The Restructuring Review

Second Edition

Editor
Christopher Mallon

Law Business Research

The Restructuring Review

SECOND EDITION

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This article was first published in The Restructuring Review,
(published in October 2009 – editor Christopher Mallon).

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Second Edition

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
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www.thelawreviews.co.uk

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: +44 870 897 3239

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ADVOKATFIRMAET HAAVIND AS

AFRIDI & ANGELL

ANDREAS NEOCLEOUS & CO LLC

BAIÃO, CASTRO & ASSOCIADOS – SOCIEDADE DE ADVOGADOS

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PREFACE

We are very pleased to present this second edition of *The Restructuring Review*. As with the first edition, our intention is to help general counsel, government agencies and private practice lawyers understand the conditions that have been prevailing in the global restructuring market in 2008/2009 and to highlight some of the more significant legal and commercial developments and trends during that period.

It is widely acknowledged that the global economy is now in the midst of the worst financial crisis since the Great Depression. As readers will have experienced, the past year has seen credit conditions deteriorate further, global asset prices continue to fall and distressed banks reach out for government support. The effects of the current global recession have been enormous: unemployment figures have risen sharply worldwide and economic growth has stagnated. Considerable uncertainty remains as to how best to remedy the current weaknesses in our economic system that have made the downturn so severe.

Although the main stock markets have shown some signs of recovery recently, there is no consensus as to how long this surge will continue and therefore how long this recession will be with us. As banks face the dual obstacles of revenue pressures and rising credit impairments, together with national economies facing fiscal tightening, talk of 'green shoots of recovery' in the short to medium term appears premature. In the meantime, it is nevertheless clear that the hostile environment businesses still confront will produce further technical and commercial issues that companies, legislators and practitioners will, of necessity, have to tackle together.

I would like to extend my gratitude to all the contributors for the support and cooperation they have provided in the preparation of this work, and to our publishers, without whom this would not have been possible.

Christoper Mallon
Skadden, Arps, Slate, Meagher & Flom LLP
London
October 2009

Chapter 21

PORTUGAL

*Ana Paula Matos Martins and Maria José Andrade Campos**

I OVERVIEW OF RESTRUCTURING AND INSOLVENCY ACTIVITY

The ongoing financial crisis has deepened in the last quarter of 2008 and continued throughout the first half of 2009, generating strong effects on the overall world economy, and of course in Portugal. Not to be neglected are the difficulties being faced by Portugal's major commercial partners (France, Germany, Italy, Spain and the United Kingdom).

Consumers, facing both economic uncertainty and financing restrictions, have reduced their spending on products, strongly contributing to the slowdown of Portugal's internal demand.

All this added to the shortage of liquidity and increasing difficulties for companies seeking to finance and refinance their activities resulted, in the last few months of 2008 and the first part of 2009, in Portugal witnessing a continued increase in insolvency filings and restructuring processes.

In its study comparing the first halves of 2008 and 2009, Coface has reported a significant 64.7 per cent growth in the number of insolvency court proceedings.

The main sectors contributing to the increase in the actual number of insolvency proceedings filed are the manufacturing industries (658 in aggregate in the first half of 2009), construction (390) and wholesale trade (360). In terms of percentage, the sectors in which the increases were most striking are agriculture and fisheries (increase of 214.3 per cent from 2008 to 2009), vehicle trade (134.4 per cent increase) and telecoms (100 per cent increase).

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Table 1: Formal insolvency proceedings (source: Coface)

Insolvency proceedings	**1st half 2008**		**1st half 2009**		**2009/2008**	
	No.	%	**No.**	%	**change (+/-)**	% change
Insolvency proceedings filed by debtors	358	25.8%	783	34.3%	+425	+118.7%
Insolvency proceedings requested by creditors	582	42.0%	879	38.5%	+297	+51.0%
Winding-up court decisions	411	29.6%	587	25.7%	+176	+42.8%
Formal restructurings approved	36	2.6%	36	1.6%	No change	No change
Total	**1,387**	**100%**	**2,285**	**100%**	**+898**	**+64.7%**

As to winding-up court decisions, the highest figures relate to wholesale trade (106 in the first half of 2009), manufacturing industries (149 in the first half of 2009) and construction (97 in the first half of 2009).

Conversely, the number of formal restructurings approved has not increased, which suggests that the room for actual restructuring as opposed to the winding-up of businesses is narrowing.

