“RESCUE PROCEDURES – A COMPARATIVE OUTLOOK”[1]

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I. INTRODUCTION

The financial crisis that gripped the world over the past several years has largely abated in the more advanced countries but has given way, especially in Europe, to another systemic problem, namely chronically high employment among under 25 year olds. This is especially true for Greece, Spain and Italy and as part of the European Commission’s deliberations on ways to ease the financial crisis, attention has focused on what Viviane Reding, the European Commissioner responsible for Justice, Fundamental Rights and Citizenship, has labelled the ‘Rescue and Recovery Culture’.

As a consequence, the years 2013 and 2014 have been an interesting period for insolvency related legal developments in Europe. Just over 10 years on from its inception, a review and consultation has been conducted through 2013 in relation to the EC Regulation on Insolvency Proceedings, resulting in a number of far reaching proposed reforms.

The objective is to shift the focus away from liquidation towards encouraging viable businesses to restructure at an early stage so as to prevent insolvency. With around 200,000 businesses across the EU facing insolvency and 1.7 million people losing their jobs each year as a result, the Commission wants to give viable enterprises the opportunity to restructure and stay in business. Reforming national insolvency rules would create a “win-win” scenario, since viable firms will keep in business and safeguard jobs, while creditors will be able to recover a higher proportion of their investment than if the debtor had gone bankrupted.

In a press release dated 11 March 2014, the European Commission (EC) set out a series of common principles for national insolvency procedures for businesses in financial difficulties. The EC has recommended that all EU Member States put the proposed measures in place within one year.[2] Said measures include the facilitating of restructuring at an early stage, the encouragement of out-of-Court

1 Presentation at the 2014 IEEI Group Meeting, Barcelona
2 http://europa.eu/rapid/press-release_IP-14-254_en.htm.

procedures, the fostering of the adoption of a restructuring plan and the elimination of the negative effects of Bankruptcy. Following this, the EC will assess the state of play based on the yearly reports of the Member States to evaluate whether further measures to strengthen the horizontal approach on insolvency are appropriate. In addition to the above, the European Parliament approved the revision of the European rules on Cross Border Insolvency Regulation (EIR), that include amongst others, the Recommendation to the National Legislator to encourage the pre-insolvency mechanisms, the allowance of the current management to stay in charge and the abolishment of the requirement, that secondary proceedings in cross border cases have to be winding up proceedings.

The EC recognises that the divergence between Member States Laws[3] has an impact on the recovery rates of cross-border creditors, on cross-border investment decisions, and the restructuring of groups of companies and because of this, the Commission has concluded that a more coherent approach at an EU level would not only improve returns to creditors and the flow of cross-border investment, but also have a positive impact in terms of entrepreneurship, employment and innovation.

Close to this lies another theoretical and yet practical debate, about company and business rescue, where the former is the emergence of the entity from restructuring largely untouched and the latter is a form of going concern sale of the viable parts.[4] While in the US and France saving the company has the leading role, in Greece both rescuing the enterprise and a going concern sale are regarded as "*successful rescue*". In the UK, the Cork Committee accepted as administrations' aim business-rescue, but authorities noted the desirability of company's salvation as well. Following this, the EA 2002 essentially elevated the importance of "*company's rescue*", acknowledging the benefits of a going concern sale.

It is clear that the subject of "*rescue*" is a modern one, raising a general academic discussion and with much to be gained at a macroeconomic level, such as such as preservation of sustainable jobs, the preservation of asset values and the added benefit of a beneficial knock on effect on the values of the assets underpinning commercial bank balance sheets.Our aim is to compare the UK, the US and Greek "*rescue procedures*" in order to evaluate their strengths and weaknesses.

I, UNITED KINGDOM

The 1986 Insolvency Act combined with subsequent legislation and amendments

3 For a discussion on the convergence of European Insolvency Laws fostering the reorganisation of troubled companies, see Patrick E. Mears and Sujai Panda, *Convergence in National and International Laws Ten Years On*, (International bar Association April 2013).

4 About the Debate on company and business rescue, a detailed approach in Sandra Frisby, 'In Search of a Rescue Regime: The Enterprise Act 2002' [2004] 67(2) MLR 248-249.

provides an array of solutions to companies in financial difficulties. Scotland enjoys its own legal system but for the Insolvency Law, it follows the system of England and Wales.

1. **Company Voluntary Arrangement**

A CVA[5] is a procedure enabling a company to reach an agreement with its creditors about how its debt is to be repaid. Small companies extensively use this system[6] as they are relatively straightforward to arrange and the supervisory costs are minimized. A CVA may provide for partial or full repayment, depending on what the company can reasonably afford to pay and can only be proposed by a company if it is insolvent or contingently insolvent. Procedurally, it requires the approval of 75% of the voting creditors and once approved, it has an absolute binding effect on all Creditors, while the directors retain control of their company under the supervision of an insolvency practitioner.

Turning to the main objectives of the mechanism, a CVA aims to serve both the best interests of creditors and the company, since it is allowed to continue trading and keep the work force in employment. The proposal may provide for the conduct of business, while it will also allow the Directors to restructure the business or company in the right way, so as to ensure it is given the best possible chance to succeed into the future. The ultimate desire with a CVA is for the company, its assets and its business to continue to exist after having included its debts into the arrangement, thus allowing the company a fresh start on successful completion and exit of the CVA. It obviously allows a company an element of debt forgiveness; since creditors are legally bound to discharge the company from the debt it owes them on successful completion of the scheme.

1. Scheme of Arrangement

A Scheme of Arrangement[7] (Arrangement or Scheme) provides a mechanism to enable a company to enter into a compromise or arrangement with its creditors. The process commences by a Court Application - filed either by the company or any creditor (or, where relevant, the liquidator or administrator) - for an order that a Meeting of Creditors be summoned. Any proposed Compromise or Arrangement becomes binding on, if it is approved by a proportion of 75 % in value and the majority in number of each class of creditors present and voting, followed by a Court sanction.

It is open to creditors to challenge the Scheme in Court at either the hearing for

5 Insolvency Act 1986, Part 1.

6 Definition in Section 382 Companies Act 2006.

7 In the United Kingdom, the relevant provisions for effectuating a scheme of arrangement are found in the Companies Act 2006, Part 26 (ss.895-901) and Part 27 (special rules for public companies).

leave to convene the Scheme meetings or the hearing to sanction the Scheme. The usual grounds for challenge are that the meetings were improperly constituted, the creditors were not given sufficient information or that the scheme is unfair. During the scheme-process there is no statutory protection for the company from its creditors. However, the Court will generally be supportive of the restructuring process of an insolvent company, assuming that the Scheme has a reasonable prospect of succeeding in Court. Case law has shown that the court may be prepared to grant a temporary stay of proceedings against a company that is in the process of implementing a scheme.[8]

In terms of schemes of foreign companies, under English law, a company is entitled to enter into a Scheme if it is capable of being wound up in England and Wales. Schemes of Arrangement of foreign companies have become a hot topic, with schemes of German, Luxembourg, Spanish, Dutch, Vietnamese and Bulgarian companies all being sanctioned by the English courts in the last couple of years. The *Vietnamese Shipbuilding* case in particular has confirmed that the fact, that English law governs the facility agreement, will be enough to establish a "*sufficient connection*" to England as to enable a Scheme of Arrangement to be sanctioned. In this case, the facility agreement conferred non-exclusive jurisdiction on the English court, and the judge held that this of itself would have been enough to establish a sufficient connection.[9]

2. Administration

In the UK the "*Cork Committee*" introduced the concept as an alternative to liquidation for companies facing financial difficulties, while the collective interests are on the forefront and jobs are preserved.[10] The hope was that administration would increase the value of assets, while more businesses would be saved.[11] It is a collective procedure that allows negotiation of a plan while an automatic stay operates[12] and it can be described as "*temporary*" leading to several different outcomes.[13]

8 http://gettingthedealthrough.com/books/35/restructuring-insolvency/.

