The Restructuring Review

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I OVERVIEW OF 2007/2008 RESTRUCTURING AND INSOLVENCY ACTIVITY

In the past 12 months and particularly since July 2008, Portugal has felt the impact of the international financial crisis. Although, at the time of writing, no major Portuguese financial institution has collapsed and the government has not been forced to nationalise (totally or partially) any bank,[1] lending activity has been substantially reduced because of the disruption felt in the domestic and international inter-banking loan markets. This shortage of liquidity has meant increasing difficulties for companies seeking to finance and refinance their activities, especially for large companies and long-term loans. Unsurprisingly, the real estate and construction sectors have been most affected by the lending dry-up.

Since the beginning of the instability in the financial market in summer 2007, the Portuguese market has seen a tightening of banks' credit standards and the adoption of more demanding contractual terms and conditions, including higher collateral requirements and more restrictive loan covenants.

According to a study published by Coface comparing the first and second quarters of 2007 with the same periods in 2008, the number of insolvency court proceedings has

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1 After this chapter was written, a government-sponsored bill was passed by parliament that nationalised a small universal bank (Law No. 62-A/2008 of 11 November). According to the bill, the reasons for this first nationalisation in Portugal in over 30 years related to alleged fraudulent management of the bank and did not directly derive from the impact of the international financial crisis.

been growing. Comparing 2007 and 2008, we find a rise of 31.6 per cent in the number of such proceedings, as illustrated in the following table.[2]

Table 1: Formal insolvency proceedings (source: Coface)

Insolvency proceedings	First half of 2007		First half of 2008		2008/2007	
	No.	%	No.	%	No.	%
Insolvency proceedings filed by debtors	412	27.4	551	27.9	+139	+33.7
Insolvency proceedings requested by creditors	704	46.9	887	44.9	+183	+26.0
Winding-up court decisions	358	23.8	499	25.2	+141	+39.4
Formal restructurings approved	28	1.9	40	2.0	+12	+42.9
Total	1,502	100	1,977	100	475	31.6

From the sectors in which the most insolvency proceedings were filed and requested, it is clear that construction and retail trade have suffered most. As to other affected industries, there is a trend difference between situations where debtors themselves file for insolvency (hotels, restaurants and services) and cases where creditors more commonly request insolvency proceedings (transport, communications and wholesale trade).

The number of approved restructurings (involving one or more rescue measures) increased by 42.9 per cent in 2008. Construction, retail trade, manufacturing, hotels and restaurants are the most affected sectors. In fact, the construction sector has undergone the largest number of approved formal restructurings, with an increase of 500 per cent from the same period in 2007, followed by retail trade, with a 100 per cent increase. Nevertheless, formal restructurings remain a small fraction of total insolvency proceedings in Portuguese courts.

II GENERAL INTRODUCTION TO THE RESTRUCTURING AND INSOLVENCY LEGAL FRAMEWORK.

Formal insolvency and restructuring procedures

The Insolvency and Enterprise Rescue Code ('CIRE') was approved by Decree-Law 53/2004, of 18 March, and amended by Decree-Law 200/2004, of 18 August.

2 The main conclusions in Coface's report, covering the first nine months of 2008, which has just been made public, point already to a dramatic 47 per cent rise compared to the same period in 2007. The hotel and restaurant industries seem to have taken the lead within such gloomy statistics.

The CIRE eliminated the previous two-part model that admitted two types of proceeding treated separately: enterprise or company rescue versus bankruptcy or liquidation. Besides establishing a single statutory insolvency proceeding, Portuguese law attributes a prime role to creditors, who are responsible for deciding on the continuation of the enterprise or company.

Insolvency proceedings generally have the following stages:

a filing of the procedure;
b preliminary assessment and possible adoption of interim measures;
c judgment declaring the actual insolvency of the enterprise or company (and possible challenge) plus appointment of the administrator of the insolvency;
d asset seizure;
e lodging of creditor claims, recovery and separation of assets;
f meeting of creditors for the assessment of the report prepared by the administrator of the insolvency;
g liquidation of the insolvent estate;
h judgment on validity and ranking of claims;
i payment of creditors;
j motion to determine degree of fault; and
k closure of the proceeding.

