
THE RESTRUCTURING REVIEW

THIRD EDITION

EDITOR
CHRISTOPHER MALLON

LAW BUSINESS RESEARCH

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THIRD EDITION

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EDITOR'S PREFACE

We are very pleased to present this third edition of *The Restructuring Review*. As with the first and second editions, 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 2009/2010 and to highlight some of the more significant legal and commercial developments and trends during that period.

The global economy is still struggling to emerge from the worst financial crisis since the Great Depression. The past year has seen credit conditions improve in many areas and global asset prices generally start to stabilise. Government support for the banking system and the economy generally, however, continues to be a key factor in maintaining the relative stability. The effects of the global recession, however, continue to be felt. Unemployment figures are still following an upwards trend and economic growth is still, despite some bright spots, generally uninspiring. Considerable uncertainty remains as to how best to remedy the current weaknesses in our economic system that has made the downturn so severe.

The main stock markets have continued their rally but there still remain no consensus as to how long this surge can continue and the risk of a double dip recession is still there. Banks have generally made a good recovery, but with national economies continuing to face fiscal tightening, talk of a full recovery in the short to medium term remains premature.

I would again 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.

Christopher Mallon

Skadden, Arps, Slate, Meagher & Flom (UK) LLP

London

September 2010

Chapter 23

PORTUGAL

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

I OVERVIEW OF RECENT RESTRUCTURING AND INSOLVENCY ACTIVITY

The ongoing financial crisis has deepened even more in the last quarter of 2009 and continued throughout the first half of 2010, generating strong effects on the overall world economy, and of course also in Portugal. Not to be neglected are the difficulties being faced by Portugal's major commercial partners (Spain, Germany, France, Italy and the United Kingdom).

Growing unemployment has deepened consumers' lack of trust. The continuous economic uncertainty and financing restrictions have further increased the need for consumers to reduce their spending, aggravating again the slowdown in Portugal's internal demand.

All this, added to the shortage of liquidity and greater difficulties for companies trying to finance and refinance their activities, resulted in an increase of insolvency filings and restructuring processes during the last months of 2009 and in the first quarter of 2010.

In accordance with a study published by Coface comparing the first quarter of 2009 with the same period in 2010, the number of insolvency court proceedings increased by 53.5 per cent.

The main sectors contributing to this phenomenon are the manufacturing industry (535 insolvency proceedings), construction works (339) and wholesale traders (281). In terms of percentages, the sectors in which the increases are most striking are the extracting industry (100 per cent increase), hotels and restaurants (94.4 per cent increase) and agriculture, fisheries and hunting (77.8 per cent increase).

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Formal insolvency proceedings

<i>Insolvency proceedings</i>	<i>Jan/Apr 2009</i>		<i>Jan/Apr 2010</i>		<i>Variation</i>	
	<i>No.</i>	<i>%</i>	<i>No.</i>	<i>%</i>	<i>No.</i>	<i>%</i>
<i>Insolvency proceedings filed by debtors</i>	420	35%	531	28.8%	+111	+26.4%
<i>Insolvency proceedings requested by creditors</i>	421	35.1%	673	36.5%	+252	+59.9%
<i>Winding-up court decisions</i>	327	27.2%	613	33.2%	+286	+87.5%
<i>Formal restructurings approved</i>	33	2.7%	27	1.5%	-6	-18.2%
<i>Total</i>	1,201	100%	1,844	100%	+643	+53.5%

Source: Coface

As to winding-up court decisions, the highest figures relate to the manufacturing industry (185), followed by wholesale traders (89) and construction works (87).

Notwithstanding the above, the number of formal restructurings approved has decreased, which suggests that the room for actual restructuring is narrowing.

It should also be mention that following Law 60-A/2008, of 20 October, and Administrative Rule No. 1219/2008, of 23 October, which created an exceptional regime of state guarantees to Portuguese financial institutions up to a maximum of €20,000 million, the Portuguese state required from the European Commission a prorogation of the due date for the guarantees up until 30 June 2010, which was accepted by the Commission.

Finally, one of the issues that contributed most to the difficulties of companies seeking to finance and refinance their activities, to increased unemployment rates¹ and uncertainty on the part of consumers relates to the downgrading of Portugal's sovereign debt. In fact, this is a recurring topic in newspapers and seems far from being resolved. However, Portugal has been forced by the IMF and by EU entities to implement austerity measures to tackle the public deficit, which is currently, according to the government's Stability and Growth Programme 2010–13, 77.2 per cent of the gross national product.