9 http://gettingthedealthrough.com/books/35/restructuring-insolvency/updates and trends.

10 Cork Report para 498; Kenneth Cork, *Cork on Cork* (Macmillan 1988) 188-189.

11 The revised administration procedure introduced by the EA 2002 puts rescue at the heart of administration, i.e. where companies can be saved they should be. That is to say, the first objective must be to consider rescuing the company as a going concern.

12 Maria Brouwer, 'Reorganization in US and European Bankruptcy Law' [2006] 22(1) EJL & E 18; Insolvency Service, 'Enterprise Act 2002-Corporate Insolvency Provisions: Evaluation Report '<http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/legislation/EA02CorporateInsolvencyReport.pdf> accessed 01 August 2012.

13 The corporate insolvency provisions in Part 10 aim to facilitate company rescues wherever possible. They seek to achieve this through restricting the use of administrative receivership to shift the balance in favour of administration, a collective procedure that takes account of the interests of all creditors.

The regime was characterised as "*creditor friendly*", since in the UK the focus remains on repayment of debts. [14] The deficiencies of administration's initial version became evident by the great deal of Court involvement that caused delays and excessive cost. To address these problems, the Enterprise Act 2002 (EA 2002) altered the process aiming to enhance flexibility and eliminate deficiencies.[15] The corporate insolvency provisions in EA 2002, Part 10 aim to facilitate company rescues wherever possible. They seek to achieve this through restricting the use of administrative receivership to shift the balance in favour of administration, a collective procedure that takes account of the interests of all creditors. The Act introduces a streamlined system of administration by providing without Court order routes into administration for floating charge holders, companies and their directors and introducing simpler means of exiting from administration. It also imposes a new duty on the administrator to perform his or her functions as quickly and efficiently as reasonably possible, as well as introducing an overall time limit for the procedure and reducing time limits generally.[16]

a) Purpose

The purpose of administration has to be explained, since the four alternatives[17] have been replaced by a single one of para 3 Sch.B1. That is to say, the EA 2002 introduces one overarching purpose, which is divided into 3 objectives that are hierarchically placed and include a) Company's rescue (as a going concern) and b) If that is not possible (or if the second objective would clearly be better for the creditors as a whole), then the administrator should try to achieve a better result for the creditors than would be obtained through an immediate winding-up of the company, possibly by trading on for a while and selling the business(es) as a going concern. Finally, if neither is possible and only in this case the administrator should realise property to make a distribution to secured and/or preferential creditors.

It is important to note, that the administrator must state which of the 3 purposes he is going to pursue before the company enters the mechanism. In other words, under the new legislation, if he has to realise property (the third objective) he must explain why he cannot achieve the second and/or first one. It is clear, that these changes elevate collective interests thus improving the traditional UK-approach towards Insolvency.[18] The third objective of distributing to secured or

14 Gabriel Moss 'Chapter 11 - An English Lawyers Critique' [1998] 11 (3) Insolv Int 18.

15 Ibid.

16 UK Insolvency Service Guidance notes on amendments to Administrations.

17 Previously, under section 8 of the IA 1986, administration had four purposes. These were: the survival of the company and/or its businesses; approval of a voluntary arrangement; entering into a section 425 compromise or scheme of arrangement with the company's creditors; or the more advantageous realisation of assets than on a winding up.

18 Fletcher, 'UK Corporate Rescue: Recent Developments–Changes to Administrative Receivership,

preferential creditors can be pursued if the administrator thinks that neither the first nor the second of the aims can be reached and collective interests are not damaged.

Generally, it is left up to administrator's professional decision-making to decide upon the aim and for this a great deal of information is needed as to conclude whether to pursue rescue or not[19].

b) Entry Routes

The EA 2002 simplified the entry routes by allowing both Court and out-of-Court[20] appointment of the administrator. Those entitled to make the direct appointment are a company's directors, the company itself or a "*qualifying floating charge holder*". The latter has the obligation to notify within 2 days any other prior holders and file the documents of para 18 with the Court since the appointment is only after filing[21].

One of the EA 2002 innovations is that there is no insolvency requirement for the appointment made by a "*floating charge holder*", which is also the case when they present a Court petition[22]. Contrary to this, para 72(a) implies the condition for the alternative route to direct appointment.

Turning to the other alternative of Court-appointment, to make the order it has to be established that administration's purpose is "*reasonable likely*" to be achieved and that there is "*existent or likelihood of insolvency*". [23] In the past the first requirement caused uncertainty as to its actual meaning. The Court in *Re Consumer* interpreted it as "*the objective being more probably to be achieved than not*" [24]. The second interpretation was this of *Re Harris Simmons,* where a less strict approach was followed and the condition is met in case of "*real prospect*" of achieving the purpose. The statutory language of the amended procedure

Administration, and Company Voluntary Arrangements–The Insolvency Act 2000, The White Paper 2001, and the Enterprise Act 2002' [2004] 5 (1) EBOR 125-126, 136; Fletcher, *The Law of Insolvency* (4th edn, Sweet & Maxwell 2009) 528.

19 *Fletcher,* The Law of Insolvency (n 17) 527.

20 The administrator will still be an officer of the court and the relevant documents will be filed with the court, but the appointment will take effect from the date and time that a notice of appointment is filed with the appropriate Court.

21 Para 19 Sch.B1; *Fliptex Ltd v Hogg & Ors* [2004] EWHC 1280 (Ch), [2004] BCC 870, [32]; Roy Goode, *Principles of Corporate Insolvency Law* (4th edn, Sweet & Maxwell 2011) 418-419.

22 Although the new administration procedure allows for an administrator to be appointed by the holder of a qualifying floating charge or by the company or the directors without a court order, an application to the Court for an administration order can still be made. This will remain the only way in which a creditor acting alone or on behalf of a number of creditors, or the supervisor of a Company Voluntary Arrangement, will be able to initiate the appointment of an administrator to a company. See Paras 14,35 Sch.B1; Goode (n 20) 385.

23 Para 11(a)(b) Sch.B1; Goode (n 20) 421.

24 [1988] 4 BCC 68 (Ch); David Milman, 'The Administration Order Regime and Courts' in Harry Rajak (ed), *Insolvency Law Theory & Practice* (Sweet & Maxwell 1993) 373.

has altered and the case of *AA Mutual* accepts its satisfaction if there is a "*real prospect*" for the aim to be met[25].

