The International Insolvency Review

Second Edition

Editor
Donald S Bernstein

Law Business Research

The International Insolvency Review

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EDITOR'S PREFACE

This second edition of *The International Insolvency Review* once again offers an in-depth review of market conditions and insolvency case developments in a number of key countries. Building on the first edition, coverage has been expanded to include Belgium, Greece, Jersey, Poland, Portugal, Singapore and South Africa bringing the total number of jurisdictions covered to 31. Once again, a debt of gratitude is owed to the outstanding professionals in geographically diverse locales who have contributed to this book. Their contributions, of course, reflect their diverse viewpoints and approaches, which in turn reflect the diversity of their respective national commercial cultures and laws. These differences drive the steadily emerging pattern, described in these pages, of resistance on the national level to the universal application of a single 'home' country's law in cross-border commercial insolvency cases.

This pattern, though understandable, poses a significant challenge. While a large and increasing coterie of countries have adopted legislation based on the UNCITRAL Model Law, with its universalist vision of global recognition of a single controlling 'main' or home country insolvency proceeding, countries continue to find it difficult to allow the rules of the foreign main proceeding to control within their borders. In addition, neither the Model Law, nor other enactments, like the European Union's Regulation on insolvency,[1] provide the tools necessary for consolidated administration of insolvencies involving multiple legal entities in a corporate group, with operations, assets and stakeholders under different corporate umbrellas in different jurisdictions. It is difficult enough for local authorities and local commercial interests to relinquish local control of the treatment of a single foreign company's local assets and stakeholders. It is almost impossible for them to do so with respect to a locally organised entity with

1 Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, 2000 O.J. (L 160) 1, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:160:0001:0018:en:PDF.

local operations, employees, assets and creditors. Embedded expectations that local law, local courts, local procedures and local insolvency administrations will apply are simply too strong.

Insolvent corporate groups are obliged to initiate separate plenary insolvency proceedings for individual companies under local insolvency regimes in multiple jurisdictions (as illustrated in the cases of Nortel and Lehman Brothers, among others), and the daily conflicts among the controlling insolvency administrations destroy value and vastly increase costs. Since there seems to be no appetite for allowing a single home country's insolvency law to take precedence in such cases, alternatives that allow a single court to administer the proceedings, but make adjustments to the treatment of each entity's stakeholders reflecting applicable foreign law, are being explored. These approaches pose a complex set of questions for which there is no legal framework or consensus. Can a single court be given control over the entire corporate group and its assets and stakeholders wherever located? How and when should adjustments in treatment be made to reflect foreign substantive law? Although possible answers to these questions are beginning to emerge, they all involve a relinquishment of national sovereignty and an expansion of jurisdiction that may be difficult to accomplish, especially without greater convergence in national insolvency laws.

Aware of the issues arising out of this deficiency in current law, in 2006, UNCITRAL referred the matter of enterprise groups to its Working Group V (Insolvency Law) for further discussion.[2] The efforts of the working group led to the publication, in 2012, of Part Three of the UNCITRAL Legislative Guide on Insolvency Law, addressing the treatment of enterprise groups in insolvency.[3] Although the Guide recognises that 'it is desirable that an insolvency law recognise the existence of enterprise groups', discusses the importance of cross-border cooperation and offers various proposals to facilitate enhanced coordination,[4] there is no consensus regarding definitive proposals. Publication of Part Three of the Guide did not mark the end of Working Group V's mandate to address the issue of enterprise groups, but everyone recognises the road to a solution, if one is possible, may be long and hard.[5]

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2 United Nations Commission on International Trade Law, Report of Working Group V (Insolvency Law) on the Work of its Thirty-First Session (Vienna, 11–15 December 2006), U.N. Doc. A/CN.9/618 (8 January 2007), available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V07/800/89/PDF/V0780089.pdf?OpenElement.