The purpose of the insolvency procedure is the liquidation of an insolvent debtor's assets and the distribution to creditors or the satisfying of creditors in the manner envisaged in an insolvency plan that is based, *inter alia*, on company recovery.[3]

The criterion for gauging the insolvency situation of the debtor is the impossibility of it carrying out obligations that have already fallen due. If the debtor is a legal entity, another criterion for gauging the insolvency situation will be a clear excess of liabilities over assets.[4]

The competent court for the insolvency procedure is the court of the head office of the company or the court of the location of the debtor's principal interests (i.e., the location where the debtor administers the company 'habitually and recognisably by third parties').[5] The insolvency proceedings are urgent.[6]

The petition for the state of insolvency to be declared can be filed by the company itself, by the company board responsible for the administration, or by any of its directors. This petition is to be filed within 60 days from the date of awareness of the insolvency.

For companies, the CIRE establishes a legal presumption of awareness of the situation of insolvency three months after general failure to meet the following obligations:

a payment of tax debts;
b payment of social security contributions;

3 CIRE, Article 1.
4 CIRE, Article 3.
5 CIRE, Article 7.1 and 7.2.
6 CIRE, Article 9.1.

c payment of debts arising from an employment contract or from the breach or termination of such a contract; and
d payment of rentals for any type of hire (including finance leases), instalments of the purchase price or loan repayments secured by a mortgage on the debtor's business premises or head office.[7]

The insolvency can also be requested by those who are legally responsible for the company's debts, by any creditor or by public prosecutors (in representation of the entities with whose interests they are entrusted) in the following situations:
a general suspension of payment of debts due for settlement;
b failure to comply with one or more obligations which, by virtue of their size or of the circumstances of the failure, show that the debtor is generally unable to meet his obligations as they fall due;
c the disappearance of the company's owner or of the debtor's directors, or the act of abandoning the head office or main centre of activity as a result of the debtor's insolvency, and without the designation of a suitable replacement;
d the dissipation, abandonment, hasty or grossly uneconomic liquidation of assets and the creation of fictitious claims;
e the lack of adequate assets to secure payment of the claimant's debt as adjudged in enforcement proceedings brought against the debtor;
f failure to comply with obligations contained in an insolvency or repayment plan, under the conditions provided for in CIRE, Article 218.1(a) and 218.2;
g general failure, in the previous six months, to meet debts of some of the following types: (i) tax; (ii) social security contributions; (iii) debts arising from an employment contract or from the breach or termination of such a contract; or (iv) rentals for any type of hire, including financial leases, instalments of the purchase price or loan repayments secured by a mortgage on the debtor's business premises, head office or residence; and
h if the debtor is a legal entity or autonomous estate, clear excess of liabilities over assets in the latest approved balance sheet, or a delay of more than nine months in approving and filing accounts, where there is a legal obligation to do so.[8]

As an alternative to the universal liquidation of the debtor's assets, the CIRE envisages the possibility of subjecting the company to an insolvency plan, the purpose of which is almost always company recovery. The insolvency plan is dependent on the approval by the creditors' meeting[9] plus court ratification.[10]

7 CIRE, Articles 18.3 and 20.1(g).
8 CIRE, Article 20.
9 CIRE, Articles 1, 192 and 212.
10 CIRE, Article 214.

Non-judicial methods to restructure companies in financial difficulties

In the last decade, a set of regulatory measures have been approved, in connection with which the Institute for the Support of Small and Medium-sized Enterprises ('IAPMEI'), a public institute, was given a leading role in the coordination, supervision and enforcement of rules. Among such measures, the following three procedures are aimed at the restructuring of distressed companies:

i PEC

Under Decree-Law 316/98 of 20 October, as amended by Decree-Law 201/2004 of 18 August, distressed companies or any of their creditors can ask IAPMEI to supervise an out-of-court conciliatory proceeding (*procedimento extrajudicial de conciliação*, 'PEC') that aims at reaching a formal agreement between the company and some (at least 50 per cent) or all of its creditors in an attempt to restructure and preserve the business from a current or imminent insolvency.

The requirements for the PEC are the same as for the formal insolvency proceeding and, as within such latter proceeding, the parties can freely agree upon the measures to be adopted in such formal rescue agreement.

