The International Insolvency Review

Third Edition

Editor
Donald S Bernstein

Law Business Research

The International Insolvency Review

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EDITOR'S PREFACE

This third edition of *The International Insolvency Review* once again offers an in-depth review of market conditions and insolvency case developments in key countries around the world. As always, a debt of gratitude is owed to the outstanding professionals in geographically diverse locales who have contributed to this book. Their contributions reflect diverse viewpoints and approaches, which in turn reflect the diversity of their respective national commercial cultures and laws.

The preface to the 2014 edition of this book touched upon the challenges faced by large multinational enterprises attempting to restructure under these diverse and potentially conflicting insolvency regimes. These challenges are particularly acute in large corporate insolvencies, because neither UNCITRAL's Model Law on Cross-Border Insolvency nor other enactments, such as 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.[2] Insolvent corporate groups are therefore obliged to cobble together consensual restructurings with local stakeholders in key jurisdictions, or to initiate separate plenary insolvency proceedings for individual companies under multiple local insolvency regimes (as illustrated in the cases of *Nortel*

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.

2 On 20 May 2015, the European Parliament and Counsel published the Recast Regulation on Insolvency 2015/848 (the 'Recast Regulation'), which will apply to insolvency proceedings initiated after 26 June 2017. The Recast Regulation contains a provision for voluntary, non-binding group coordination proceedings in the EU. The practical impact of this new tool remains to be seen.

and *Lehman Brothers*, among others), with added costs, dispersed control, legal conflicts and inconsistent judgments.

As discussed in last year's edition, the search for a legislative or treaty-based solution to this problem is ongoing, but any such solutions would necessarily involve some degree of relinquishment of national sovereignty and a ceding of local jurisdiction and control that may be difficult for local interests to accept, especially without substantial convergence in national insolvency laws. Given the lack of statutory tools, for some time it has been common in cross-border cases to implement insolvency protocols designed to address potential procedural, and in some cases substantive, conflicts. These agreements may be limited to providing a general framework for cross-border cooperation and coordination, or they may also include specific procedures for deferral, claims resolution, communication between the courts or other particular needs of an individual case.[3] Since the time of the *Maxwell Communications* case, cross-border protocols have enjoyed widespread support from insolvency practitioners and organisations, including from the American Law Institute, the International Insolvency Institute and INSOL Europe.[4]

However, while cross-border protocols are often valuable tools in multinational corporate group insolvencies, they are inherently limited in important ways. Absent supranational legal regimes, courts can only adjudicate disputes under the laws of their own countries, and parties can only be bound to the extent that the writ of the local court can be enforced against them. Fundamentally, cross-border protocols cannot expand the sovereignty or jurisdiction of the court presiding over an insolvency proceeding, superimpose a single governing substantive law or extend the reach of enforcement of local law against foreign parties. This is especially true if multiple plenary insolvency proceedings have been instituted under divergent national legal regimes with respect to members of a corporate group. Cross-border protocols are not a replacement for the enactment of supervening multi-jurisdictional solutions that bring all of the proceedings under a single controlling legal umbrella.

Some observers believe that the deficiencies in the protocol approach to cross-border insolvencies go beyond their inherent limitations. Questions have been raised about whether the effort to overcome these deficiencies leads to aberrational results, as the parties and the courts try to live up to the cooperative spirit of such protocols. In one such critique, former US bankruptcy court Judge James M Peck, who oversaw a number of cases employing cross-border protocols, most notably the *Lehman Brothers* case, recently addressed this issue in the context of the ongoing fight over distributions in

3 See UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, New York 2010, available at www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_Ebook_eng.pdf.

4 See Final Supplemental Order Appointing Examiner and Approving Agreement Between Examiner and Joint Administrators, *In re Maxwell Comm. Corp,* Case No. 91-15741 (Bankr. S.D.N.Y. 15 January 1992); see also Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases, published by the American Law Institute (16 May 2000) and adopted by the International Insolvency Institute (10 June 2001); European Communication and Cooperation Guidelines for Cross-Border Insolvency, prepared by INSOL Europe's Academic Wing (2007).

the *Nortel Networks* insolvency cases.[5] As discussed in greater detail in the United States chapter of this review, various Nortel entities initiated plenary insolvency proceedings in the US, UK and Canada. After the sale of substantially all of Nortel's assets, the question remained of how to allocate the resulting US$7.3 billion fund among creditors of the various estates. The parties implemented a cross-border protocol that was designed to promote consistent determinations of legal issues in the various proceedings.[6] After years of legal manoeuvering, the US and Canadian courts did indeed reach consistent decisions, following a trial 'held in two cross-border courtrooms linked by remarkable and effective technology,' on the methodology for distributing the fund to creditors.[7] However, despite the legal wrangling that has so far cost the Nortel and its creditors over US$1 billion in legal fees, as Judge Peck notes, US bondholders have questioned the legitimacy of the rulings under US law, and appeals have been filed.[8] As Judge Peck explains, even the most accomplished commercial judges may have a 'propensity to seek pragmatic resolutions in good faith that may solve the problem presented but that may deviate from a merits based determination'.[9] While judges in multi-jurisdiction insolvency cases should be praised for trying to fit a single irregular peg into both a square and a round hole, it is certainly worth asking whether the integrity of a court's process can be compromised in the struggle to do so.