3 United Nations Commission on International Trade Law, UNCITRAL Legislative Guide on Insolvency Law; Part Three: Treatment of Enterprise Groups in Insolvency, U.S. Sales No. E.12 V. 16 (2012), available at www.uncitral.org/pdf/english/texts/insolven/Leg-Guide-Insol-Part3-ebook-E.pdf.

4 Id.

5 See United Nations Commission on International Trade Law, Report of Working Group V (Insolvency Law) on the Work of its Forty-Fifth Session (New York, 21–25 April 2014), U.N. Doc. A/CN.9/803 (6 May 2014), available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V14/028/64/PDF/V1402864.pdf?OpenElement. The European Commission is also considering amending the European Union Regulation on Insolvency to better encompass

I once again want to thank each of the contributors to this book for their efforts to make *The International Insolvency Review* a valuable resource. As each of our authors, both old and new, knows, this book is a significant undertaking because of the current coverage of developments we seek to provide. My hope is that this year's volume will help all of us, authors and readers alike, reflect on the larger picture, keeping our eye on likely, as well as necessary, developments on the near and, alas, distant horizon.

Donald S Bernstein
Davis Polk & Wardwell LLP
New York
October 2014

enterprise groups. See European Commission, Proposal for a Regulation of the European Parliament and of the Counsel Amending Council Regulation (EC) No. 1346/2000 on Insolvency Proceedings (2012), available at http://ec.europa.eu/justice/civil/files/insolvency-regulation_en.pdf.

Chapter 27

PORTUGAL

José Carlos Soares Machado and Joana Figueiredo Oliveira[1]

I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

Portuguese Insolvency and Recovery Code

Insolvency proceedings in Portugal are mainly regulated by the Portuguese Insolvency and Recovery Code (CIRE). The CIRE was approved by Decree-Law No. 53/2004 and was recently amended by Laws No. 16/2012 and 66-B/2012.

Pursuant to the CIRE a company is insolvent when it is unable to pay its debts that have fallen due or when its liabilities are clearly greater than its assets, according to the relevant accounting standards.

A company must file for its insolvency within 30 days of the date it becomes aware of its insolvency or of the date on which it should be aware of its insolvency. When the debtor is the owner of a company, Portuguese law presumes that awareness of the insolvency occurs three months after the general failure to meet debts regarding taxes and social security payment and contributions; debts arising from an employment contract or from the breach or termination of such contract; or rentals for any type of hire, including financial leases; or instalments of the purchase price or loan repayments secured by a mortgage on the debtor's business premises, head office or residence.

Moreover, the debtor's insolvency can also be requested by those who are liable for its debts, by any creditor or by the Public Prosecutor if certain events indicative of an insolvency happen.

The court within the territory of which the debtor's head office or centre of main interest is situated has jurisdiction to open the insolvency proceeding, which begin with the filling of a written petition by one of the above-mentioned entities.

1 José Carlos Soares Machado is a partner and Joana Figueiredo Oliveira is an associate at SRS Advogados – Sociedade Rebelo de Sousa e Associados, RL.

The petition must indicate the facts on which it is based. The contents of the petition will depend on who is the petitioner; the debtor or someone else. The debtor may acknowledge its insolvency. In this event, it can file a petition with the court, which must declare the debtor's insolvency immediately. If the petition is filed by a creditor, the petitioner must allege and prove the source, nature and amount of its credit or its liability for the debts of the insolvent and disclose any known facts related to the debtor's assets and liabilities.

The court decides on the admissibility of the petition. Furthermore, at the insolvency petitioner's request, the court may adopt interim measures whenever it is necessary to protect the debtor's assets until the insolvency is declared. For instance, the court may name an interim administrator for the company with powers to manage the company or to assist in the management.

The creditor's petition is considered to be founded and unless the debtor cannot be located, the court will notify the debtor to file its opposition within 10 days, otherwise the facts on which the petition is based shall be accepted and the insolvency declared.