IAPMEI can intervene not only as supervisor of each PEC but also to suggest (but not impose) specific measures to be adopted and even specific aid schemes to be considered to help the distressed company promote the terms of the agreement with its creditors.

ii SIRME

Decrees-Laws 80/98 and 81/98, both of 2 April, set out several provisions to restructure and consolidate financially distressed companies through mergers and acquisitions; management buyout; management buy-in; and buy-in and management buyout.

IAPMEI coordinates the referred proceeding through the Incentives System for Business Revitalisation and Modernisation ('SIRME'). Under this scheme, companies, employees or directors of the distressed company may apply to acquire such distressed company benefiting from special conditions set by the above legal framework, such measures comprising, *inter alia*, the possibility of not committing all funds required for the acquisition of the distressed company as a specific venture capital investment fund, the Fund for Business Revitalisation and Modernisation ('FRME'), might fund it and become a stockholder of said company, as well as tax benefits, and the financing or the granting of financing collaterals by SIRME.

iii AGIIRE

Decree 5/2005 of 12 July established the Cabinet for Intervention in Business Restructuring ('AGIIRE') whose purpose, *inter alia*, is to support the business rescue and modernisation of Portuguese enterprises. Although it works alongside IAPMEI regarding SIRME and PEC, AGIIRE may play a closer role by appointing experts to work *in loco* with distressed companies or ones going through a restructuring process, enabling them to monitor and assist companies' directors in their decision making.

In 2007, IAPMEI and AGIIRE received and analysed the following volume of non-judicial restructuring requests: 255 agreements between creditors; 195 procedures

filed under PEC, of which 91 procedures were approved; six procedures filed under SIRME, of which two were approved.[11]

Other legal issues

i Taking and enforcement of security

The CIRE defines 'secured claims' as those claims that benefit from security *in rem* over assets in the estate, up to the value of the assets secured.[12] After the decision decreeing the insolvency of the company becomes enforceable and following the creditors' meeting that examines the insolvency administrator's report, any delay in the sale of the asset with security *in rem* shall give the creditor the right to compensation.[13]

The insolvency administrator is responsible for choosing to sell the secured asset or to make a full payment to the creditor holding that security, at the expense of the insolvent estate.[14]

The first case will have to wait for the final decision on the determination and priority of claims for the secured assets to be sold. After deduction of the respective expenses, payments are immediately made to the secured creditors, in accordance with their priority. If the secured creditors are not paid in full, the remaining balance is considered an unsecured claim.[15]

ii Duties of directors of companies in financial difficulties

The filing in court of a petition for the declaration of insolvency within the time limit stipulated by law is one of the duties of the directors of a given insolvent company. This petition should be submitted within 60 days from the date of awareness of the situation of insolvency.[16] Failure to comply with this obligation may subject the director of the insolvent company to civil and criminal liability.

The Portuguese law of insolvency does actually provide for a specific stage, within the formal insolvency proceeding, in which the liability of the company's directors, if any, shall be ascertained: the 'categorisation' of the insolvency.[17] The ultimate purpose of this 'categorisation' is to determine whether the insolvency was culpable or, instead, fortuitous.

However, it should be pointed out that such 'categorisation' within the insolvency proceedings does not limit or preclude any possible liability, civil or criminal, of the directors, assessed outside of such proceedings.

11 Source: IAPMEI.
12 CIRE, Article 47.4(a).
13 CIRE, Article 166.1.
14 CIRE, Article 166.2.
15 CIRE, Article 174.1.
16 CIRE, Article 18.
17 CIRE, Article 185 *et seq.*

The insolvency will be culpable when it was brought about or aggravated as the result of the fraudulent activities or gross misconduct of the debtor or of its directors, in law or in fact, in the three years prior to the starting of the insolvency proceedings.[18]

The insolvency of a company is always considered fraudulent when its *de facto* or *de jure* directors have adopted certain conducts identified by the law, e.g., they have:

a destroyed, damaged, rendered useless, hid, or got rid of the estate of the debtor, in its entirety or in a considerable part;

b created or artificially aggravated liabilities or losses, or reduced profits, causing, in particular, the debtor to enter into loss-making transactions to its own benefit or to the benefit of those with which it has a special relationship;

c purchased goods on credit, in order to sell them or use them as payment at a price considerably lower than current prices, before satisfying the obligation;

d used assets of the debtor for personal benefit or for the benefit of third parties;

e exercised, under the cover of the company's legal personality, if applicable, an activity for personal gain or third parties and to the detriment of the company;