Judge Peck argues that courts should not overly strive to enhance consistency in decision making across jurisdictions, as 'judges who are performing their jobs faithfully within their home court system are doing all that is required of them.'[10] If parties fear inconsistent outcomes, they may be more willing to enter into binding arbitration or find other means of settling their differences as, Judge Peck suggests, they did in the *Lehman Brothers* case.[11]

While it runs against the grain, after all the efforts of the past 25 years to promote cooperation and coordination in international insolvencies, to suggest that judicial cooperation can sometimes work at cross-purposes with efficient administration of cross-border insolvencies, there is no denying that the likelihood of speedy, clear and accurate (even if inconsistent) substantive adjudication drives settlements in large complex cases. In cross-border cases, striving for judicial decisions that are hard to challenge, even if inconsistent, may be a straighter path to a practical outcome than striving to attain wholly symmetrical results.

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5 James M. Peck, A Cross Border Judicial Dilemma – Conflict and Consistency in Insolvency Cases that Span the Globe, Banking & Financial Services Law Association, Brisbane, Australia (4 September 2015).

6 Id.

7 *In re Nortel Networks, Inc.*, 532 B.R. 494 (Bankr. D. Del. 2015).

8 James M. Peck, A Cross Border Judicial Dilemma – Conflict and Consistency in Insolvency Cases that Span the Globe, *supra* note 4.

9 Id.

10 Id.

11 Id.

Of course, the need for judges to make such pragmatic choices would be reduced if there were clear legal enactments providing for the alignment of insolvency outcomes across jurisdictional lines.

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 our effort to provide truly current coverage of important commercial insolvency developments around the world. My hope is that this year's volume once again will help all of us 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 2015

Chapter 27

PORTUGAL

José Carlos Soares Machado and Vasco Correia da Silva[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 amended by Laws No. 16/2012, 66-B/2012 and Decree-Law No. 26/2015 .

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.

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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.

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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.

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 proceedings 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 amendments to the CIRE are intended to change the previous tendency to liquidate the debtor's assets, but were clearly insufficient to achieve that goal. Consequently, the liquidation of a company continues to be the most common option, mostly because the debtor or its directors fail to commence with the insolvency proceedings at an early stage, thus jeopardising the chances of restructuring the company in financial difficulties. In addition, creditors are frequently not willing to take on more risk.

Bearing this result in mind, the insolvency law was amended by Decree-Law No. 26/2015 whereby the government implemented a set of more favourable measures for the approval of recovery plans, the long-term financing of productive activity and hybrid capitalisation instruments in order to facilitate investments of capital and additional know-how.

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

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

conceivable the CIRE (pursuant to Law No. 16/2012) sets out two alternatives to the 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,[10] 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

10 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 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.

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[11] from various Member States, the lack of harmonisation of the differing domestic insolvency laws is an obstacle to preventing forum-shopping. It is clear that whenever the debtor has knowledge of the existence of a more favourable jurisdiction 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.*[12],[13]

II INSOLVENCY METRICS

Portugal was one of the EU members that suffered the most from the world economic crisis that began in 2008. The country was able to complete the bailout funding programme in May 2014. Currently the Portuguese economy is showing moderate signs of recovery but is still far from achieving real financial stability, mainly in light of the euro crisis and the risk of contagion from the financial problems of Greece and its third bailout in July 2015.

In August 2014, and after a loss of €3.6 billion, the Portuguese Central Bank intervened in Banco Espírito Santo, Portugal's largest listed lender by assets, splitting it into a new, surviving good bank (Novo Banco) and runoff bad bank. The healthy business was transferred to the new bank, as part of a €4.9 billion rescue plan. This, however, had a negative effect on the availability of credit for companies and families.

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

12 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.

13 In April 2015, the Council adopted a favourable position at first reading: 'The Council believes that its position at first reading represents a balanced package and that, once adopted, the new Regulation will significantly contribute to making cross-border insolvency proceedings more efficient, benefiting debtors and creditors, both corporate and natural persons, throughout the European Union, facilitating the survival of businesses and presenting a second chance for entrepreneurs.' Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2015.141.01.0055.01.ENG.