The opposition must include a list of the debtor's five major creditors. The debtor has the burden of proving its solvency. If the debtor opposes the petition or cannot be located, the court shall schedule a hearing, notifying the petitioner and the debtor and its directors to personally attend the hearing or to be represented by someone else with powers to act on their behalf. In the event the debtor does not attend the hearing, the facts on which the petition is based shall be accepted and the insolvency declared. When the petitioner is a creditor, in the event it does not attend the hearing, the court closes the insolvency proceeding. After the hearing, the court gives its decision on the insolvency of the debtor.[2]

The court's decision can be challenged by means of an application to the lower court or by means of an appeal to a higher court. The application must indicate additional facts or proofs that were not previously presented and that, if presented, would impose a different decision on the debtor's insolvency. The appeal shall indicate why the court's decision should have been different in light of the facts that were proved.

Among other things, the court's decision nominates an insolvency administrator, establishes a deadline for filing the credits claims and schedules a creditors' general meeting. This decision has several effects on the debtor and its directors,[3] on the pending

2 The insolvency proceeding cannot be subject to suspension, unless another insolvency petition was previously filed.

3 Generally, the debtor and its directors lose their powers to manage and dispose of the debtor's assets.

proceedings,[4] on the credits,[5] on the pending agreements[6] and on acts prejudicial to the debtor's assets.[7] Further, the debtor's assets on the date of declaration of insolvency are seized, as will be the assets and rights obtained by the debtor while the insolvency proceeding is pending.

Within the period set out in the court's decision, all the creditors, even those whose credit has already been recognised by a court decision, must file a credit claim. The credit claim must indicate the credit source, date of payment, amount, conventional and legal interests, terms, nature and guarantees. Fifteen days after the deadline for filing the claims, the insolvency administrator must present a list of credits including those that have been recognised and those that have not. This list can be challenged within 10 days of its publication and any creditor is allowed to respond to the oppositions filed. If there is no opposition to the list of credits the court must immediately deliver its decision on the credits and their priority. Afterwards, the creditors' committee[8] has 10 days to deliver its opinion on the oppositions filed by the creditor. Subsequently, the court must schedule an attempt at conciliation and a hearing and finally give its decision on the credits and their order of priority.

---

4 For instance, the pending enforcement proceedings filed by the creditors against the debtor or other proceedings affecting the debtor's assets are suspended, unless these proceedings were filed against others debtors (aside from the debtor declared insolvent), because in this event the proceedings shall continue but only against the other debtors.

5 Usually, with the declaration of insolvency all the credits of the debtor fall due.

6 Commonly, the pending agreements are suspended until the insolvency administrator decides whether to fulfil the agreements or to reject the agreements fulfilment. There are special provisions for several agreements, for instance: sale of goods agreements with a retention of title clause; promise to purchase and sale agreements; sale of goods agreements when the goods were not delivered yet, lease agreements; forward transactions; mandate agreements; long-term service agreements; powers of attorney; and current account agreements.

7 The acts prejudicial to the debtor's assets carried out in bad faith, within two years before the declaration of insolvency, will be set aside. For this purpose, all acts reducing payment, making it difficult or impossible to pay, or jeopardising or delaying payment to the creditors are prejudicial to the debtor's assets. There are several acts that are presumed to be prejudicial to the debtor's assets. Also there are several acts that are presumed to be carried out in bad faith, namely those carried out two years before opening the insolvency proceedings by or with benefit to a person specially related to the debtor. For this purpose, bad faith arises from: (1) the knowledge of the debtor's insolvency; (2) the knowledge of the damage caused by the act; (3) the knowledge of the debtor's imminent insolvency; or (4) the knowledge of the commencement of the insolvency proceeding. The agreements settled to allow a company's recovery, financing the company activity, cannot be set aside.

8 The creditors' committee is composed of three or five members and two substitutes, being the president of the major creditor, appointed by the court before the first creditors' general meeting to oversee the insolvency administrator's activity. The maintenance of the creditors' committee or of its members depends on the will of the creditors' meeting.