II GENERAL INTRODUCTION TO THE RESTRUCTURING AND INSOLVENCY LEGAL FRAMEWORK.

i *Brief description of the formal insolvency and restructuring procedures available for companies in Portugal, including details of relevant legislation.*

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

1 Currently (and according to the government's Stability and Growth Programme 2010–13) unemployment is stable at 9.5 per cent.

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 insolvency administrator;
- d* asset seizure;
- e* lodgements of creditors' claims, recovery and separation of assets;
- f* meeting of creditors for the assessment of the report prepared by the insolvency administrator;
- 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 proceedings.

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').²

The insolvency proceedings are urgent.³

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 of rentals for any type of hire (including finance leases); or instalments of the purchase price or loan repayments secured by a mortgage on the debtor's business premises or head office.⁴

2 Articles 7.1 and 7.2 of the CIRE.

3 Article 9.1 of the CIRE.

4 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 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 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; or
 - 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
- b* 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.⁵

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' meeting⁶ plus Court ratification.⁷

ii Brief description of non-judicial methods to restructure companies in financial difficulties in Portugal.

Throughout the past decade a set of regulatory measures were approved in connection in the Instituto de Apoio às Pequenas e Médias Empresas e à Inovação ('the IAPMEI'), a

5 Article 20 of the CIRE.

6 Articles 1, 192 and 212 of the CIRE.

7 Article 214.

public institute, was given a leading role for the coordination, supervision and enforcement of the rules. Among such measures the following three different procedures aiming at the restructuring of distressed companies are most notable.

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 the 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 protect the business from a current or imminent insolvency.

The requirements for the 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 the formal rescue agreement.

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

SIRME

Decrees-Law 80/98 and 81/98, both of 2 April, set out several provisions for restructuring and consolidating financially distressed companies through mergers and acquisitions, management buyouts, management buy-ins and buy-in and management buyouts.

The IAPMEI coordinates the referred proceeding through the incentive scheme named Sistema de Incentivos à Revitalização e Modernização Empresarial ('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, the Fundo para a Revitalização e Modernização do Tecido Empresarial ('FRME'), might fund it and become a stockholder of said company, as well as tax benefits, and the financing or the granting of financing collateral by SIRME.

AGIIRE

Decree 5/2005, of 12 July, incorporated the Gabinete de Intervenção Integrada de Reestruturação Empresarial ('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 the IAPMEI regarding SIRME and PEC, the AGIIRE may play a closer role by appointing experts to work *in loco* with the distressed companies or companies going through a restructuring process, which will enable them to monitor and assist companies' directors in their decision-making processes.

ii *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.⁸ 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.⁹

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.¹⁰

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.¹¹

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.¹² 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 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.¹³ The ultimate purpose of this ‘categorisation’ is to determine whether the insolvency was culpable or, instead, merely bad luck.

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 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 starting of the insolvency proceedings.¹⁴ 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:¹⁵

8 Article 47.4(a).

9 Article 166.1.

10 Article 166.2.

11 Article 174.1.

12 Article 18 of the CIRE.

13 Article 185 et seq.

14 Article 186.1 of the CIRE.

15 Article 186.2 of the CIRE.

- a destroyed, damaged, rendered useless, hidden 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 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;
- i 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
- h repeatedly failed to comply with their duties to report and to collaborate, until the date of the opinion drawn up by the insolvency administrator.

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.¹⁶

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;¹⁷ concealment of assets;¹⁸ negligent insolvency¹⁹ or favouring of creditors.²⁰ 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.²¹

16 Article 186.3 of the CIRE.

17 Article 227 of the Penal Code.

18 Article 227-A of the Penal Code.

19 Article 228 of the Penal Code.

20 Article 229 of the Penal Code.

21 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, such as creditors, under general law.

'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.²²

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.

