Europe, Middle East and Africa Restructuring Review 2019

EUROPE, MIDDLE EAST AND AFRICA

RESTRUCTURING REVIEW 2019

Reproduced with permission from Law Business Research Ltd
This article was first published in June 2019
For further information please contact Natalie.Clarke@lbresearch.com

LAW BUSINESS RESEARCH

Published in the United Kingdom
by Global Restructuring Review
Law Business Research Ltd
87 Lancaster Road, London, W11 1QQ, UK

www.globalrestructuringreview.com

To subscribe please contact subscriptions@globalrestructuringreview.com

ISBN: 978-1-83862-230-5

Printed and distributed by Encompass Print Solutions
Tel: 0844 2480 112

Contents

Preface

Welcome to the *Europe, Middle East and Africa Restructuring Review 2019* – a Global Restructuring Review special report.

Global Restructuring Review is the online home for all those who specialise in cross-border restructuring and insolvency, telling them all they need to know about everything that matters.

Throughout the year, the GRR editorial team delivers daily news, surveys and features; organises the liveliest events ('GRR Live'); and provides our readers with innovative tools and know-how products.

In addition, assisted by external contributors, we curate a range of comprehensive regional reviews – online and in print – that go deeper into developments than our journalistic output is able.

The *Europe, Middle East and Africa Restructuring Review 2019*, which you are reading, is part of that series.

It contains insight and thought leadership from 26 pre-eminent practitioners from these regions.

Across 12 chapters and 126 pages, it provides an invaluable retrospective and primer. All contributors are vetted for their standing and knowledge before being invited to take part.

Together, these contributors discuss recent changes and what they mean, with footnotes and relevant statistics. Others provide a primer on the tools available in their home-state, along with their benefits and shortcomings.

This edition covers Cyprus, France, Greece, Italy, Mauritius, the Netherlands, Portugal, Slovenia, Spain and Switzerland; evaluates the updated EU Insolvency Regulation, along with the UK's chances outside it ('a retrogressive step for the UK insolvency market'); and compares Spain's version of the pre-pack with the UK's.

Among the gems, it contains:

- details of the new Dutch scheme, which 'takes elements of' the UK's schemes and the US's Chapter 11 'and improves on both';
- Italy's extensive new code;

- Slovenia's steady improvement in the World Bank's rankings, following eight amendments to its law; and
- the emergence of credible restructuring and pre-pack tools in Portugal, Italy, France, Mauritius and Spain.

Along the way, you will encounter a host of helpful information and details, including an innovative suggestion that Dutch schemes should be both inside, and outside, the EU Insolvency Regulation (depending on what the debtor elects) and the art of asset tracing in Switzerland.

Enjoy!

If you have any suggestions for future editions, or want to take part in this annual project, my colleagues and I would love to hear from you.

Please write to insight@globalrestructuringreview.com.

David Samuels
Publisher
May 2019

Portugal

Maria João Ricou and Manuel Requicha Ferreira
Cuatrecasas

Global overview and recent developments

During the past decade, the Portuguese insolvency and restructuring regime has been subject to significant reforms, mainly intended to create swift and simple restructuring procedures either in court or out of court. The intention was to provide companies and creditors with legal tools that allow them to efficiently manage financially distressed companies.

The first version of the Portuguese Insolvency Code, approved in 2006, was more insolvency-driven and did not adequately tackle the need to have a proper, efficient recovery proceeding. The only judicial recovery proceeding legally foreseen was embedded in the insolvency proceeding itself as a type of insolvency plan, and was therefore subject to the usual delays of insolvency proceedings.

Following the international financial crisis, the need for such a proceeding became evident and the government decided to create a new judicial recovery process called a special revitalisation proceeding (PER), partially based on the concept of Chapter 11 of the US Bankruptcy Code. The creation of this proceeding changed the landscape and companies started to use it frequently to ensure a legally protected and efficient judicial proceeding for the recovery of the companies and the restructuring of debt, in particular bank debt of large and medium corporates. Moreover, the PER also allows for cramdown of dissenting creditors, forcing the restructuring of the debt that is approved by a certain majority of the creditors.

In 2016, the government decided, under the Revitalizar Programme (which aims to capitalise companies), to further develop the recovery regimes and to offer investors more efficient legal mechanisms to revitalise companies, particularly mechanisms that could be implemented out of court and that offered similar legal protection to those executed in court. This programme led to substantial changes being enacted in 2016 to the PER and the insolvency regime and the creation of new out-of-court company recovery mechanisms: the extrajudicial recovery process (RERE) and the legal framework for conversion of debt into equity.

The legislation now encompasses an array of tools that can be used in or out of court to deal with debt restructuring and recovery of companies, which has led to a more competitive market for restructuring and successful restructuring transactions.