Portuguese law establishes four classes of credits: secured; preferential; subordinated; and non-secured. Secured credits are those with security over assets seized up to the value of such assets. Preferential credits are those with a right to be preferentially paid up to the value of the assets over which such preference exists. Pursuant to the Civil Code, some preferential credits (special preference credits) take priority over all others, including secured credits. Other preferential credits (general preference credits) only take priority over non-secured credits. Subordinated credits are those that will be settled only after the non-secured creditors have been paid in full. The subordinated credits are listed in the CIRE.

In any event, the credits incurred during the insolvency proceeding, for example court fees or insolvency administrator's remuneration, take priority over all other credits.

As previously mentioned the court's decision also schedules a creditors' general meeting, which all creditors can attend. The credits provide creditors with votes in proportion to the amount of their credits: (1) if they were previously recognised by a court decision, (2) if they were previously claimed or (3) if they are claimed during the creditors' general meeting when the deadline for filing the credits' claim has not yet ended and the insolvency administrator or the other creditors do not oppose to the credit's recognition. Subordinated credits can only vote to approve or reject a recovery plan. Generally, the decisions of the creditors' general meeting are taken by a majority of the votes, without taking in account the abstentions.

The first creditors' general meeting is called to: assess the insolvency administrator's report produced following to the declaration of insolvency; decide whether the debtor's establishment or establishments must remain open or must be closed; and decide whether the insolvency administrator must prepare an insolvency plan and therefore suspend the liquidation and distribution of the assets or continue the liquidation and distribution of the assets. In any event, the referred suspension ceases and the insolvency administrator must continue the liquidation and distribution of the assets if the insolvency plan is not submitted within the following 60 days or if it is not approved.

The insolvency administrator (if the creditors' general meetings so decide), the debtor or another person liable for its debts, or a group of creditors representing one-fifth of the total amount of the non-subordinated credits can prepare and submit an insolvency plan for the approval of the creditor's general meetings. The insolvency plan can set out how to perform the payment of the credits or how to liquidate the debtor's assets or how to restructure or recover the debtor. The contents of the insolvency plan can be agreed with the creditors, but the insolvency plan shall treat the creditors equally unless the difference in treatment is justified. The insolvency plan shall forecast the measures necessary to achieve the purposes agreed by the creditors' general meetings, liquidate the debtor's assets or restructure or recover the debtor, and include the details necessary for its approval by the creditors and by the court. The quorum for approval of the recovery plan is two-thirds of the votes issued at the creditors' general meeting provided that at least half of the votes issued are not subordinated and one-third of the total amount of credits with voting rights attended the creditors' general meetings.

Finally, it is important to note that the CIRE sets out a proceeding to punish the insolvent's or its directors' fraudulent behaviour, when its conduct caused or increased the insolvency.

Other legislative instruments

EU Regulation No. 1346/2000 on Insolvency Proceedings is also an important instrument in Portuguese insolvency law. This Regulation is applicable to cross-border insolvency proceedings in the EU and it aims to improve the efficiency and effectiveness of insolvency proceedings that have cross-border effects.

As for Portuguese legislation related to hybrid procedures meant to encourage the recovery of companies that are struggling with severe financial difficulties, there are three forms: (1) 'special revitalisation proceedings'; (2) 'proceedings to approve extrajudicial agreements'; and (3) 'the extrajudicial system for corporate recovery'. The special revitalisation proceedings and proceedings to approve extrajudicial agreements were adopted by Law No. 16/2012 while the extrajudicial system for corporate recovery was adopted by Decree-Law No. 178/2012. See Section I.iii, *infra*.

ii Policy

An Economic Adjustment Programme was negotiated in May 2011 between the Portuguese authorities and officials from the European Commission, the European Central Bank and the International Monetary Fund. These parties signed a memorandum of understanding[9] that, *inter alia*, listed the need to amend the CIRE 'to better facilitate effective rescue of viable firms'. Subsequently, the insolvency law was amended by Law No. 16/2012.