As for the second requirement, it needs to be shown that the company "*is or is likely to become unable to pay its debts*" a condition defined in s. 123 of the IA and evaluated on a combination of the cash flow and balance sheet tests. Case law suggested, that the "*likelihood*" of inability to pay the debts has the meaning of insolvency being "*more likely than not*" to occur. This condition was later explained in case *AA Mutual* though, as requiring insolvency to be "*more probable than not*".[26]

c) Moratorium

For the company that is in administration, paras 42-43 Sch.B1 provide for a moratorium in order to preserve the assets until the processes' conclusion. This includes two-stages with the first being an interim from the beginning of the process until its formal initiation and the second one lasting while the procedure is pending. [27] However, the stay imposed is of a procedural and not substantive nature. [28]

The moratorium is divided in two categories one covering insolvency proceedings, such as a winding up resolution or the advertisement of such a petition, and another covering other legal procedures. The unclear proviso of "*steps taken to enforce security*" lead Courts to conclude, that it covers acts to enforce and not "*steps towards enforcement*".

The prohibition against any "*legal process*" was unclear and its interpretation was left to case-law, where the approach was to maximise it in order to support the administration attempts. [29]

d) Conduct of Administration

In administration the pre-existing management is displaced by an administrator

25 [2004] EWHC 2430 (Ch), [2005] BCLC 8; *Auto Management Services Ltd v Oracle Fleet Ltd* [2007] EWHC 392 (Ch) [3], [22]; *Hammonds v Pro Fit USA Ltd* [2007] EWHC 2941 (Ch), [20]; Fletcher, *The Law of Insolvency* (n 17) 530

26 Insolvency' itself is not defined by the Insolvency Act 1986. Instead it contains the concept of a company being 'unable to pay its debts'. The recent Supreme Court decision in *BNY v Eurosail* makes it clear that the balance-sheet test and the cash-flow test should be viewed together. The test requires the court to make an assessment of the company's assets and liabilities and to decide whether, on the balance of probabilities (making proper allowance for contingent and prospective liabilities), the company cannot reasonably be expected to meet those liabilities.

27 Fletcher, *The Law of Insolvency* (n 17) 541; Frisby and others, *Kerr and Hunter on Receivers and Administrators* (19th edn, Sweet &Maxwell 2010) 338.

28 *Barclays Mercantile Business Finance Ltd v SIBEC Developments Ltd* [1993] BCC 148; Picarda, *The Law Relating to Receivers, Managers and Administrators* (4th edn, Tottel Publishing 2006) 560; Goode (n 20) 425.

29 David Milman, 'Reforming Corporate Recue Mechanisms' in John de Lacy (ed), The Reform of United Kingdom Company Law (Cavendish 2002) 421.

who, unlike receivers, has the interests of creditors as a whole in mind. So, both management and the conduct of affairs is entrusted to him as a Court officer and he also acts as the company's agent.[30] Therefore, he enjoys a wide range of statutory powers and has no personal liability for the acts following his appointment.[31] The Court has only limited power to interfere with the administrator's decision making, either in cases of legal wrongdoing or unfairness to creditors.[32]

The EA 2002 introduced an accelerated time frame that contributes to the early monitoring of crisis.[33] That is to say, paras 46-47 Sch.B1 provide for the proposals that must now be issued within 8 weeks instead of three months, which was the limit under the old regime. The administrator has to formulate the proposals explaining in any case the reasons for not pursuing the first two alternative objectives discussed above. Then, the proposals are put before the creditors' meeting and may be approved with or without modifications- in which case the administrator must consent.[34] Any resolution must then be reported by the administrator in accordance with para 54 (6) Sch.B1. In the event of non-approval, the Court has amongst others the power to terminate administration or order winding up.

e) Terminating Administration

The original process was open-ended and uncertain as to its length and outcome, a defect addressed by EA 2002 that offers flexible alternatives.[35] These involve either ending or conversion.[36] Firstly, the outer time limit is the automatic termi-

30 Paras 67-69 Sch.B1; *Re Home Treat* [1991] BCC 165 (Ch) 166; Justice, *Insolvency Law: An Agenda for Reform* (Justice 1994) 35.

31 The administrator must manage the company's affairs, business and property in accordance with the proposals that have been agreed by the creditors. He will send regular progress reports to the creditors, the court and the registrar of companies covering each 6-month period from the date that the company entered administration until the administration ends, or until he ceases to act. These reports will provide full details of the progress of the administration to date, including receipts and payments account and any other relevant information for the creditor.

32 During the course of the administration a creditor or member of the company may apply to the Court to challenge the conduct of the administrator if it appears that the administrator is acting, or intends to act, in a way that unfairly harms the interests of the applicant. An allegation of misfeasance may be made to the court by the official receiver, the administrator or liquidator of the company, a creditor or a member of the company if it is alleged that the administrator, or former administrator, has misapplied or retained monies or other property of the company or has breached a fiduciary or other duty in relation to the company.

33 Vanessa Finch, 'The Recasting of Insolvency Law' [2005] 68(5) MLR 715; Fletcher, *The Law of Insolvency* (n 17) 552.

34 Paras 51-53 Sch.B1; Frisby and others (n 26) 352-353.

35 Goode (n 20) 392; John Armour and Audrey Hsu and Adrian Walters, 'The Impact of the Enterprise Act 2002 on Realisations and Costs in Corporate Rescue Proceedings' <http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/research/corpdocs.htm> accessed 06 June 2012.

36 Administration is no longer an open-ended procedure, but will automatically end after one year from the date the company entered administration. In practice it is unlikely that an administration would end in such a way, but in those cases where an administration continues for 12 months and the administrator has not taken steps to ensure that an extension is arranged, either by the consent of the creditors or by the court, then the administration will cease.

nation after one year of the appointment, the so-called "*sunset clause*". [37] Secondly, the process can conclude by adopting a CVA or Arrangement or by being converted into company's voluntary liquidation or dissolution. Thirdly, the Court may terminate the process after the administrator's or a creditors' application.

f) Pre-packs

A pre-packaged administration (pre-pack) is where the sale of a business and the assets of an insolvent company is arranged prior to the onset of formal insolvency and effected immediately, or very soon after, the administrator's appointment. Pre-packs are not specifically provided for in the UK insolvency legislation – they have arisen out of practice and through judicial approval.

The trend towards pre-packs is a worldwide one and in the UK, the Courts have embraced them despite the absence of statutory provisos. [38] The number of pre-packs has risen in recent times, in line with general company insolvencies (which have increased dramatically over the last few years).[39] The innovation is that negotiations to sell the business take place prior to administration's formal appointment. Criticism is often directed at the lack of transparency and apparent secrecy in which the pre-pack is planned and prepared. Creditors (other than key suppliers) are invariably not consulted and the pre-pack is seen by many suppliers as a methodology used by customers to dump debt and sometimes as a means to sell the business cheaply to connected parties. But the UK Insolvency Service has published the view that pre-packs are within the established statutory framework and they encourage the pursuit of the procedure in order to deliver greater returns to creditors and to save businesses from closure. The Insolvency Service believes that if the UK Government were to alter the rules on pre-packs or abolish them altogether, it is businesses and the economy that could suffer as a result.