Finally, it should be mentioned that under Law 60-A/2008, of 20 October, and Administrative Ruling 1219-A/2008, of 23 October, which created an exceptional regime for state guarantees to be granted for the benefit of Portuguese banks (in connection with their financing and re-financing) up to a maximum aggregate amount of €20 billion (as confirmed for application in 2009 by Article 148 of the 2009 State Budget, approved by Law 64-A/2008, of 31 December), the government, in the first quarter of 2009, has granted five such guarantees and others were announced, totalling €4.35 million.

II GENERAL INTRODUCTION TO THE RESTRUCTURING AND INSOLVENCY LEGAL FRAMEWORK

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

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 or otherwise 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* judgement declaring the actual insolvency of the enterprise or company (and possible challenge) plus appointment of the insolvency administrator;
- *d* asset seizure;
- *e* lodgements 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.

Article 1 of the CIRE sets out the purpose of the insolvency procedure: 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.

Article 3 of the CIRE states that 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.

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') (Article 7.1 and 7.2 of the CIRE).

The insolvency proceedings are urgent (Article 9.1 of the CIRE).

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.

In the case of companies, the CIRE establishes a legal presumption of awareness of the situation of insolvency three months after general failure to meet the following obligations: payment of tax debts; payment of social security contributions; payment of debts arising from an employment contract or from the breach or termination of such a contract; payment for 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 (Article 18.3 combined with Article 20.1(g) of the CIRE).

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 that, by virtue of their size or of the circumstances of the failure, show that the debtor is generally unable to meet its 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 Articles 218.1(a) and 218.2;
g general failure, in the previous six months, to meet debts of some of the following types:
- tax;
- social security contributions;
- debts arising from an employment contract or from the breach or termination of such a contract; and
- 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; or

h if the debtor is a legal entity or an 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 a legal obligation to do so exists (Article 20 of the CIRE).

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 (Articles 1, 192 and 212 of the CIRE) plus court ratification (Article 214).

Throughout the latest decade a set of regulatory measures were approved in connection with which Instituto de Apoio às Pequenas e Médias Empresas e à Inovação ('IAPMEI'), a public institute, was given a leading role for the coordination, supervision and enforcement of rules. Among such measures the following three different procedures aiming at the restructuring of distressed companies are notable.

a *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 ('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 a PEC are the same as for the formal insolvency proceeding and, as in such latter proceeding, the parties can freely agree upon the measures to be adopted in such formal rescue agreement.

IAPMEI can not only intervene as supervisor of each PEC but also to suggest (though not impose) specific measures to be adopted and even to be taken into

consideration for aid schemes to help the distressed company promote the terms of the agreement with its creditors.

b *SIRME*

Decree-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 buyouts, management buyins and buyin and management buyout.

IAPMEI coordinates such proceedings through the incentive scheme 'SIRME'. Under SIRME, 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, upon which the '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.

c *AGIIRE*

Decree 5/2005, of 12 July, incorporated the 'AGIIRE' whose purpose, *inter alia*, is to support the business rescue and modernisation of Portuguese enterprises. Notwithstanding the fact that it works along with IAPMEI regarding SIRME and PEC, AGIIRE may play a closer role by appointing experts to work *in loco* with the distressed companies or those going through a restructuring process, which will enable them to monitor and assist companies' directors in their decision-making processes.

i *Other legal issues relevant to insolvency and restructuring*

The 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 (Article 47.4(a)). 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 (Article 166.1).

The insolvency administrator is responsible for choosing to sell the secured asset or making a full payment to the creditor holding that security, at the expense of the insolvent estate (Article 166.2).

Sale of the secured asset will have to wait for the final decision on the determination and priority of claims before the secured assets can 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 (Article 174.1).

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 an insolvent company. This petition should be submitted within 60 days from the date of awareness of the situation

of insolvency (Article 18 of the CIRE). 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 (Article 185 *et seq*). 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.

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 beginning of the insolvency proceedings (Article 186.1 of the CIRE).

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, such as:

a destroyed, damaged, rendered useless, hidden, or disposed 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 the assets of the debtor for their 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 (Article 186.2 of the CIRE).

It is to be noted that the 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 (Article 186.3 of the CIRE).

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 (Article 227 of the Penal Code); concealment of assets (Article 227-A of the Penal Code); negligent insolvency (Article 228 of the Penal Code) or favouring of creditors (Article 229 of the Penal Code). 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 *supra* 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 (Article 229-A of the Penal Code).