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: (1) that the debtor was in a situation of insolvency; (2) of the detrimental nature of the act and that the debtor was, at the time, in a situation of imminent insolvency; (3) of the onset of the insolvency proceedings.²³

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 granted 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 the preceding point (c) 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 60 days prior to the date of onset of the insolvency proceedings;

22 Article 120.1 and 2.

23 Article 120.5.

- 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;
- b* 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 the preceding point (h).²⁴ 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.²⁵

However, this regime does not apply wherever there are legal rules that exceptionally always require bad faith or the occurrence of other requirements as conditions for the avoidance of acts.²⁶

The insolvency administrator may declare the avoidance of a given act, by registered letter with recorded delivery, within the 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.²⁷

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.²⁸

This avoidance has retroactive effects, requiring therefore the reinstatement of the situation that would have existed had the act not been undertaken or omitted.²⁹

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.³⁰

24 Article 121.1.

25 Article 120.3.

26 Article 121.2.

27 Article 123.1 and 2.

28 Article 124.

29 Article 126.1.

30 Article 125.

III RECENT LEGAL DEVELOPMENTS

Recent months have seen the Portuguese government and Parliament trying to solve the problems arising from the downgrading of the Portuguese sovereign debt in the international market.

Following the €20 billion programme of state guarantees approved last year, Portugal requested the European Commission to extend its due date until 30 June 2010. Furthermore, the Portuguese Parliament passed Law 3-B/2010, of 28 April, approving the 2010 State Budget, in which the maximum limit for the granting of guarantees by the Portuguese state is set at €8 billion.

Additionally, and as an exception, the 2010 State Budget also proposed that the Portuguese state could grant guarantees to reinforce the stability and liquidity of the financial markets up to €9,149,200,000, but Parliament passed Law 12-A/2010, of 30 June, approving additional measures of budget consolidation, in which its maximum limit was increased to €2.775 billion.

Also pursuant to the 2010 State Budget, companies under restructuring processes are now allowed to pay their tax debts in 120 monthly instalments when they prove they are in serious economic difficulty and the debt is of more than €51,000.

The Portuguese government announced new measures to accelerate the implementation of the National Strategic Reference Framework ('QREN'). One of these measures resulted in the creation of a credit line of €700 million to support companies that already resorted to the EU financing and are able to obtain credit from the banks.

Following the difficult market conditions currently felt in Portugal, the Portuguese government decided to open an exceptional three-month period for companies that already resorted to QREN to restructure and update the projects presented and approved by QREN.

Additionally, the government is launching two new tenders for internationalisation and research projects, worth €150 million.

Notwithstanding the above, the Portuguese government was forced to implement austerity measures to contain and control the public deficit, namely, amending the conditions for granting social benefits such as unemployment allowances, increasing all rates of value added tax by 1 percentage point, increasing the percentages applicable to income tax (it is now expected that annual incomes above €150,000 shall be subject to 45 per cent income tax) and increasing company income tax.

Such amendments will certainly have a negative impact on companies' liquidity and in the purchasing power of consumers.

Two relevant judgments were given by Portugal's Constitutional Court that are of interest. A judgment,³¹ 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.

31 Case 50/08.

Another judgment,³² 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 crisis in 2010, most Portuguese companies have seen a strong impact on their businesses and, as a consequence, several restructuring operations were undertaken.

The largest car manufacturer in Portugal, an affiliate of a German transnational corporation, is going to enforce all the flexibility measures agreed with employees to face a significant decrease in the production of cars forecast for the next half of 2010.

Even public companies are undertaking restructuring measures. Estradas de Portugal, for example, is laying off 345 employees, reducing its telecommunication costs by 35 per cent and fixing maximums for expenses related to vehicles.

One Portugal's main league football clubs has informed the Portuguese Securities Commission of the proposed financial restructuring of the club, which proposes reinforcing the club's equity since it currently faces technical insolvency.

V INTERNATIONAL

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

Judgment³³ given on 29 May 2008 by the Court of Appeal having jurisdiction over the jurisdictional District of Lisbon decided the following:

[...] IV – National law cannot to act as 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. [...]

32 Case 777/08.

33 Case 1351/2007-6.

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 an 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:³⁴

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.

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 an authorisation of a Portuguese court in order to be advertised and registered in a public register in Portugal.³⁵

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.³⁶

VI FUTURE DEVELOPMENTS

As a result of the economic recession, lack of financing and striking pessimism, it is unfortunately likely that the steady increase in the figures of corporate insolvency 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 an environment of significant payment delays and defaults, shortages of liquidity and decreases in turnover.

34 2000/C183/01.

35 Article 274.1 of the CIRE.

36 Article 293 of the CIRE.

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 newly elected government, which does not enjoy a parliamentary majority.

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 again play an important role. Thus, it is no surprise that at present (and in the near future), one sees 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 notable 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 probably 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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