f made use of the credit or assets of the debtor contrary to its interests, to their own benefit or the benefit of third parties, namely in order to favour another company in which they have a direct or indirect interest;

g pursued, in their own interest or the interest of third parties, a loss-making operation, while being aware or with the obligation to be aware that this would lead in all likelihood to a situation of insolvency;

h failed to comply substantially with the obligation to keep organised accounts, maintained creative accounting or a dual accounting system or committed irregularities significantly detrimental to the assessment of the assets and liabilities and financial situation of the debtor; or

i repeatedly failed to comply with their duties to report and to collaborate, until the date of the opinion drawn up by the insolvency administrator.[19]

Portuguese insolvency law presumes the existence of gross misconduct whenever the *de facto* or *de jure* directors fail to comply with their duty to file for insolvency or with their duty to prepare annual accounts, within the legal time limit, and to submit them for due supervision or deposit them at the Register of Companies.[20]

Moreover, if there is evidence of acts that may constitute a crime, the Court should determine that the Public Prosecutor is informed, with a view to possible prosecution. The criminal offences that may arise are fraudulent insolvency,[21] concealment of assets,[22]

18 CIRE, Article 186.1.

19 CIRE, Article 186.2.

20 CIRE, Article 186.3.

21 Penal Code, Article 227.

22 Penal Code, Article 227-A.

negligent insolvency,[23] or favouring of creditors.[24] These crimes are punishable with imprisonment or a fine, under the terms provided for in the Penal Code.

The penalties applicable to any of the crimes referred to above are increased by one-third, in their minimum and maximum limits, if, as a consequence of such crimes, employees claims are thwarted, during the enforcement or insolvency proceedings.[25]

It is to be noted that, if the debtor is a legal entity, company or *de facto* association, whoever has in fact exercised the management or effective control is also punishable.

The directors of the insolvent company may also be required to pay compensation to injured parties, e.g., creditors, under general law.

iii Claw-back actions

The CIRE envisages the possibility of avoiding, to the benefit of the insolvent estate, all acts undertaken or omitted within the four years prior to the date of the onset of the insolvency proceedings, if they diminish, frustrate, hinder, threaten or delay the settlement of creditors' claims.[26]

It is established, as a rule, that avoidance presupposes bad faith by the third party, which is presumed in the case of acts undertaken or omitted within two years prior to the onset of insolvency proceedings and involving a person in a special relationship with the insolvent party, or from which such a person benefited, even if the special relationship did not exist at the time in question.[27]

For this purpose, the 'bad faith' of the third party is reflected in the awareness, at the date of undertaking or omitting the act, of any of the following circumstances:

a that the debtor was in a situation of insolvency;

b of the detrimental nature of the act and that the debtor was, at the time, in a situation of imminent insolvency; and

c of the onset of the insolvency proceedings.[28]

The following acts are always avoided to the benefit of the insolvent estate, without depending on any other requirements:

a the division of an estate less than one year before the date of onset of the insolvency proceedings in which the share of the insolvent party has been essentially completed with easily concealable assets, the co-interested parties in such division having been attributed most of the immoveable property and nominative assets;

b acts performed by the debtor, free of charge, in the two years prior to the date of onset of the insolvency proceedings, including repudiation of the inheritance

23 Penal Code, Article 228.

24 Penal Code, Article 229.

25 Penal Code, Article 229-A.

26 CIRE, Article 120.1 and 120.2.

27 CIRE, Article 120.4.

28 CIRE, Article 120.5.

or bequest, with the exception of donations in compliance with customary practice;

c the establishing, by the debtor, of security on existing obligations or others that may replace them, within the six months prior to the date of onset of the insolvency proceedings;

d any surety, sub-surety, guarantee and lending mandate which the insolvent party has signed during the period referred to *supra* and which does not concern business operations of real interest to that party;

e the establishing, by the debtor, of security at the same time as the creation of secured obligations, within the sixty days prior to the date of onset of the insolvency proceedings;

f the payment or other acts of extinction of obligations that fall due after the date of onset of the insolvency proceedings, occurred within the six months prior to the onset of the insolvency proceedings, or after that date but before they fall due;

g the payment or other means of extinction of obligations made within the six months prior to the date of onset of the insolvency proceedings on terms not customary in trade and which the creditor could not demand;

h acts performed for payment by the insolvent party within the year prior to the date of onset of the insolvency proceedings in which the obligations assumed clearly exceed those of the other party; and

i repayment of shareholder loans, when occurring during the same period referred to *supra*.[29]

The law expressly states that these acts are presumed to be detrimental to the insolvent estate, not admitting evidence to the contrary, even if engaged in or omitted outside the defined time limits.[30]

However, this regime does not apply wherever there are legal rules that exceptionally always require bad faith or the occurrence of other requirements[31] as conditions for the avoidance of acts.