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.

Clawback 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 (Article 120.1 and 2).

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 (Article 120.4).

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: that the debtor was in a situation of insolvency; of the detrimental nature of the act and that the debtor was, at the time, in a situation of imminent insolvency; or of the onset of the insolvency proceedings (Article 120.5).

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 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 that the insolvent party has signed during the period referred to in point (c) *supra* and that 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 60 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, that 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 that 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 in point (h) *supra* (Article 121.1). 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 (Article 120.3).

However, this regime does not apply where there are legal rules that always require bad faith or the occurrence of other requirements (Article 121.2) 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 six months 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 (Article 123.1 and 2).

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 faith, are universal successors of the assignor or the assignment has been made free of charge (Article 124).

This avoidance has retroactive effects, requiring therefore the reinstatement of the situation that would have existed had the act not been undertaken or omitted (Article 126.1).

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 (Article 125).

III RECENT LEGISLATIVE AND CASE LAW DEVELOPMENTS

Recent months have seen the Portuguese parliament and government taking a number of actions designed to rebuild the investors' confidence in the markets and to reinstate internal demand.

In fact, apart from the aforementioned €20 billion programme of state guarantees designed to help Portuguese banks finance and refinance their own financing activities, the following measures were approved:

Parliament passed Law 10/2009, of 10 March, which modified and supplemented the 2009 State Budget, approving, within the implementation of the European Union Economic Recovery Plan, some extra €980 million of governmental targeted expenditure aiming at fostering investment and employment. In addition, such legislative initiative enacted a set of complimentary tax measures, including the approval of a specific tax incentive regime designed to support business asset investment in 2009.

Decree-Law 104/2009, of 12 May, has set a €100 million special purpose real estate investment fund ('the FIEAE'), designed to help companies, small and medium-sized companies in particular, overcome their liquidity difficulties, typically with resort to mechanisms materially equivalent to sale and lease-back operations.

Finally, Law 28/2009, of 19 June, has enacted a set of more detailed and stringent rules designed to tackle, within the circle of public interest entities (ie, listed companies, banking and insurance companies, as well as banking and insurance holding companies, financial and asset management entities, investment funds, pension funds and, in general, sizeable public sector companies), the following two issues: discussion, approval and public disclosure of the remuneration and benefits of the management and audit board members, and punitive aspects, including the powers and competences of specialised regulatory and supervisory authorities.

Recently, two relevant judgments were given by Portugal's Constitutional Court that are of interest.

A judgment (Case 50/08), given on 20 January 2009, ruled that Article 30.2 of the CIRE is unconstitutional, for breach of the right to a fair trial, if interpreted in the sense that the debtors' challenge of an insolvency request filed by a creditor should be dismissed by the court if the debtor fails to attach a list of its five main creditors without such debtor being given an additional opportunity to comply with such legal requirement.

Another judgment (Case 777/08), given on 4 May 2009, has decided that Article 189.2(b) of the CIRE is unconstitutional, for disproportionate restriction of individual freedoms and rights, as it makes it compulsory for the court, whenever it decides that a given corporate insolvency is to be qualified as culpable, to determine restrictions to the civil capacity of the insolvent company's directors.

IV SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND MOST ACTIVE INDUSTRIES

Due to the deepening of the global financial and economic crisis in 2009, most Portuguese companies suffered a strong impact on their businesses; as a consequence several restructuring operations were undertaken.

For instance, the largest car manufacturer in Portugal, in turn an affiliate of a German transnational corporation, has chosen to reduce costs by negotiating with employees and unions a 10-day per month lay-off period. Collective dismissal of the employees seems to be the alternative.

A publicly traded company, which is one of the oldest and most prestigious companies operating in the ceramics industry, was subject to a rescue takeover. The company had reported losses of almost €18.5 million in 2008, a 49.1 per cent increase if compared to the 2007 figures, and was on the verge of collapse when one of its shareholders launched the takeover. Following said takeover, the bidding shareholder took a 63 per cent share capital control of the company.

Another prestigious company, operating in the same sector, was also rescued from liquidation by means of a private law purchase.

One could actually say that the time for large-scale resort to M&A as a means of corporate rescue and restructuring might be close, the main adverse factor being, at present, the prevailing defensive attitude on the part of loan suppliers.

