

INSOL Europe Judicial Wing
Copenhagen
September 26th, 2019

CLAWBACK AND RELATED PARTY TRANSACTIONS UNDER THE GREEK LAW

Vassilis Portokallis
Judge, Athens Court of Appeal, LLM

1. The rule

Transactions of the debtor, conducted within the time as of the cessation of payments until the declaration of insolvency (suspect period - periode suspecte) and which are detrimental to the group of creditors, are revoked or can be revoked by the syndic (bankruptcy administrator) (article 41 of the Greek Insolvency Code - GIC).

2. Mandatory revoked transactions

- ▶ a) Donations and gratuitous transactions as well as transactions in which the consideration was disproportionally smaller in relation to the dispensation.

EXCLUDED: Common donations made for reasons of social dignity, or moral duty, as well as the transactions conducted freely by the debtor in fulfilling a legal obligation and the dispensations for the economic or professional restitution of his children, if the dispensations are proportionate to his financial state and have not resulted to a substantial decrease of the debtor's assets.

- ▶ b) Payments of non-matured debts.
- ▶ c) Payments of matured debts by another mean and not in cash or by the agreed consideration .
- ▶ d) Creation of security *in rem*, including the registration of prenotice of mortgage, or the granting of other securities of contractual nature for pre-existing obligations, for which the debtor had not assumed a corresponding obligation to (provide) security, or for securing new obligations that were assumed by the debtor so as to replace those that pre-existed (Article 42 GIC).

3. Potential revoked transactions

- ▶ a) Every bilateral act made after the cessation of payments and before the declaration of insolvency, if the counter party, was aware that the debtor has ceased his payments and that the payment was detrimental for the creditors group (double knowledge).

The knowledge of the counter party is presumed, if he or she was, the debtor's spouse, or a blood relative up to a third degree, or by marriage up to a second degree, or a person with whom the debtor was living together the last year before the transaction.

For companies that are counter parties the presumption of knowledge concerns the abovementioned persons, if they were either the founder, the director or the manager of the company.

The presumption does no longer apply if the claw back action was raised after the lapse of a year from the declaration of insolvency.

If the debtor is a company, the knowledge of the counter party is presumed for the persons connected with the debtor on accordance with article 32 Law 4308/2014 (when the debtor and the creditor are connected as holding, subsidiaries or otherwise connected companies) (Article 43 GIC).

- ▶ b) Transactions of the debtor made within the last five (5) years preceding the declaration of insolvency, with intent to harm the creditors or to benefit others, if the third party had knowledge of the debtor's malicious intention (Article 44 GIC).

4. Excluded transactions (not revoked)

- ▶ a) Normal transactions of the professional or business activities of the debtor, performed under ordinary conditions and within the limits of his ordinary transactions.
- ▶ b) Transactions of the debtor, which the law specifically excludes from the application of the rules on revoke, invalidity or nullity of acts performed within the suspect period.
- ▶ c) Transactions performed by the debtor during the stage of performing the reorganization plan, in case of returning to liquidation due to an inability to perform the plan.
- ▶ d) Grants of the debtor for which the counter contracting party paid immediately an equivalent consideration in cash.
- ▶ e) Transactions that took place with the agreement or in execution of the rehabilitation agreement (Article 45 GIC).

5. Special provisions on financial transactions

The validity or revoke: a) of liquidation, or granting of collateral in the derivatives market, b) of agreements for providing financial collateral and c) of clearing of payment transactions, or settlement system, or a financial market is governed by the provisions applicable, respectively, to the relevant stock market, or the relevant agreements, or the relevant transactions (Article 46 GIC).

Regarding the payment of a negotiable instrument by the debtor within the suspect period, the claw back action can be directed only against the issuer of a bill of exchange, and first endorser of a promissory note and checks, and only if these had knowledge at the time of issuance, or endorsement, respectively, that the payee of the bill of exchange, or the issuer of the promissory note and check, had ceased his payments (Article 47 GIC).

6. Judgement - Legalization

Transactions concluded within the suspect period are revoked by decision of the insolvency court.

The revoke action is exercised by the syndic.

It may also be exercised by a creditor, if he has requested the syndic in writing, to recall a specific act, for a specific legal reason, and the syndic did not exercise it within 2 months from receiving the written request.

The revoke action is directed against those who had taken part in the act under revocation or their heirs, successors or a *male fide* special successor.

The revoke is not precluded on the grounds that an enforceable title (e.g seizure) has been issued for the transaction under revocation, or that the right arising from it was acquired through enforcement (Article 48 GIC).

7. Consequences of judgement

Anyone who has acquired, through a revoked transaction, an asset of the debtor, is required to retransfer it to the insolvency estate.

If the actual retransfer is not possible, the obligation is to provide a sum of money equal to the worth of the asset (provision for unjust enrichment).

The recipient of a donation is obliged to return only his enrichment, unless he had or could have had knowledge that the donation causes damage to the creditors. In that case he has to return the donation in total (Article 49 GIC).

8. Claims of the counter contracting party

If with the revoked transaction a claim was satisfied, with the retransfer, the claim revives.

In case of revoking a bilaterally onerous act, the counter contacting party, has a claim for the counter dispensation as a group creditor, otherwise he is satisfied as an insolvency creditor (Article 50 GIC).

9. Time bar of claw back action

The claw back action is time barred with the lapse of one (1) year from the day the syndic obtained knowledge of the transaction and in any case after the lapse of two (2) years from the declaration of the insolvency (Article 50 GIC).

10. Additional provisions

Additional provisions stipulating transactions that are exempted from bankruptcy revocation, including:

- any mortgage or pledge, granted under the Legislative Decrees 17-7/13-8-1923 and 4001/1959, to secure a loan,
- any mortgage or pledge, granted to secure claims from bond loans, issued according to Law 3156/2003,
- the transfer of claims, pursuant to Law 3156/2003, regarding the securitization of claims,
- financial collateral agreements, as well as the provision of financial collateral under such agreement, pursuant to Law 3301/2004 and
- within the framework of Law 3389/2005 regulating PPPs (public - private partnership), any securities granted by a special purpose vehicle (SPV), or any third party, in favour of a credit or financial institution, or any third party in order to secure claims towards the SPV.

Thank you!