The CIRE states that the current purpose of insolvency proceeding is to satisfy the creditors by means of an insolvency plan, namely to recover the company, when this recovery is possible, or by means of the liquidation and distribution of the debtor's assets. The amends to the CIRE intended to change the previous tendency to liquidate the debtor's assets, but were clearly insufficient to achieve that goal.[10] Consequently, the liquidation of the company continues to be the most common option, mostly because the debtor or its directors fail to commence the insolvency proceeding at an early stage, jeopardising the chance to restructure the company in financial difficulties, and the creditors are frequently not willing to take more risks.

iii Insolvency procedures

Procedures to wind up or rescue the companies

Portuguese law sets out judicial and hybrid procedures to recover a company and a judicial procedure to liquidate a company.

As concerns the recovery of the company there are different procedures the applicability of which depends on the seriousness of the financial situation of the company. If the company is in a pre-insolvency situation and its recovery is still conceivable the CIRE (pursuant to Law No. 16/2012) sets out two alternatives to the

9 Available at: http://ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm.

10 Catarina Serra, 'Emendas à (lei da insolvência) portuguesa – primeiras impressões', *Direito da Sociedades em Revista*, Ano 4 (March 2012), Volume 7, Almedina, 2012, pp. 97 et seq, and Maria do Rosário Epifânio, *Manual de Direito da Insolvência*, 2012, 4th ed., Coimbra, Almedina, pp. 275 and 276.

insolvency proceeding: special revitalisation proceedings and proceedings to approve extrajudicial agreements. Special revitalisation proceedings allow a company that is in a difficult financial situation or that is at imminent risk of insolvency to negotiate with all its creditors and prepare a recovery plan without having to be declared insolvent. Proceedings to approve extrajudicial agreements allows a company that is in a difficult financial situation or that is at imminent risk of insolvency to submit a pre-arranged plan signed by the debtor and its creditors for the court's approval. If the company is already insolvent, the recovery of the company will have to take place in an insolvency proceeding and depends on the approval of a recovery plan by the creditors' general meeting and the court.

Moreover, Decree-Law No. 178/2012 also sets out an alternative to the insolvency proceeding, the extrajudicial system for corporate recovery, which updated the extrajudicial negotiation proceeding under the mediation the Portuguese Agency for SMEs and Innovation. This proceeding is only available for companies that are in a pre-insolvency situation or an insolvency situation and aims to promote the settlement of an extrajudicial agreement between the company and its creditors, that represent at least 50 per cent of the total amount of the company's debts, allowing the recovery of the financial situation of the company.

Besides the recovery of the company, the insolvency law establishes a liquidation procedure for insolvent companies. When a company is declared insolvent, the Portuguese creditors can vote the company's liquidation. The decision to liquidate is taken in the creditors' general meeting. After the company's liquidation by the insolvency administrator, the product of the sale of assets is distributed according to the priority of the credits and the insolvency closed.

Ancillary proceedings

Portuguese insolvency law allows for ancillary proceedings when the main proceeding is pending in another EU Member State and under the rules established in Regulation No. 1346/2000 and in the CIRE. Under Regulation No. 1346/2000, the effects of an ancillary proceeding are limited to the extent of the insolvent's assets that are located in the territory of that EU Member State. In short, when the insolvent has its head office or centre main interests in another EU Member State the ancillary proceeding only covers assets located in Portugal.

Time frames

According to the most recent official statistics on insolvency proceedings in Portugal,[11] the approximate time frame of a proceeding has been decreasing since 2007. In the first trimester of 2014 the average time frame between the commencement of the proceeding in court and the declaration of insolvency was three months. The average time taken for the subsequent stages of proceedings up to a full conclusion is 25 months.