Alongside out-of-court restructuring operations, some major Portuguese companies actually filed for insolvency. That was the case with the most renowned local stationery company, which, in the first quarter of 2009, reported losses of €2.89 million. The company was already declared insolvent by the court and a formal restructuring plan for the company is under preparation.

In June 2009, an affiliate of the oldest Portuguese record-producing and selling company was wound up by the judiciary. The affiliate had debts of more than €1 million and was a defendant in over 30 civil law suits.

Furthermore, a semiconductor and chip manufacturer, until recently the largest Portuguese export company and an affiliate of a German transnational corporation, whose sales exceeded €1.4 billion in 2007 and employed approximately 1,800 employees, most of them qualified workers, filed for insolvency. So far, no formal restructuring plan has been submitted and approved. However, the government has quite understandably been pushing towards the out-of-court rescue of at least a part of the business units of the company. To this purpose, efforts have been made to put in place a purchasing consortium prepared to make an estimated investment of about €15 million.

An affiliate of a transnational car and aircraft products and systems supplier was backed by its creditors (mainly banks) and shareholders in connection with the rescue by means of a formal court restructuring plan.

Finally, after the nationalisation of a commercial bank in 2008, such bank still being subject to out-of-court restructuring measures as a step prior to its purported privatisation, the central bank has appointed managers for a smaller local investment bank and the government has backed a €450 million syndicated loan to such investment bank. It seems likely that such bank will soon be subject to formal court insolvency proceedings.

V INTERNATIONAL

In connection with the application by Portuguese courts of EC Regulation 1346/2000 on insolvency proceedings, the following decision should be highlighted.

The judgment (Case 1351/2007-6) given on 29 May 2008 by the Court of Appeal with jurisdiction over the jurisdictional district of Lisbon decided the following:

> *[...] IV – National law cannot act as an obstacle to the effect and application of European Union law in internal matters in view of its 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 fact that, following a decision rendered under English law [to commence insolvency proceedings], the claimant was estopped from appealing to the Portuguese courts to obtain recognition of its claim is not contradictory to the constitutional right to legal and effective jurisdictional protection, as such plaintiff can always enforce its claim in accordance with the legal system of the jurisdiction where the insolvency proceedings were commenced, and the consequent greater complexity or cost [associated with the enforcement of said claim outside of Portugal] does not trigger, by itself, the application of 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 2000, on insolvency proceedings and complemented by the Portuguese insolvency law (CIRE).

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

> *Article 37 of Council Regulation (EC) No. 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.*

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. The effects of the proceedings may not be challenged in other Member States.

Nevertheless, insolvency proceedings commenced in another EU Member State require the authorisation of a Portuguese court to be advertised and registered in a public register in Portugal (Article 274.1 of the CIRE).

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 (Article 293 of the CIRE).

VI OUTLOOK

As a result of the economic recession, lack of financing and overall pessimism, it is unfortunately rather likely that the steady increase in the figures of corporate insolvencies will persist in the months to come.

This is mainly due to the global economic and financial crisis, but Portugal's long-term structural weaknesses are also playing a role.

The skills of company managers and CFOs will, therefore, be tested to their limits in a market with significant payment delays and defaults, a shortage of liquidity and decreases in turnover.

Restructuring viable companies in distress and letting the ones running at a loss collapse could be the most sensible option but would most certainly bring about significant social turmoil in a country like Portugal. Moreover, such a courageous and responsible choice is certainly not to be expected from the present majority-sustained government prior to the September 2009 general election or from the following government that, most probably, will be merely based upon a parliamentary minority or upon a problematic coalition.

As Portugal has a long-lasting practice, which dates back to the revolution of 1974, of spending massive public resources on insolvent enterprises, such practice, given the current circumstances, could once play again an important role. Thus, it is no surprise that at present (and in the near future), one has seen and will continue to see the resurrection of past state-driven restructuring mechanisms such as state-owned venture capital companies or funds being set up to 'invest' in insolvent enterprises.

From a strictly legal perspective, it is to be remarked that the 2004 CIRE, which, having been enacted in a period of economic stability, was 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, has not yet been subject to any major amendment. However, considering the present and lasting economic atmosphere it is to be expected that the liquidation-oriented innovative characteristics of the CIRE will soon be under close scrutiny. 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 for a debtor-controlled restructuring procedure and increasing the odds for management-led companies to emerge out of insolvency situations.

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