Turning to case-law, in *T&D Industries*[40] the Court noted that it is acceptable in some circumstances not to consult creditors before selling the property, a position affirmed under Sch.B1 in *Transbus*[41] case and *DKLL Solicitors*. [42] It is accepted that to avoid any abuse, the administrator has to justify why this is the best outcome, taking into consideration the collective interests. To foster transparency, the "*SIP 16*"[43] gives guidance on practitioners in relation to pre-packs, underlying

37 Picarda (n 27) 677; Frisby and others (n 26) 389.

38 McCormack, *Corporate Rescue Law* – An Anglo-American Perspective (Edward Elgar ed 2008) 71.

39 Independent research in UK shows clear evidence that pre-packs fare considerably better than alternatives in terms of the retention of jobs and returns to secured creditors.

40 [2000] 1 WLR 646 (Ch).

41 [2004] EWHC 392 (Ch), [2004] BCC 401 [1] [9] [12] [14].

42 [2007] BCC 908 (Ch) [7], [10], [19], [20]; Vanessa Finch, 'Pre-packaged Administrations: Bargains in the Shadow of Insolvency or Shadowy Bargains?' [2006] JBL 9-10.

43 Statement of Insolvency Practice 16 (SIP16) is a professional standard, which sets out the information that insolvency practitioners must provide to creditors shortly after a pre-pack sale has taken place.

the importance of information and the need of disclosure to creditors, a view that was further upheld in *Kayley Vending.* [44]

II. UNITED STATES OF AMERICA

We now turn to examine the US system that is according to some the prototype of "*true rescue*". In America all insolvency procedures are called "*bankruptcies*" and each US-insolvent-firm has two alternatives; i.e. liquidate according to the provisos of Chapter 7 or Reorganise, according to the notorious Chapter 11.[45]

The traditional system involves a debtor filing a petition that triggers the automatic stay, during which the so-called "*d.i.p*" operates the business leading to a plan proposal. So, it is right from the start obvious, that the aim is to *increase the prospects of company's emergence untouched.*[46]

1. Initiation and Requirements

A Chapter 11 reorganisation begins almost always by a voluntary Court petition filed by the debtor and procedurally, a Board of Directors-Resolution and the necessary forms are required (11 U.S.C. § 1121). Then, the process commences officially and all property that once belonged to the enterprise is automatically passed on to the *Bankruptcy Estate* (11 U.S.C. § 541). Another alternative is for the Creditors to file a so-called involuntary petition and this is likely in case "*the company does not pay the debts as and when they become due*".[47]

A distinctive feature of the mechanism is the total absence of the "*insolvency*" prerequisite. In other words, there are no statutory conditions or tests to initiate the reorganisation proceedings. However, some safeguards exist as well, since the petition can be dismissed upon early filing in bad faith or unreasonable hope of success.[48]

2. The Moratorium

Similarly to a UK administration, the initiation of the process triggers the *moratorium* of 11 U.S.C. §362 (a). This automatic stay is broadly drafted affecting all

44 EWHC 904 (Ch), [2009] BCC 904 (Ch) [3], [7], [24]; *Hellas Telecommunications, Re (Luxembourg) II SCA* [2010] BCC 295 (HC) [7].

45 The US experts underline, that liquidation is essentially "*the death of a company*". In more detail Elisabeth Warren and Jay Lawrence Westbrook, *The Law of Debtors and Creditors: Text, Cases, and Problems* (6th edn, Wolters Kluwer 2009) 389.

46 Some criticise the US System expressing the view that it leaves control up to the Courts. See Moss, 'Chapter 11 - An English Lawyers Critique' (n 13) 17.

47 For the alternatives, i.e. the voluntary and involuntary petition 11 U.S.C. § 303.

48 Its advantages are seen in the encouragement of early filling of a plan and the better preservation of the company's value.

attempts to begin or take forth a legal proceeding (e.g. enforcement of rights, setoff, even a demand letter may constitute contempt of Court and any such action is regarded as violation of the stay and is in essence void etc). We can conclude that it is essentially more powerful than the UK or Greek one, because it virtually eliminates the risk of challenge by a creditor.[49] In *Farm Credit of Central Florida,* the Court underlined the significance of the proviso and mentions that the moratorium also allows both, the asset protection together with the opportunity to rehabilitate.

The US legislator provides for the possibility to lift the stay, but the creditors are usually discouraged to do that, since they know that the process to lift is expensive and time-consuming and that any violation can lead to sanctions. In case *Re Sky Group* the Court noted, that even when a debtor consents to the waiver of the stay, this is going against the aim of the moratorium provisos, so a lift is granted only exceptionally. The test provided is more specific, but narrowly drafted and the main grounds to grand a lift are (a) for cause, including inadequate protection of a creditor's interest in property or (b) no equity in property subject to security and property is not necessary in reorganisation or (c) failure to file a plan within the allowed 90 days – only for real estate cases and (d) fraudulent action by the debtor.[50]

As Warren mentions, the above noted provisos are a clear expression, that secured creditors receive better treatment than those without such interests. That is to say, in a petition to lift the stay, the Court balances the contradictory interests, i.e. this of the secured creditor and the collective interest. One of the most debated issues regards the interpretation of the general concept of "*adequate protection"*, with the Courts granting the lift of the stay in case a creditor is not less secured in the event the rescue fails as they are the moment the petition is filed. This essentially means, that a creditor is not adequately protected, when the property depreciates during a stay. In case *Timbers of Inwood Forest Association* the Supreme Court held that a creditor is adequately protected if the value of his collateral is protected, but protection is not afforded for the loss resulting from the inability to repossess. In case *Re Alyucan Interstate Corp*, the Court noted, that the Congress put forward a concept that mediates the different interests.

3. The Debtor in Possession

49 Case law suggests that even a demand letter may constitute contempt of Court and any such action is regarded as violation of the stay and is in essence void in Jay Lawrence Westbrook 'A Comparison of Bankruptcy Reorganisation in the US with the Administration Procedure in the UK' (6 InsL&P 1990) 386; Jay Lawrence Westbrook, *Chapter 11 Reorganisations in the United States* in Harry Rajak (ed), *Insolvency Law Theory & Practice* (Sweet and Maxwell 1993) 347.

50 11 U.S.C. § 362 (d).

Turning to the procedural question of the person who is to conduct the reorganisation attempt, Warren correctly notes, that one core element is to retain the business-operation. The options for this task are two, i.e. either keep the pre-petition debtor or assign to a third person. The American approach varied throughout the years and the 1898 Act provided for the appointment of a trustee.[51] The USBC altered this system, though and introduced the concept of the "*debtor in* possession" ("*d.i.p*"). According to this, the debtor retains control of the company's governance and enjoys *all the powers of a trustee.*[52] A trustee can be appointed, but only under special conditions provided in 11 U.S.C. § 1104.

The "*d.i.p*" has different duties, ranging from the "*business-activity decisions*", to the "*reorganisation negotiations*".[53] He must consider all the distinct and differential interests involved and generally runs the so-called "*ordinary"* business without Court approval. In some cases though, 11 U.S.C § 363 (b), provides for the necessity of creditors' notification and Court approval. However, he is required to file financial data and report back to the Court on a regular basis.

As will be later explained, the US acceptance of the concept of the *"d.i.p",* demonstrates in the most vivid way the radically different attitude towards Insolvency, since in US bankruptcy is not regarded as a disgrace, to the extent that it is in the EU. Notwithstanding, the March 2014 EC proposals are strongly indicative of an EU shift towards the adoption of "*d.i.p.*" as a way of addressing problems.[54] Despite the debate about management displacement, though, Mc Cormack correctly mentions, that it "*doesn't have to be an all or nothing approach"*.