As a consequence of the global economic crisis and the austerity policies, unemployment in Portugal increased from 7.6 per cent in 2008 to 16.3 per cent in 2013. This path has been inverted recently, and in the second trimester of 2015 the unemployment rate decreased to 11.9 per cent.[14]

According to the most recent statistics,[15] from the second trimester of 2014, the number of insolvency procedures enacted by Portuguese courts decreased for the first time since 2007, in a homologous comparison (2014: 3,958; 2013: 4,298; 2007: 649). This means that the impact of the crisis appears to have slowed down and that confidence and investment are slowly returning.

According to the same source, 12.7 per cent of insolvency proceedings had a value of €50,000 or higher and 79.5 per cent of insolvency proceedings had a value of between €1,000 and €49,999. This means that the large majority of this type of proceeding concerns small companies.

In the same period of time, the most affected industry was the wholesale, retail and vehicle repair industry, which made up 28.7 per cent of all companies that were declared insolvent. This sector of the economy was followed by the construction industry, which made up 22.2 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.[16] 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 Nuno Guerreiro insolvency

Nuno Guerreiro was made a defendant by the public prosecutor in 2012, following a legal process that involved the purchasing of pharmacies where there was suspicion of fraud estimated at €100 million. According to the investigation, Nuno Guerreiro was allegedly the owner of approximately 30 pharmacies, when the maximum permitted by law is four. Through this set of pharmacies that he allegedly controlled, either direct or indirectly, he was able to obtain huge bank credits and significant discounts in abnormally high orders for medicines which were rarely paid for. The sale of the pharmacies in question to the general public allowed the pharmacies to receive the variable co-participation of the National Health Service regarding the price of medicines. By virtue of the reduction in

14 Available at: https://www.ine.pt/xportal/xmain?xpid=INE&xpgid=ine_destaques&DESTAQUESdest_boui=224671146&DESTAQUESmodo=2.

15 Available at: www.siej.dgpj.mj.pt/webeis/index.jsp?username=Publico&pgmWindowName=pgmWindow_635748929151718750.

16 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.

profit margins of the pharmacies in relation to the medicines, they began to be involved in insolvency proceedings, and neither the banks nor the suppliers received what was due. The investigation has not yet been finalised, and there has been no charge or abandoning of the prosecution.

In parallel to this criminal proceeding, Nuno Guerreiro and his wife filed their own insolvency petition with the Sintra Commercial Court. They had signed personal guarantees for loans and supplies undertaken by those pharmacies. A bank with a credit of €102 million and a pharmaceutical company with an €18 million credit requested that the insolvency be qualified as culpable.

However, in June 2015 the court did not agree with this qualification, and declared it to be a fortuitous insolvency. The court considered that the aggravation of the patrimonial situation of those pharmacies and, consequently, of its creditors by the non-presentation of the defendants to the insolvency within the legal period was not proved.

It also considered that they failed to demonstrate that the encumbrance or dissipation of the assets damaged the creditors insofar as the obligations were entered into prior to the insolvency of those pharmacies and were intended to avoid that same insolvency.

The assets of the insolvents (such as real estate, vehicles, pharmacies and a yacht) included in the proceeding are estimated at €14 million and will clearly be insufficient to pay the creditors.

ii Albará insolvency

Albará SA is the new name of Moviflor, Comércio de Mobiliário SA, which is a public limited company with a share capital of €18,089,780. The company trades in furniture and appliances. Moviflor has been in the market for 40 years and held a leading position in household furniture retail. It evolved from one store to 24 stores throughout the country, as well as being deployed under licence in Angola and Mozambique.

The turnover in 2013 was €31 million, with a net loss of €18 million and a €143 million liability. The business costs are too high in comparison with sales. Given the difficulties in meeting its commitments in 2013, Moviflor filed a special revitalisation proceeding[17] at the Court of Commerce of Lisbon providing for the closure of several stores, the renegotiation of payment terms and the raising of new funds. This plan was approved by its creditors on 17 December 2013.

However, this plan was never fulfilled, allegedly because the tax authority and social security demanded guarantees that Moviflor were unable to obtain. This prevented them from obtaining bank financing and resulted in the lack of a viable recovery plan for the company.

In 2014, eight applications were presented to declare Moviflor, which closed all its stores on 9 February 2014, insolvent. At that time its turnover was €8 million. On 18 November 2014, Albará SA (the renamed Moviflor) was declared insolvent and the

17 Case No 876/13TYLSB.

volume of debt was €135 million, of which €19 million corresponded to employment claims. On 1 August 2015, the creditors voted in favour of the liquidation of assets.