The insolvency administrator may declare the avoidance of a given act, by registered letter with recorded delivery, within the six months period following awareness of the act, provided that no more than two years have elapsed since the date of declaration of insolvency and the insolvency proceedings remain outstanding. However, as long as the business has not yet been completed, avoidance may be declared, without depending on any term, as a defence.[32]

Avoidance to the benefit of the insolvent estate can also be invoked in subsequent assignments of assets or rights from the insolvent estate, if the assignees are in bad

29 CIRE, Article 121.1.

30 CIRE, Article 120.3.

31 CIRE, Article 121.2.

32 CIRE, Article 123.1 and 123.2.

faith, are universal successors of the assignor or the assignment has been made free of charge.[33]

This avoidance has retroactive effects, requiring therefore the reinstatement of the situation that would have existed had the act not been undertaken or omitted.[34]

The avoidance of acts to the benefit of the insolvent estate can be contested, by way of a legal action running as an appendix to the insolvency proceedings, provided it is brought against the insolvent estate within six months.[35]

III RECENT LEGISLATIVE AND CASE LAW DEVELOPMENTS.

Council Regulation 788/2008 of 24 July 2008, published on 8 August 2008, amending the lists of insolvency proceedings and winding-up proceedings in Annexes A and B to Regulation (EC) 1346/2000 on insolvency proceedings, and codifying Annexes A, B and C to such Regulation.[36]

A relevant judgment[37] was given on 22 May 2007 by the Court of Appeal of Coimbra that decided the following:

> *I – The criteria pointing towards a culpable (negligent or intentional) insolvency must be alleged. II – A situation of insolvency must be qualified as culpable whenever the insolvent company fails to deliver its accounting records and books. III – All Board members, including those without an effective management role, may be punished for a culpable insolvency.*

September and October 2008 have seen governments across the world intervening in markets and financial institutions with several measures in an attempt to solve what is already considered one of the worst financial crises ever.

The Portuguese Securities Market Commission took the unprecedented decision, as other supervisory authorities worldwide did, to ban short-selling transactions on financial institutions listed in Euronext Lisbon and PEX. Almost simultaneously, the Portuguese government, besides reassuring the guaranteed status of Portuguese bank deposits (up to a certain amount per banking institution), has taken a number of actions designed to rebuild the investors' confidence. For these purposes, the government has mainly focused upon its proposed 2009 state budget.

The proposed budget contemplates the creation of a new type of real estate investment fund, named Real Estate Investment Funds for Residential Lease ('FIIAH'), which are closed-end funds to be set up with the purposes of fostering the real estate rental market, help distressed families (who are increasingly defaulting in their mortgage loans) and, alongside, help restore the liquidity of banks. The operation comprises the selling by the borrowers of the mortgaged properties to the FIIAH (with repayment of the loans to the banks) and the simultaneous letting of the same real estate by the FIIAH

33 CIRE, Article 124.

34 CIRE, Article 126.1.

35 CIRE, Article 125.

36 N. Celex: 32008R0788.

37 Tribunal da Relação de Coimbra, case R 961/2004.

to the selling borrowers. The tenants will then have an option until 2020 to repurchase the properties.

The amount of rent to be paid to the investment fund will almost inevitably be less than the amount that was being paid beforehand to the lending bank and all the procedures surrounding the FIIAH will be strongly stimulated by tax benefits.

Another contemplated measure is the extension of the legal regime of Decree-Law 14/98, of 28 January (basically, a regime providing, in exceptional circumstances, for a purchasing company to carry forward and set-off against its own profits the five-year tax losses of a purchased company in distress), to companies that purchase distressed companies under the aforementioned restructuring incentive scheme SIRME.