4. The Reorganisation Plan

The most significant stage of the system, regards the reorganisation plan and its confirmation, since the problems that may occur at this stage, can put an early end to all reorganising attempts.[55] Procedurally, the "*control*" is initially retained

51 The old regime introduced a division between "large" and "small" businesses and in the latter the management retained control. This lead to extensive litigation though, making an amendment more than necessary in Elisabeth Warren*, Chapter 11: Reorganising American Businesses* (2008 Wolters Kluwer) 55.

52 11 U.S.C. § 1107.

53 His powers include closure or selling of divisions, laying off employees, repositioning the business and renegotiation the contracts.

54 The main attributes of this system are viewed in the early filling of the petition, better preservation of the value and the so-called "*know how*". The early initiation is essential, since the company initiates the attempt before reaching The US authorities note that this option maximises the going concern value, contrary to the administration and takes account of other issues such as employees etc. in Westbrook, *Chapter 11 Reorganisations in the United States* (n 48) 351.

55 The voting procedure demands the acceptance of each class of creditors; the different interests of them collide leading to extensive negotiations as to achieve the best possible outcome. Moreover, the negotiation procedures have other Tax and Employment implications that need to be taken into account. For these Elisabeth Warren-Jay Lawrence Westbrook, *The Law of Debtors and Creditors (*6th Edition Walters-Kluwer) 612.

by the "*d.i.p*" that has the exclusive right for a period to propose a viable plan (11 U.S.C. §1121). That is to say, the debtor has the exclusive right to propose a plan within the first 120 days after filing and then for the next 60 days he has to get the creditor-approval. Both time frames measure from the time of the initial filing and overlap each other. After the expiration of this period and any possible granted extension, any creditor is entitled to propose a plan.[56] For the plan content, it can vary, entailing the sale of the business or even its continuation with alterations regarding the debts.

5.The Confirmation – Dischar ge

The last but crucial stage regards the plan confirmation, since it ends the process that begun with the petition to open the Chapter 11 procedure. The USBC imposes 13 enumerated legislative requirements in 11 U.S.C. §1129 that need to be satisfied by the Court, in order for the confirmation to occur. All conditions are mandatory, apart from the consensus of subsection (8) of 11 U.S.C. §1129 (a), since the "*cram down"* provisos offer an alternative for "*non-consensual confirmation of a plan"*.

Before explaining the specific provisos, though, it is important to note that the voting procedure is made in accordance with 11 U.S.C. §1122 (a), that provides for the formation of classes that are designed under the plan. The rule for said classification is similarity of claims and interests and the only requirement is that all creditors of similar classes have similar legal rights and receive similar treatment. Following this, each class is deemed to have accepted the plan if creditors forming more than one half of it and representing at least 2/3 of the amount of debt owed to that class, vote in favour of the plan (11 U.S.C. §1126). It is significant to note, that the unimpaired classes, are deemed to have accepted the plan under 11 U.S.C. §1124 and 1129 (a) (8).

In case a class of creditors does not accept the plan the USBC offers an alternative, for the Court to confirm it, despite the objection of a creditor class(es), under the provisos of 11 U.S.C. §1129 (b). In this scenario, the plan is presented before the Court and the so-called "*cram down"* provisions apply, of course with the simultaneous application of all the above-mentioned principles. In this scenario, the Court shall confirm the plan "*if it does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan*".[57] As Westbrook explains, a class of se-

56 Even a going concern sale is a possible solution under the Chapter 11 provisos in Warren-Westbrook ibid. Turning to the possibility of an extension, the 2005 amendments introduced a strict system that does not leave it up to the Court discretion to grant an unlimited extension, but puts forth a time-limitation of 18 months to propose a plan and 20 months to solicit votes on it.

57 11 U.S.C. § 1129 (b) (1) Notwithstanding section 510(a) of this title, if all of the applicable require-

cured creditors may be "*forced to accept the plan*", if it receives the value of its collateral plus interest, while a class of unsecured creditors may be crammed down only if every class junior in priority receives nothing, i.e. the "*absolute priority rule*".

Hearing this, one might wonder about the protection of dissenting creditors under this system. Their strongest asset is of course their voting right, but they enjoy other "*weapons*" as well.[58] In other words, according to 11U.S.C. §1129 (a) (7), the plan is not confirmed by the Court if it does not satisfy the "*best interest test*", that reassures that the dissenting Creditors will receive at least as much as they would under a Chapter 7 liquidation. Secondly, even in case of full consent, the Court will perform the so-called "*feasibility test*" of 11 U.S.C. §1129(a) (11), under which the Court has to be satisfied that the plan has actual chances to succeed.[59]

A Court confirmation offers a wide discharge of all pre-confirmation debts, in accordance with 11 U.S.C. § 1141 (d) (1). In this case, the process terminates and the creditors take up their rights as formed under the plan. However, this is

ments of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements: (A) With respect to a class of secured claims, the plan provides (i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property; (ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or (iii) for the realization by such holders of the indubitable equivalent of such claims. (B) With respect to a class of unsecured claims— (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section (C) With respect to a class of interests—(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

58 These are the so-called "legal requirements" are found in ar. 1129 (a)(7) and (11), demanding that the plan is "*feasible*" and to the "*best interest*" of all dissenting Creditors.

59 The feasibility requirement prohibits the confirmation of visionary schemes. It essentially provides that the business will survive, long enough to pay the debts as formed under the plan. See Re Yates Development and Warren-Westbrook, *The Law of Debtor and Creditors* (n 54) 616, 622.

not a usual case, since as authorities note, "*the front door to Chapter 11 is wide, but the back door is narrow"*.

III. GREECE

In 2007 the Greek BC introduced the mechanisms of "*conciliation"* and "*re-organisation"* revisiting its "*rescue culture*". The aim of the former is to avoid bankruptcy while the latter's aim is to prevent liquidation. [60] Because most companies ended up liquidated, the 6th Chapter of Bankruptcy Code was amended replacing conciliation with "*rehabilitation*".

1. Rehabilitation

The innovative mechanism of *conciliation* gave a "*breathing space*" to troubled companies that negotiated, under Court supervision, a plan, while a temporary moratorium was in force. [61] The main influence was the French consensual procedure that allows rescue before the stage of "*cessation of payments*". [62] The first years of its use however, demonstrated a number of deficiencies, with the main disadvantage being on the non-binding effect for non-signatory creditors and the possibility of abuse, concerns expressed also for the French system. To tackle these, "*rehabilitation*" replaced the old regime focusing on rescue at an early stage.

a) Court Commencement

The debtor may initiate the process upon filing a Court petition, in which the subjective and objective conditions of ar. 99(1) GBC must be proven. The former remain the same as in conciliation so that the debtor -natural or legal person- must be engaged in commercial activities and have the centre of his main interest in Greece. Ar. 100(6) GBC inserted the mandatory notification of Tax Authority upon filing the petition, seen as an attempt to reduce tax evasion. [63]

The objective conditions are altered though and while conciliation demanded "*current or forthcoming financial difficulties without reaching the stage of cessation of payments*", rehabilitation allows commencement upon "*current or forthcoming inability to pay the debts in a general manner*". The initial proviso reflects the French prototype that drew a strict dividing line between the pre- and

60 *Lampros Kotsiris*, Bankruptcy Law (8th edn, Sakkoulas Athens-Thessaloniki 2011) 555.