According to the appointed judicial administrator, the assets of the company that have been enrolled for the insolvent estate amounted to €18 million. However, the representatives of the insolvent estate alienated stock valued at €1.9 million to a company owned by a person with a special relationship with the sole administrator of Albara for about €468,000, which equates to approximately 20 per cent of the value of the goods. The judicial administrator understood that this value, although small, could be justified given the devaluation of the stock concerned. However, the amount received from the sale was not forwarded to the insolvent estate, but was used to pay a creditor, the son of the founder of Moviflor, who was favoured at the expense of all other creditors without justified reason.

This resulted in the judicial administrator filing an insolvency qualification report, which involved several other creditors. In theory, the practice of favouring creditors is an offence punishable with imprisonment of up to two years.

There is an ongoing sale of the remaining assets of Albara, with only about €329,000 having been obtained in an auction. The final decision of the court on the classification of the insolvency as culpable is not yet known.

iii PFR Insolvency

PFR Invest – Sociedade de Gestão Urbana is a company that was established in 2007 and is owned by the Municipality of Paços de Ferreira, which is the only shareholder. The corporate objective of this company is to promote and manage industrial parks in the Paços de Ferreira district. The total debt of the company is €47 million. Among the 89 creditors are two banks: CGD has a credit of €24 million and Novo Banco has a credit of €17 million. It is estimated that the assets of PFR Invest are enough to pay only 30 per cent of its liabilities.

In 2014, PFR Invest filed a petition asking the Court of Amarante to initiate a special revitalisation proceeding for its economic recovery. The court rejected the claim in April 2014, on the understanding that PFR Invest is a corporate public entity and therefore cannot be subject to insolvency proceedings, and as a result any measure provided for in CIRE, such as a revitalisation proceeding, cannot be applied.

However, this decision was appealed and was revoked by the court of appeal of Oporto, which held that PFR Invest is not a corporate public entity, and therefore is not excluded from the scope of CIRE. Consequently the court of appeal ordered the special revitalisation proceeding to continue.

During the negotiation period, the creditors were not able to approve any revitalisation plan for PFR Invest. Subsequently, the provisional judicial administrator stated that PFR Invest was insolvent. In light of this opinion, the Court of Amarante declared PFR Invest insolvent on 16 February 2015.

The banks appealed the decision arguing, *inter alia*, that despite the fact that PFR Invest is formally a private company, it is materially a public sector entity, and so should be considered as such for the effects of insolvency proceedings. The appellants argued that these local companies belong in the domain of public administration, are created by public entities and manage public funds, and the Portuguese state, even if indirectly,

through the municipalities, is jointly and severally liable for the debts of municipal companies. Thus, if PFR Invest has no way to pay its debts, the municipality of Paços de Ferreira should dissolve it and assume the payment of its debts to its creditors.

In June 2015, the court of appeal[18] ruled in favour of these companies being subject to the common insolvency regime. They may be declared insolvent by the civil courts.

The court ruled that following Law No. 50/2012, some municipal companies are legal persons of private law, and therefore subject to the legal framework which is specific to them, including commercial law and the articles of association of the companies and, secondarily, to the public sector regime, subject to the imperative rules therein. There is no specific rule that prevents municipal companies from being declared insolvent.

This proceeding is being followed with great interest by the Portuguese legal community because PFR Invest is the first municipal company to be declared insolvent by a Portuguese court. The decision has not yet been finalised, but if it were to be confirmed as final, this would open a very important precedent in the framework of Portuguese insolvency. So far the creditors, and in particular the banks, regarded loans to these municipal companies as safe, as they would always be repaid.

If municipal companies opt for filing for insolvency (or special revitalisation proceeding) petitions, creditors may be forced to accept substantial losses. For municipalities, it is an option that is beneficial in that it enables a path of relief for large debts. However, this option can have a serious drawback, which is that bank financing can be limited or refused to companies with higher liabilities, considering the risk that arose from this decision in the *PFR Invest* case.

IV TRENDS

According to the data available on the Ministry of Justice website, the number of insolvency proceedings in the second trimester of 2014 was slightly lower than the number of insolvency proceedings in the same period in 2013.

However, the recent events related to the crisis at Banco Espírito Santo and Espírito Santo Financial Group might lead to an increase in the number of insolvency proceedings and hybrid procedures. In fact, those events are likely to lead to countless litigation proceedings, such as litigation over directors' liability and fraudulent transfers and criminal proceedings, currently under investigation by the Public Prosecutor.

As stated in III.iii, *supra*, the fact that some municipal companies could be subject to the common insolvency regime, and therefore be declared insolvent by the civil courts, may have a huge impact on the framework of Portuguese insolvency.

18 Case No. 169/15.0T8AMT.

Appendix 1

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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.

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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.

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Vasco Correia da Silva has significant experience in litigation representing clients mainly in civil and commercial proceedings and in bankruptcy and insolvency litigation. He provides legal assistance to clients in areas such as insurance, automobile, infrastructure, shipping, energy, TMT, financial services and banking.

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