11 Available at: www.dgpj.mj.pt/sections/siej_pt/destaques4485/sections/siej_pt/destaques4485/estatisticas-trimestrais8132/downloadFile/file/Insolv%C3%AAncias_trimestral_20140731.pdf?nocache=1406814865.06.

iv Starting proceedings

Who may commence plenary proceedings and how

The plenary insolvency proceedings commence with the submission of a written petition requesting the declaration of insolvency. A petition can be filed by: the debtor; those who are liable for its debts; the creditors; or the Public Prosecutor.

How concerned parties may oppose

If the declaration of insolvency is requested by the debtor itself the insolvency will be immediately declared. Otherwise, the court will notify the debtor to file its opposition or the facts on which the petition is based shall be accepted and the insolvency declared.

Who may commence ancillary proceedings and how

Pursuant to EU Regulation No. 1346/2000, the opening of secondary proceedings may be requested by: the liquidator in the main proceedings; or any other person or authority empowered to request the opening of insolvency proceeding under the law of the Member State within the territory of which the opening of a secondary proceedings is requested.

v Control of insolvency proceedings

Insolvency proceedings are controlled by the court from beginning to end. Although the CIRE and its amendments reduced the extent of the courts' invervention, the courts still have power to control the insolvency proceedings.

The court's main intervention is the declaration of insolvency, ratification of the insolvency plan and the decisions concerning the recognition of credits and their order of priority.

vi Special regimes

There are several entities excluded from the insolvency regime adopted in the CIRE whenever their specific regime is not compatible, namely: (1) legal persons of public law and state-owned companies; and (2) insurance companies, credit institutions, finance companies, investment undertakings that provide services involving the holding of funds or securities for third parties and collective investment undertakings.

For instance, the insolvency regime of the credit institutions and finance companies is regulated by Decree-Law No. 199/2006 of 25 October, recently reviewed by Decree-Law No. 31-A/2012 of 10 February.

vii Cross-border issues

As to cross-border issues, Portugal applies fully the rules of EU Regulation No. 1346/2000.

As underlined by commentators[12] from various Member States, the lack of harmonisation of the differing domestic insolvency laws is an obstacle to preventing

12 Georg Friedrich Sclaefer, *Forum Shopping under the Regime of the European Insolvency Regulation*, 2010.

forum-shopping. It is clear that whenever the debtor has knowledge of the existence of a more favourable jurisdiction and and an opportunity to use it, it is very likely that 'the centre of a debtor's main interests' will be transferred to this jurisdiction to the detriment of creditors' interests. Therefore, the approval of the recent proposal for a regulation of the European Parliament and of the Council amending Council Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings might help to prevent forum-shopping. The proposal:

> *requires the court to examine its jurisdiction ex officio prior to opening insolvency proceedings and to specify in its decision on which grounds it based its jurisdiction. Furthermore, the proposal grants all foreign creditors a right to challenge the opening decision and ensures that these creditors are informed of the opening decision in order to be able to effectively exercise their rights. These changes aim at ensuring that proceedings are only opened if the Member State concerned actually has jurisdiction. It should therefore reduce the cases of forum shopping through abusive and non-genuine relocation of the COMI.*[13]

II INSOLVENCY METRICS

Portugal was one of EU Member States that suffered the most from the world economic crisis that began in 2008. Currently the Portuguese economy is showing some signs of recovery but is still far from achieving real financial stability. However, the crises surrounding Banco Espirito Santo, the second-largest private financial institution in Portugal in terms of net assets, because of its severe financial problems will certainly have a negative impact on the Portuguese economy.

As a consequence of the global economic crisis, unemployment increased immensely in Portugal and in 2013 it reached 16.3 per cent, almost 9 per cent more than in 2008 (7.6 per cent).

The availability of credit has also suffered and it is extremely hard for companies to obtain any credit, which has led many companies to request their own insolvency.