61 *Monomeles Protodikeio (Athens) 10689/2008* [2009] DEE 73; *Polymeles Protodikeio (Thessaloniki) 28664/2008* [2009] EfAD 727-728

62 Ibid; Paul Omar, 'Four Models for Rescue: Convergence or Divergence in European Insolvency Laws? Part 2' [2007] 18(5) ICCLR 171-172.

63 *Polymeles Protodikeio (Larissa) 4/2012* <http://lawdb.intrasoftnet.com/> accessed 01 July 2012; *Polymeles Protodikeio (Larissa) 5/2012* <http://lawdb.intrasoftnet.com/> accessed 01 July 2012.

post-bankruptcy options.[64] The petition succeeded when it could be shown that debtor's financial problems were temporary and could be overcome. Contrary to this, rehabilitation can be initiated even when the debtor has ceased the payments, in which case a bankruptcy petition must be filed. It is important to note, that the application must be accompanied by an expert report that assesses the chances of success.[65]

Finally, the Court makes the order in case it concludes that reaching an agreement is feasible and the collective interests are not impaired. Case law suggested that the collective interests are harmed if the creditors receive less than they would under liquidation.[66] We see here the obvious influence of Chapter 11 "*feasibility test*". To enhance certainty, the 2012 amendments curtailed the process that can now last for a period no more than two months during which both the agreement and petition to affirm the approval must be filed.[67]

b) Preventive Measures

Similarly to the UK administration's interim moratorium, to maximise the rescue chances the Court may issue preventive measures until the formal initiation, if the petition is "*likely*" to succeed and there is "*urgency and necessity*".[68] Ar. 103(1) GBC seems to provide only for a stay of enforcement rights but to tackle this, the combination of ar. 103(3) and 10 GBC allow issuing any appropriate measures including prohibition of bankruptcy declaration.

c) Rehabilitation Agreement

After the process commences, the aim is to reach an agreement for which a conciliator may be appointed.[69] The agreement can be reached in three ways, with or without the formation of a Creditors' Committee -followed by Court approval- and "*out-of-Court*". As for its content, ar. 106E GBC provides a non-exhaustive list[70] that allows designing an agreement tailored to the needs of each case.

64 *Polymeles Protodikeio (Athens) 655/2009* [2009] DEE 1355; Paul Omar, 'French Insolvency Law: Remodelling the Reforms of 2005' [2009] ICCLR 214.

65 *PP* (Athens) 672/2013 NOMOS.

66 *PP* (Athens) 11923/13 NOMOS; *PP* (Athens) 11680/2012 NOMOS.

67 We have to underline that at this critical stage the debtor is being protected through the preventive measures, also discussed later for reorganisation. The Court issues these if the petition is "*likely*" to succeed and there is "*urgency and necessity*". See Ar. 103 BC.

68 Lampros Kotsiris and Paris Arvanitakis 'Preventive Measures in Conciliation Process of the new Bankruptcy Code: Opinion' [2008] NoB 807.

69 Ar 102 BC; Dimitris Avgitidis, *Rehabilitating Enterprises* Pre-Bankruptcy Agreements (Nomiki Bibliothiki 2011) 237-239; Lampros Kotsiris, Conciliation (2nd edn, Sakkoulas Athens-Thessaloniki) 249-251; Alexander Rokas, *The Pre-Bankruptcy Rehabilitation Process* (Sakkoulas Athens-Thessaloniki 2011) 49-53.

70 It includes measures, such as the reduction of creditors' claims, the going concern sale of whole or part of the business, renegotiation of contractual relationships or a moratorium in Avgitidis (n 68) 254-255. So, it embraces the concept of going concern sale of the business, embracing business rescue as a possible outcome.

d) Creditors' approval and Court affirmation

Where a Creditors' Committee is formed, the agreement has to be approved by creditors forming 50% in number of claims, a proportion in which both 60% of those being present and 40% of the secured ones must be included. [71] In case there is no Creditors Committee, the agreement has to be accepted by creditors holding 60% of claims in total, where 40% of those holding securities must be included. [72] The provisos of ar. 116 GBC are followed here, so that non-impaired creditors are deemed to have accepted the plan while those abstaining are regarded as voting in favour of the agreement.

After the approval a Court-petition is filed, accompanied by an expert report, that raises again the cost of the process. In case an agreement cannot be reached; the conciliator informs the Court which in turn terminates the procedure (ar. 102 GBC). Lastly, the agreement is not affirmed if the Court concludes that the company is not viable, the collective interests are damaged or the state of "*ceased payments*" is not reversed (ar. 106 Z GBC).

e) Pre-packaged Rehabilitation

Following the development of "*pre-packs*" in the Anglo-American Laws, the new statutory procedure introduced provisions for them. [73] More specifically, the agreement needs to be approved by the mentioned proportion of creditors and then be presented within 3 months before Court for confirmation. [74] Two safety provisos exist, including the non-approval when creditors of the same class are not similarly treated or in case the collective interests are harmed. Recent case law suggests that the Court examines a series of issues before approving a pre-packaged plan, such as the financial situation of the company, the debt owed to the Public Authorities and the Expert Report. [75] Despite the attempt though, the provision is not drafted in detail and case law must interpret the conditions upon which the pre-agreed plan is to be affirmed, creating additional safety-nets for creditors not participating in the negotiations.

2. Reorganisation

The Bankruptcy Code introduces a flexible system with liquidation and reorganisation as alternatives, where the latter aims at a better result serving the "*collective payment of debts*". [76]The process is influenced by the Chapter 11USBC and

71 Ar 106(4) BC; Avgitidis (n 68) 226-228, 251.

72 Ar 106A BC.

73 Rokas, *The Pre-Bankruptcy Rehabilitation Process* (n 68) 63.

74 Ar 106B BC.

75 *Ioannis Delikostopoulos*, The Process of Conciliation and the Draft Bill for the Pre-Bankruptcy Rehabilitation Process (Sakkoulas Athens – Thessaloniki 2011) 36.

76 Andreas Remmert, 'Introduction to German Insolvency Law' [2002] 13 (11) ICCLR 430.

the German "*Reorganisationsplan*". Having as its chief characteristic the concept of party autonomy, some options are -under the influence of §218 InsO[77]-- company's rescue, liquidation in more beneficial terms or company's going concern sale. Therefore, it is not in essence a genuine rescue proceeding, since creditors' interests remain in the forefront. [78]

a) Commencing the Process

Firstly, a bankruptcy petition must be filed provided the subjective and objective conditions of ar. 2-3 are met.[79] The former constitute conditions also demanded in rehabilitation, while the latter require "*cessation of payments or forthcoming inability to do so*". That is one of the main differences from Chapter 11, which is regarded as a business tool not demanding insolvency.