Finally, and most relevantly, under Law 60-A/2008 of 20 October and Administrative Rule No. 1219/2008 of 23 October, an exceptional regime of state guarantees for the Portuguese financial institutions was created, allowing the government to guarantee the borrowings of Portuguese banks up to as much as €20 billion.[38] This measure envisages not only facilitating the finance and refinance of banking operations but also restoring liquidity and rebuilding the investors' confidence in banks and in the financial sector and preventing economic recession as much as possible.

IV SIGNIFICANT TRANSACTIONS AND HOT INDUSTRIES.

In 2007, a listed company involved in the paper distribution industry was subject to an out-of-court process of restructuring.

The main technique used by this company was the well known *coup d'accordéon*, basically consisting of a combination of a share capital reduction with a share capital increase, resulting in a net treasury increase destined to repay debt (or finance new investments).

This specific operation involved a share capital reduction from €150 million to €27,237,013 (used to cover past equity losses) and a share capital increase to €150 million by means of issuance of new stock subject to the existing stockholders' pre-emptive right and bringing about a considerable amount of new equity.

2008 saw the first insolvency proceeding brought against a sportive joint stock company owned by a football club. At the end of September 2008 those proceedings were suspended since the parties are trying to reach an out of court settlement.

Another sportive joint stock company staged one of the biggest restructuring operations taking place in Portugal in May.

This company reported a banking debt amounting to €254 million plus €20 million of non-banking debts, and was not being able to develop its activities due to

38 Such regime of state guarantees was deemed by the European Commission not to contravene Article 87.3(b) of the EC Treaty, as said rescue package aims at stabilising the financial markets and is an adequate remedy for its intended purposes. In its decision, the Commission highlighted the fact that (i) this regime of guarantees is limited in time and scope, (ii) it is available on a non-discriminatory basis and (iii) its beneficiaries will pay a market-oriented premium (decision in case no. NN60/2008).

the large amount of debt. It implemented a restructuring plan comprising both the debt renegotiation together with the company's recapitalisation. To achieve those objectives, it made a €30 million issue of mandatory convertible bonds, at the issue price of €2, in the total amount of €60 million, with an initially interest rate of 3 per cent (floating interest rate) and stockholders equity in the amount of €55 million.

V INTERNATIONAL

In connection with the application by Portuguese courts of EC Regulation 1346/2000 on insolvency proceedings, the following decision should be highlighted. In a judgment[39] of 29 May 2008, the Court of Appeal of Lisbon decided the following:

IV – National law cannot act as an obstacle to the effect and application of European Union law in the internal order in view of its primacy over national law. This is borne out by Article 8.4 of the Constitution. The primacy of EU law is reflected in its immunity against the constitutional system of supervision of constitutionality and 'reinforced legality'. V – The refusal by a Member State may only occur, in the light of the provisions of Article 26 of the Regulation, if its enforcement would be 'manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual'. VI – The circumstance that, under the decision rendered under English law, the plaintiff was prevented from appealing to Portuguese jurisdiction to obtain recognition of the entitlement claimed does not detract from the constitutional guarantee of access to the law and to effective judicial protection, since it can always be exercised with observance of the legal system of the State where the insolvency proceedings are opened, and are not the greatest difficulty or costs that it may entail, per se, grounds liable to shake or threaten the foundations of the Portuguese legal order and activate the recourse to the public policy reservation.

It could also be pointed out that, thus far, Portugal has not adopted the UNCITRAL Model Law on Cross-Border Insolvency. The approach to the recognition and the giving of judicial assistance to insolvency proceedings commenced in foreign jurisdictions (the cross-border insolvency issue) differs depending on whether the proceedings have commenced in a EU Member State or in any other jurisdiction.

If the proceedings take place in another EU Member State, the main rules are provided by the above mentioned EC Council Regulation 1346/2000 of 29 May on insolvency proceedings and complemented by the CIRE.

One must also consider the Declaration of 30 June 2000 by Portugal concerning the application of Articles 26 and 37 of said Council Regulation (2000/C183/01):

Article 37 of Council Regulation (EC) n. 1346/2000 of 29 May 2000 on insolvency proceedings, which mentions the possibility of converting territorial proceedings opened prior to the main proceedings into winding-up proceedings, should be interpreted as meaning that such conversion does not exclude judicial appreciation of the State of the local proceedings (as is the case in Article 36) or of the application of the interests of public policy as provided for in Article 26.

