislator also directs the Court when making the selection to take into account the debtor's or creditors' proposals on the matter.

The wording of the second subparagraph of the article 102§2 GBC makes clear that anyone can be appointed as a mediator regardless of their education, occupation or special skills. "*Especiallly,*" as a mediator may be appointed a Lawyer of at least five-year's experience, who is practicing in the same legal district as that of the Bankruptcy Court and who is also registered in the Member's Register of the local Bar Association, according to Article 63§1 GBC or even a mediator who has been suitably qualified as such according to the Greek Law No 3898 / 2010.

² Article 102§3a GBC

³ Article 105 GBC – Convocation of the meeting of Creditors and Article 102§3b GBC

According to Article 4 point c) of this Law (No 3898 / 2010), a mediator is meant to be a person who is entirely independent and non-related to the parties in dispute and who is required to conduct the mediation process in an effective, impartial and competent way, regardless of how he/she was appointed or requested to conduct the mediation. Further, according to Article 7 of the Greek Law No 3898 / 2010 the mediator must be a fully accredited lawyer. In case of a land-border dispute, though, the parties in dispute may appoint an accredited mediator who does not have attorney status. The mediator who is trained and accredited as such, though, must be registered in the public Catalogue of Accredited Mediators of the Ministry of Justice.

The training of a mediator shall include training in a range of specific skills and techniques and these are prescribed in detail in the Greek Presidential Decree No 123 / 2011. Apart from the theoretical training, the candidates also practice what they have been taught by taking part in mock mediations exercises. Finally, they are assessed through nationwide examinations before they achieve their mediator's accreditation. It therefore appears that the selection of a mediator who has been accredited under Greek Law No 3898 / 2010 will provide the pre-bankruptcy restructuring process more guarantees for agreement and boost the effectiveness of this procedure. This is because the accredited mediator besides the use of the special people and expectation management techniques that have been trained on, as an independent participant in the process can negotiate with the creditor(s) more efficiently.

IV. Mediator's mission under GBC

As in all mediations that are covered and take place under the Greek Law No 3898 / 2010, the mediator has as his/her principal mission the establishment of a mutually beneficial agreement between the debtor(s) and its creditor(s), which will be sustainable and long lasting so that the Bankruptcy Court can accept such agreement and so proceed to its ratification. Thus, the primary goal of the mediator is to achieve a sustainable and long lasting agreement that will not only ensure the future survival of the debtor(s) and his/her business but which also -ideally- will achieve continuity of cooperation between debtor(s) and its creditor(s).

The importance, therefore, of these goals in addition to the special weight that the legislator has placed upon them is proved further by the fact that Article 102§4 GBC give power to the mediator to request and receive all the relevant and necessary information that will assist him in his work. In fact, the legislator places such a high importance to the mediator's mission that Legal Entities, like Government Agencies, are by law obliged to provide free of charge any and all information requested concerning the financial condition of the debtor(s) within a time-limit of ten (10) days from the date requested. Moreover, the importance of the me-

diator's mission is further demonstrated in Article 104§2 GBC where the law obliges the debtor(s), during the negotiation stage of an agreement, to provide all the necessary information in order for his/her business situation and prospects to be fully and properly assessed.

V. Added value of participation of an accredited mediator

It is an established fact that the timely use of the pre-bankruptcy restructuring process can ensure the rescue, prestige and credibility of the debtor(s) and their business in the market.

The combination of the pre-bankruptcy restructuring and the mediation processes can prove to be profitable for the debtor(s) who is/are either presently or imminently close to a stage of been unable to meet his/her/their financial obligations. Equally profitable may also prove to be such combination for the creditors who under a fair agreement may be end up financially better-off and thus suitably satisfied. In fact, as a method that offers solution creativity and effectiveness, mediation can resolve disputes between debtor(s) and creditor(s) in a decent and constructive way that is mutually beneficial for both parties.

Clearly in the restructuring process should in the event that there are no special grounds, e.g. reasons of trust and/or other special circumstances etc., precede and strive to select an accredited mediator of N.3898 / 2010. This is because the accredited mediators are trained to offer as well as ensure to the involved parties *-among others-*:

- Active presence and participation within a completely confidential process where the essential and vital interests of the participants are fully safeguarded.
- The possibility of resolving the dispute between the debtor(s) and its creditor(s) in a flexible, speedy, simplified (but in no way simplistic) and effective manner.
- Assurance of their free participation and stay in the process, guarantying its non-binding and voluntary nature all within well established and practiced privacy and confidentiality conditions.
- The possible restoration of business relationship between the creditor(s) and their debtor(s) in addition to the possibility of renewed business trust between them that could lead to continuing their business cooperation in future.

VI. Conclusion

It is generally acknowledged that Greek businessmen are not familiar with the possibility of restructuring their business before been faced with bankruptcy. Admittedly, in recent years, a number of significant efforts have been made to make known the benefits of mediation as an alternative way of dispute resolution in civil and commercial cases. Familiarity with the institution of mediation as

well as with the ability of orderly restructuring of a business which is threatened or which is at the initial stages of economic weakness, may prove to be salutary not only for the business but for the debtor(s) too, who through this voluntary process can control the outcome of their dispute with their creditor(s).

In the USA, the so called Bankruptcy Mediation is a well-known and widely applied procedure. It is a highly successful negotiation process facilitated by a neutral third party, the mediator, who assists the parties in dispute to amicably resolve their dispute. A typical example is that of the United States Bankruptcy Court of the District of Arizona which appoints attorneys and bankruptcy trustees that demonstrate significant bankruptcy expertise and mediation training in order to serve as bankruptcy mediators (“Panel Mediators”)⁴.

Last, but not least, it should be noted that the participation of a properly trained and accredited mediator in the pre-bankruptcy restructuring process is highly important as it provides further guarantees as to the success of the process. The participation of a trained mediator in this process can prove to be the best option for all the reasons and benefits examined above. In addition, through his training and specialist expertise the mediator can assist the parties achieve an agreement that is creative, flexible and actually complied with the principals of mutuality and reciprocity instead of being subject to a ‘*winner takes all*’ court decision. The pre-bankruptcy restructuring process is a process that can prevent not only bankruptcy but also the ‘*stigma*’ on a possible negative reputation of the debtor and its business. For all these reasons, this is a process with ‘*sensitive*’ issues. If the mediator of GBC is not an accredited mediator in accordance with the requirements of Greek Law No 3898 / 2010 but is selected according to Article 63§1 GBC or he/she is an expert under Article 100 GBC, then, *de lege ferenda*, experience in bankruptcy law issues and/or experience in mediation and/or negotiations would seem particularly useful for the success of pre-bankruptcy proceedings.

⁴ Information about ‘Panel Mediators’ are available for review on the Bankruptcy Court’s website: www.azb.uscourts.gov These mediators serve both as uncompensated and compensated bankruptcy mediators