Turning to the objective requirements, the first alternative of ar. 3 GBC is cessation of payments. The concept was shaped through case law and this definition is now statutorily accepted. It is defined as the real and permanent inability of paying the debts as and when they become due, making the continuation of the commercial activity impossible. [80]

The forthcoming inability to pay on the other hand, justifies a petition filed only by the debtor. Generally it is considered as a stage prior to cessation of payments, [81] with the financial difficulties a debtor faces being calculated to lead there. [82] The Explanatory Memorandum defines it as the prediction of a forthcoming inability to pay as and when the debts become due, allowing measures to be taken at an early stage. [83]

Moreover, either the debtor or the practitioner is entitled to file a plan according to ar. 108 GBC. The debtor may do so either jointly in the process of filing of the bankruptcy petition or within four months following the publication of the order. The practitioner on the other hand, shall file a plan, if that serves the collective interests, within 3 months following the debtor's exclusivity period and ars. 109-

77 Thomas Eger, 'Bankruptcy Regulations and the New German Insolvency Law from an Economic Point of View' [2001] 11(1) EJL&E 41; Eberhard Braun, *Commentary on the German Insolvency Code* (IDW 2006) 424-425; Stefan Smid, *Praxishandbuch Insolvenzrecht* (DeGruyter 2007) 478-480.

78 *George Sotiropoulos*, 'The new Bankruptcy Code: From Bankruptcy to Rescue' [2008] ChrID 298 .

79 Namely that the debtor is engaged in commercial activities, has the Center of his Main Interests in Greece and that he faces current or forthcoming inability to pay the debts. See *AP 577/1967* [1967] NoB 175; *Areios Pagos280/1969* [1970] EEmpD 124; *AP629/1971* [1972] 187,188; *Efeteio PP (Athens) 12/2010* [2010] DEE 445

80 *Areios Pagos 577/1967* [1967] NoB 175; *Areios Pagos 280/1969* [1970] EEmpD 124; *Areios Pagos 629/1971* [1972] 187,188; *Efeteio (Athens) 1572/2001* [2001] EllDni 1418; *Efeteio (Athens) 4514/2010* [2011] DEE 195; *Polymeles Protodikeio (Athens) 12/2010* [2010] DEE 445.

81 *Polymeles Protodikeio (Athens) 206/2009* <http://lawdb.intrasoftnet.com/> accessed 01 July 2012.

82 Dimitris Avgitidis, 'Forthcoming Inability to Pay as Bankruptcy Condition' [2009] ChrID 459 459.

83 Alexander Rokas, 'The Forthcoming Inability to Pay as Grounds for Bankruptcy' [2008] DEE 673-674.

112 GBC prescribe the minimum requirements for the plan's content, dividing it into three parts; the informative, descriptive and constructive.

Despite the central role of party autonomy,[84] some safety nets exist to safeguard creditors. Firstly, ar. 110 BC affirms that the plan shall not reduce creditors' claims more than 10% in amount, a percentage deposited within three years. The requisite percentage was relaxed in order to improve the feasibility prospects but since bankruptcy makes all claims automatically become due the debtor will be unable, in reality, to put forth a feasible plan. Secondly, all claims are being classified and ar. 113 BC guarantees the equal treatment of a single class, following the US and German equivalents.

b) Court Pre-approval and Creditors' Consent

After the plans' submission the Court has to pre-approve its feasibility and its legal consistency. Considering the need to preserve the assets, ar. 114 (4) GBC provides for Courts' discretionary power in issuing preventive measures until the plan's approval, making any change in property automatically ineffective. This power supplements the automatic stay of ar. 25 and 26 (3) GBC resulting from bankruptcy declaration.

After fixing a date for the creditors meeting, the Bankruptcy Secretary shall notify all known creditors about the decision and plan. The Code regulates in detail the voting procedure with the requisite "*double-majority*" consisting of creditors forming 60% of the claims, a percentage in which at least 40% of those holding securities is included (ar. 115 – 121 GBC). Additionally following the US "*cram-down*" some presumptions are introduced to accelerate the process (ar. 116 GBC).

c) Court Affirmation of Consent - Termination

Following this, the Court shall affirm the creditors' consent and the plans' consistency with the law. After this, the Bankruptcy Process is terminated and creditors are entitled to enforce their rights as formed under the plan. The most significant feature is provided in ar.131 concerning the debtor's restoration to the company's governance with powers limited by the administrator's supervision and the terms of the plan.[85] This differentiates reorganisation from the German provisions, where the practitioner has a supervisory role only if the plan provides so.[86]

84 The general principle of party autonomy derives from Civil Law and art.5 of the Greek Constitution. It essentially provides for the right of the parties in an agreement to formulate its content as they wish, respecting the Statutory Provisos of Contract Law and the generally accepted principals of Law. See ar. 361 Civil Code.

85 Michael Marinos 'Reorganisation Plan and Management of Company – Comments for the Insolvency- and Company Law Relationship' [2010] ChrID 10-11.

86 §263 InsO; Harald Hess, *Insolvenzrecht* (CF Müller 2007) 219; Foerste, *Insolvenzrecht* (Beck 2008) 521.

IV. COMPARATIVE REMARKS

After having analysed the most significant features of the UK, US and Greek Rescue mechanisms, the focus turns on a comparative examination.

1. Entry Requirements

The UNCITRAL Guide noted that clear entry-conditions are essential for quick resolution. Reflecting the global approach to such regimes, the UK introduced the "*cash flow*" and Greece the "*cessation of payments*" test as the threshold to initiate the attempt. These provisos essentially connect rescue to insolvency, despite the fact that this is the main driver of job-loss, undermining of supplier credit and business closure.

Therefore, one could actually wonder, whether "*insolvency*" is an appropriate condition considering the primary focus of all three systems on "*saving*" the company. Responding to this, Chapter 11 does not introduce such a requirement[87], while the initial "*Cork Committee*" suggestion was for administration to be initiated without any "*insolvency*" prerequisite.[88] This was one of the fundamental suggestions of the Commission Recommendation of 12.03.2014, where it was mentioned that monitoring the crisis on an early stage could maximise the rescue chances.

Despite the obvious US influence on Commissions Recommendations though, authorities in the US consider that both solutions entail inherent dangers since in case companies resort to Chapter 11 in a "distressed stage" the legislation cannot function with some difficulties. On the other hand, if businesses resort to Chapter 11 only to gain an advantage, this is in essence a procedural abuse. So one must balance both possibilities and provide an appropriate criterion to find the best condition to initiate the system at the most accurate stage. In any event, the American system does prohibit the excessive litigation over the initiation of reorganisation, responding to the initial approach that reorganisation is essentially a business-tool.

Turning to the Greek regimes, a drafting deficiency is observed since rehabilitation allows commencement at a later stage, in a way which could lead to its colliding with reorganisation. Following this, it might be appropriate to restore the former "*dividing line*" between the pre- and post-bankruptcy procedures, allowing each to fulfil their objectives.

2. Administrating the Process

87 Westbrook, 'Chapter 11 Reorganisations in the United States' (n 48) 348.
88 Cork (n 9) 196.

The person that is to conduct the "*rescue*" procedure is a very important figure in all regimes that introduce different approaches worth evaluating.[89] The "*debtor in possession*" model of the US was criticized in the UK, where the "*practitioner in possession*" system was followed, expressing the view that "*you cannot leave the alcoholic in charge of the pub*". This shows a really different approach towards the concept of managing business-failure in an orderly manner.