According to the most recent statistics, in the first trimester of 2014,[14] 12.8 per cent of insolvency proceedings had a value of €50,000 or higher and almost 80 per cent of insolvency proceedings had a value of between €1,000 and €49,999. This means that most insolvency proceedings concern small companies. Although the number of insolvencies has continued to increase in recent years, the number of proceedings with a value of €50,000 or higher has been decreasing.

13 Explanatory memorandum of the proposal for a regulation of the European Parliament and of the Council amending Council Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings.

14 Available at: www.dgpj.mj.pt/sections/siej_pt/destaques4485/sections/siej_pt/destaques4485/estatisticas-trimestrais8132/downloadFile/file/Insolv%C3%AAncias_trimestral_20140731.pdf?nocache=1406814865.06.

In the first trimester of 2014, the most affected industry was the wholesale, retail and vehicle-repair industry, which made up 24.6 per cent of all companies that were declared insolvent. The second-most affected industry was construction, which made up 16.8 per cent of insolvent companies.

III PLENARY INSOLVENCY PROCEEDINGS

In the scope of the Portuguese jurisdiction it is possible to identify several recent and significant proceedings all of them assuming different substantive and procedural characteristics.[15] It is important to note that when we refer to significant proceedings we are not only considering those with a particular economic significance, but also those that have specific characteristics or that have had a noteworthy media exposure.

i The CM insolvency

Cláudio Moreira – Unipessoal, Lda (CM) is a single-shareholder limited company that was founded in August 2005. The corporate object of the company is the wholesale of new or used minerals and metals, such as gold and silver. The share capital of the company is of €50,000 owned by the single shareholder, JCM. This small company – with only two employees and rented premises – had a surprising sales volume of €84.25 million in 2012.

Despite the high volume of sales, CM filed its own insolvency petition in May 2014. The plenary insolvency proceeding followed its terms in the Court of Commerce in Vila Nova de Gaia.[16] The insolvency was declared on 8 May 2014 and published on 12 May 2014.

The insolvency situation occurred as a result of the seizure of all the company's assets by the police in November 2013. Following this operation the single shareholder of CM was held as a defendant in a criminal proceeding regarding money laundering and tax fraud. In addition, he was forbidden from carrying on commercial activities or from practising any commercial acts, which forced CM's insolvency.

According to the insolvency administrator's report, the company's accounting had no credibility because despite its high cash balance (€203,402.52) there was no evidence of that money actually existing. In addition, there were no further assets in stock, except for a vehicle.

Only very few creditors actually claimed their credits in the scope of the insolvency proceeding and none of the creditors is a bank institution, which is quite unusual in an insolvency proceeding of a company with such a high volume of sales. In the list of credits, there are privileged creditors (two employees, social security and the tax authority) and common creditors (who own about 90 per cent of the total amount of credits of the

15 The information concerning the proceedings that are described in this chapter, results from interviews with parties that are directly involved in the proceeding. As such, the information hereby provided does not dismiss a further consultation of the judicial proceedings in court.

16 Case No. 445/14.9TYVNG.

company). The company was closed and is now in liquidation. Considering the inexistence of assets it is highly probable that the non-secured creditors will not recover their credits.

ii TP insolvency

Tesouros Perdidos – Ourivesaria Unipessoal, Lda (TP) is a single shareholder limited company that was founded in September 2008. The corporate object of the company is the retail trade of watches, jewels, filigrees and other pieces of jewellery, and also the buying and selling of used gold. The share capital of the company is of €5,000 paid in one single share, which is owned by the single shareholder, VQR. This company also had an impressive sales result of €73.072 million in 2012.

In the first semester of 2014, TP filed its own insolvency petition. The plenary insolvency proceeding followed its terms in the Court of Commerce in Vila Nova de Gaia.[17] The insolvency was declared on 8 April 2014 and published on 21 April 2014.