39 Tribunal da Relação de Lisboa, case 1351/2007-6.

If insolvency proceedings are opened in another EU Member State, any decisions issued by the competent courts of that Member State will be automatically recognised in Portugal from the time they become effective in that Member State. And the effects of the proceedings may not be challenged in other Member States.

Nevertheless, insolvency proceedings commenced in another EU Member State require an authorisation of a Portuguese court in order to be advertised and registered in a public register in Portugal.[40]

If the insolvency proceedings are opened in a jurisdiction outside the EU, recognition of decisions is automatic only if an applicable international convention expressly so provides. In most cases it is necessary to start a special *exequatur* procedure to obtain recognition and enforcement in Portugal of such foreign decisions. This recognition does not require that the decision is final.[41]

VI OUTLOOK

In a situation of financial turmoil, it is even more difficult to rise above the noise of the present and try to perceive the underlying trends regarding insolvency and restructuring law. In the present context, the future evolution of Portuguese insolvency and restructuring law will be highly influenced by two factors: the impact of the banking crisis in the real economy; and state intervention.

Portugal has a long record of state intervention in the economy and the current situation seems to encompass all the ingredients to encourage governmental interference. In the last few months ,there has been a severe credit squeeze combined with an economic slowdown that economists forecast will be, at best, a light recession. On top of this, 2009 will be an election year in Portugal.

Portugal has had a long-lasting practice, which dates back to the revolution of 1974, of spending massive public resources on insolvent enterprises and that feature might again play an important role. From the recent governmental measures within the bailout package for the banking sector, there emerges the sense that partial nationalisations may be just around the corner.[42] It is possible that in the near future one will see the resurrection of past state-driven restructuring mechanisms such as state-owned venture capital companies or funds being set to 'invest' in insolvent and (hopefully) economically viable enterprises.

A reform of the 2004 CIRE is also not out of the question. As already mentioned, the adoption of the CIRE meant a radical move from the traditional debtor-friendly approach, that favoured restructuring over bankruptcy, to a new creditor-driven approach leading primarily to the liquidation of the insolvent enterprise. It can be argued that the CIRE gives the creditors the central role in the insolvency proceedings but it does not favour, at least in literal terms, liquidation over restructuring. But the

40 CIRE, Article 274.1.

41 CIRE, Article 293.

42 Shortly after the time of writing the present chapter, the full share capital of a small Portuguese bank was nationalised. See note 1, *supra*.

fact remains that restructuring of economically viable enterprises was not made easier under the new Code because the creditors have an almost absolute control over the restructuring proceedings. Not surprisingly, the vast majority of these proceedings end in the liquidation of the debtor's estate.

In the present economic atmosphere, the liquidation-oriented characteristics of the CIRE will be even more striking. The need for the protection of distressed companies (sustained by such a vast majority in the country) will probably induce strong pressures for the introduction of changes in the insolvency law, most likely giving room to a debtor's controlled restructuring procedure and increasing the odds for management-led companies to emerge out of insolvency situations.

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Having graduated from the Faculty of Law of the University of Lisbon in 1992, she was admitted to the Portuguese Bar in 1994 and has been in private practice since then. Ana became a partner at Baião, Castro & Associados in 2001. More recently, adding to her extensive professional experience, she has studied Judicial Proceedings and Commercial Consultancy at the Law Faculty of the Portuguese Catholic University (2002) and has obtained a postgraduate qualification in Arbitration at the Law Faculty of Lisbon's Universidade Nova (2008). She is a member of the Portuguese Bar Association and she speaks Portuguese, English and Spanish.

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Cristina Bonito is counsel at Baião, Castro & Associados and part of the firm's banking and finance unit. Her fields of activity include banking, financial and corporate law. She is regularly involved in dealing with non-performing loan portfolio transactions, structured finance, security issues and mergers and acquisitions. Having graduated from the Faculty of Law of the Portuguese Catholic University in 1998, Cristina was admitted to the Portuguese Bar in 2000 and has been in private practice since then. However, from 2005 to the first half of 2008 she was also business developer and subsequently head of the bankruptcy and corporate department at a Portuguese subsidiary of a multinational investment unit. She is a member of the Portuguese Bar Association and speaks Portuguese, English and Spanish.

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