The advantages of the American approach are the early filing of the petition and the experience on the business, considering that the existing managers know the operational aspects better.[90] However, one could argue that this entails an inherent potential danger of using the regime to serve other purposes, while a going concern sale seems a distant concern.[91] It is significant, that the Commission's March 2014 proposals recommend this mode, suggesting that in an effective system the debtor conducts the day-to-day issues of the business.

The main attributes of the English regime are the expertise and professionalism of the Insolvency Practitioners,[92] whose existence is promising for post-petition finance. Despite that, the involvement of an expert necessarily causes greater expenses and can be the reason for delays in employing the process.[93] To tackle this, authorities suggested the implementation of penalties for belated commencement such as wrongful trading.

Suggestions were made in the past for combining both regimes, so that the practitioner negotiates and designs the plan, while the management conducts the business. The Greek reorganisation embraces this concept and brings about what will hopefully be best of both worlds.

3. Flexibility

A common concern in all regimes is speed in initiating the rescue mechanism. The UK Administration's accelerated timetable helps to avoid deterioration of company's financial situation, especially through the provisos on the out-of-Court appointment.[94] In Greece, on the other hand, the Courts are greatly involved in both processes, which causes delays and leads to their description as "*luxurious*".

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89 David Hahn, 'Concentrated Ownership and Control of Corporate Reorganisations' [2004] 4 JCorpLStud 127

90 Westbrook, 'Chapter 11 Reorganisations in the United States' (n 48) 351; Gerard McCormack, 'Control and Corporate Rescue - an Anglo-American Evaluation' [2007] ICLQ 526.

91 Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, Cambridge University Press 2009) 286-288.

92 McCormack, 'Control and Corporate Rescue - an Anglo-American Evaluation' [2007] ICLQ528; Mc Cormack, *Corporate Rescue Law – An Anglo-American Perspective* (Edward Elgar ed 2008) 135.

93 Vanessa Finch, 'Control and Coordination in Corporate Rescue' ([2005] 25 (3) Legal Studies 388.

94 Frisby, 'In Search of a Rescue Regime' (n 3) 257.

[95] That is why the proviso of ar. 106(b) GBC has been positively received. To eliminate any drawbacks, it may be worth introducing an out-of-Court process of reorganisation in Greece similar to administration.

The issue of "*Court Involvement"* has been addressed in the Commission's March 2014 Recommendations. The recommendation is to tackle the extent of the involvement, as to facilitate speed and lower the expenses. However, the Commission underlined the need to encourage the involvement, as long as this is necessary for the protection of creditors.[96]

Likewise, some blame US Chapter 11 for its lack of speed, due to the dominant role of the Court.[97] Authorities actually blame the high bureaucracy for the unsuccessful outcome of some rescue attempts, since in all systems speed is essential, in order to avoid any undesirable publicity. Moreover, this great-deal-of-Court-involvement maximises the cost and fees, as legal advice must be paid for at all stages of the process. This is one of the main concerns of the US experts in the area that put forth a set of reforms to be presented at the end of 2014, to tackle the high-cost of Chapter 11. To enhance flexibility, a link between the different Insolvency proceedings is necessary, considering that the evaluation of the rescue chances is sometimes impossible at an early stage. This maximizes speed and minimizes expenses making the system more accurate. However, this is closely related to the objectives of each regime and because of this it would be contradictory to link rehabilitation and liquidation since it is a pre-insolvency regime aiming at restructuring.

4. Pre-packs

They have been described as an "*hybrid*" in-between bankruptcy and private negotiations.[98] The concept emerged in the UK, causing discussion amongst Insolvency experts, while the Greek BC introduced it, allowing redetermination of debtor-creditor relations without the social "*stigma*" attached to bankruptcy.[99].

This mechanism reduces lengthy negotiations, formalities[100] and excessive publicity[101]while costs are kept low and jobs are preserved.[102] Some disadvantages

95 Evdoxia Kiouptsidou-Stratoudaki The Bankruptcy Court Order–Reorganisation Plan (Sakkoulas Athens-Komotini 2011) 43.

96 The Commission's recommendation reads as follows: 'Allow debtors to restructure their business without needing to formally open court proceedings'.

97 Moss, 'Chapter 11 - An English Lawyers Critique' (n 13) 19.

98 Elisabeth Tashjian, Ronald Lease and John McConnell, 'Prepacks: An Empirical Analysis of Prepackaged Bankruptcies' [1996] 40(1) Journal of Financial Economics 135.

99 Delikostopoulos (n 74) 29.

100 *Finch* , Corporate Insolvency Law (n 90) 454-455; Warren and Westbrook (n 54) 658.

101 *Finch*, 'Pre-packaged Administrations' (n 41) 571.

102 Alan Katz and Michael Mumford, 'Study of the Administration Cases: Report to the Insolvency Ser-

need to be tackled though, such as the potential harm on collective- or interests of unsecured creditors.[103] The pre-packs also lack transparency, while companies are not being tested in the market as to evaluate whether their continuation is appropriate.[104]

In any event pre-packs are tricky in their control,[105] considering that any Court involvement would contradict the desired flexibility.[106] Even though the suggestions for control are many, one could actually conclude that all these point towards the realisation that solutions need to be found at an early stage as an indication of "*crisis-managements*".[107]

V. CONCLUSION

The subject of corporate rescue is a relatively modern one, gaining significance as the financial crisis turned from national to global. Numerous studies and comparisons have highlighted the uncomfortable fact that the concept cannot easily be defined and a generally accepted definition needs to take into account the several co-existing interests.

The Commission has concluded in its latest report (March 2014) that transnational horizontal coherence is potentially of great significance. That is to say, by coordinating national Insolvency Laws, benefits will be found in the encouragement of cross-border investments, preservation of sustainable employment and restructuring of groups of companies.

The concerns in all regimes are similar, attempting to balance an effective rescue with speed and low cost. International evidence shows that an early initiation is the milestone for success, so that authorities re-evaluate the "*insolvency condition*" of all these regimes. Moreover, the administration of the process is a subject of debate with the primary solutions being the "*debtor-in-possession*" and "*practitioner-in-possession*" regimes. One last remark relates to the trend of "*pre-packs*" and their significance worldwide, showing that reduced publicity and informal, out-of-Court negotiations are more desired than formal proceedings that support the "rescue" prospects.

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vice' <http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/ research/corpdocs/studyofadmincases.pdf> accessed 26 July 2012.

103 Ibid; Goode (n 20) 413; Finch, 'Pre-packaged Administrations and the Construction of Propriety' (n 41) 5-6.

104 Ibid; Insolvency Service ,'Dear IP Letter <http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionand legislation/iparea/prepackleter.doc> accessed 13 July 2012; Pontian Okoli, 'Rescue Culture in the United Kingdom: Realities and the Need for a Delicate Balancing Act' [2012] 23 (2) ICCLR 64.

105 Finch, 'Pre-packaged Administrations and the Construction of Propriety' (n 41) 18.

106 *Finch*, Corporate Insolvency Law (n 90) 475.

107 Finch, 'Pre-packaged Administrations' (n 41) 588-589.

In conclusion, it has to be underlined that all rescue efforts are not just legal but social and financial issues and the stigma related to Insolvency needs to disappear in order for them to succeed. This was the governing principle in the US but Europe seems more sceptical on this regard. In this respect the discussion is open-ended and the coming years will definitely help re-determine the role of "*rescue*" within Insolvency.