Even though the similarities with CM's insolvency proceeding are evident, there is an interesting particularity in the *TP* case. Whereas in the *CM* proceeding the court scheduled – as usual – a creditors' meeting to discuss and decide the future of the company, such opportunity was not given to the creditors in this proceeding. In fact, the court decided that the proceeding should immediately continue to its liquidation phase.

iii GBS insolvency

Golfe Bom Sucesso – Exploração de Equipamentos Desportivos, SA (GBS) is a business corporation that was founded in 2006. The company object is the promotion and operation of golf camps and other leisure sports equipment. The share capital of the company is €6.25 million and it is 100 per cent owned by another company, BST. This company had a sales result of €587,331 in 2013.

On 3 July 2014, GBS filed its own insolvency petition. The plenary insolvency proceeding followed its terms in the Judicial Court of Caldas da Rainha.[18] The insolvency was declared on13 July 2014 and published on 17 July 2014.

As the cause of its financial difficulties, the company claimed that the residents' and tourists' demand for the golf course fell far short of the financial expectations that had been planned when the company was founded. The business costs are very high in comparison with the actual sales and the company ended with a net result of -€571,701 in 2013.

There is currently no viable recovery for the company and none of the creditors proposed the presentation of an insolvency plan. As a result, the creditors voted that the company should be put into liquidation.

According to the list of credits, there is one secured creditor – a financial institution with a credit of €4.388 million. This secured creditor holds a mortgage on an asset with a greater value of the company, which is its only real estate. There are also privileged creditors – several employees, social Security and tax authorities – that have credits of

17 Case No. 265/14.0TYVNG.

18 Case No. 420/14.3TBCLD-D.

€136,599.11. The non-secured creditors, who are mainly suppliers and other service providers, have credits in the amount of €1.08 million.

In addition to the mortgaged property, the insolvency administrator seized several golf-related moveable assets.

This insolvency proceeding will now continue with the sale of all the seized assets. Considering the value of the assets it is highly probable that the secured creditor and the privileged creditors recover their credits. Even non-secured creditors might recover at least a part of their credits, which is not as common in Portuguese insolvency proceedings as it should be.

IV TRENDS

According to the data available on the site of Ministry of Justice, the number of insolvency proceedings on the first trimester of 2014 was similar to the number of insolvency proceedings in the same period of 2013.

However, the recent events related to the crisis at Banco Espirito Santo and Espirito Santo Financial Group might lead to an increase in the number of insolvency proceedings and hybrid procedures because of the impact of a possible new banking and financial crisis. In fact, those events are likely to lead to countless litigations, such as litigations over directors' liability and fraudulent transfer and even criminal proceedings.

Appendix 1

ABOUT THE AUTHORS

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José Carlos Soares Machado graduated from the faculty of law of Lisbon University in 1976 and has practised law for more than 30 years. He has been consistently recognised as a leading civil and commercial litigation lawyer.

Since 2011 he has been a partner and head of the litigation and arbitration department at SRS Advogados, one of the most important law firms based in Lisbon.

He is a professor at the law faculty of Nova University of Lisbon and a member of the ILA International Commercial Arbitration Committee. He has also been the representative of the Minister of Justice on the Portuguese Insolvency Administrators Supervisory Committee since 2005.

José Carlos Soares Machado is a former president of Lisbon Bar Council, as well as a member of the Portuguese Bar Association National Board of Directors, and of its National Supreme Council. He is also an arbitrator at its arbitration centre.

He is the author of several published works on constitutional law, corporate law, real estate law and professional ethics.

He is a member of the Portuguese Arbitration Association and has been an arbitrator in numerous cases. He has also represented clients in numerous arbitrations before *ad hoc* and arbitration centre tribunals.

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Joana Figueiredo Oliveira has a master's degree in law and management from the Nova School of Business and Economics (thesis title: 'Informal Workouts') and her undergraduate law degree is from the Catholic University of Portugal.

She has been an associate at SRS Advogados' litigation and arbitration department since 2007 and has experience, accrued during these years of practice, on insolvency and

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