PER

Type of proceeding

The aim of the PER is to allow companies that are in financial difficulty or facing imminent insolvency, but that are still recoverable, to enter into negotiations with their creditors for the purposes of renegotiating and restructuring their debt. Companies in financial difficulty are defined as companies that struggle to pay their obligations as they fall due for liquidity reasons or because they are not able to obtain financing.

Main benefits: moratorium and cramdown of dissenting creditors

The main benefit for companies is that they are granted a legal moratorium and a freeze of enforcement proceedings upon filing the initial request, which gives them time to have a discussion with the creditors. For creditors, this proceeding allows for a cramdown of dissenting creditors and, particularly for banks with secured debt, it is a way of potentially writing off the debt owed to common creditors as they become subject to the decision of the majority. Furthermore, it grants legal protection from clawback actions and prior ranking privilege regarding acts approved in the restructuring, such as sale of assets or granting of new security or new credit.

The PER is a voluntary proceeding, therefore the request must be filed by the debtor. In turn, and in order to avoid the debtor implementing delay tactics with regard to the insolvency declaration, the debtor cannot file the PER alone – at a minimum, it requires the support of unsubordinated creditors that are not specially related to the debtor, which represent at least 10 per cent of the unsubordinated debt.

Additional requirements introduced in 2018

In 2018, in the context of the Revitalizar Programme reform, the legislature introduced additional requirements regarding the financial situation of companies, which hinder the use of the PER. The company must submit a certificate issued by a statutory auditor certifying that it is not in an insolvency situation in accordance with the criteria defined in section 3 of the Insolvency and Corporate Recovery Code (CIRE). Under article 3 of the CIRE, a situation of insolvency is defined, in general, as (i) the inability of the debtor to fulfil its obligations as they fall due (cash flow test) or (ii) when, according to accounting criteria, the liabilities of the debtor clearly exceed its assets (balance sheet test).

An unbalanced balance sheet can hinder the use of the PER and force a restructuring in an insolvency proceeding that is, in fact, more complex.

Timing and majorities

The PER process is relatively swift. The period for lodging claims is 20 days and the provisional list of credits is issued within five business days thereafter by the interim judicial administrator. The negotiation period between the company and its creditors is 60 days, which can be extended by 30 days.

A recovery plan within the PER is considered approved when a vote is taken by creditors whose debt represents at least one-third of the total debt with voting rights duly acknowledged in the list of creditors of the PER (the quorum), plus approval by more than two-thirds of the total votes cast and more than half of the votes cast corresponding to unsubordinated debt (voting majority). Alternatively, it can be approved by creditors representing more than half of the debt with voting rights and more than half of the credit being unsubordinated credit.

The plan, once judicially homologated (the court has 10 days to decide), will also be binding on dissenting creditors – either those that voted against the plan or those that simply did not participate. The above-mentioned majorities are therefore crucial when outlining the strategy for the recovery and restructuring.

The extrajudicial recovery plan

In order to make the process more efficient, particularly in situations where there is already an agreement in place between the company and its creditors (usually the banks), it is possible for the company to file the PER with an extrajudicial recovery plan signed by creditors that represent the majorities referred to above.

This process avoids the negotiation phase and only has the lodging of credits phase (20 days), which is simpler as the majority of the creditors should have already signed the plan.

The interim judicial administrator must prepare the provisional credits list five days after the credits phase has ended and creditors may challenge it within five business days. The judge will then have five business days to decide on any challenges and will homologate or refuse the plan (if there are legal grounds) within 10 days.

Legal and judicial effects/protection

Once the recovery plan is homologated by the court, it produces immediate effects with the termination of all legal actions proposed against the debtor relating to its debt, unless otherwise agreed in the plan, and the termination of any pending insolvency proceedings.

In relation to guarantees granted by a third party in respect of debtor's debt, the prevailing understanding that has been sustained by certain judicial decisions is that the recovery plan only affects the debtor's liability and not that of the guarantors, thus the rights of the creditors before the third-party guarantors remain unchanged. However, this is still disputed, with some decisions allowing for this possibility only in the event that the plan is approved by a unanimous vote.

Finally, there are two important legal protections: (i) new money (eg, for liquidity reasons) granted during the PER can benefit from a prior ranking privilege, which ranks prior to special statutory liens over movable assets granted to employees; and (ii) security approved within the PER is, in principle, protected against any clawback actions, if a declaration of insolvency is issued in the next two years.

RERE

Type of proceeding

The RERE allows a company facing a difficult economic situation, or in imminent insolvency, to promote negotiations with one or more of its creditors, as it deems appropriate, with the aim of executing a restructuring agreement.

As a voluntary procedure, creditors are free to participate in the negotiations by entering into a negotiation protocol and to approve the restructuring agreement. Moreover, creditors who initially did not participate in the negotiations may adhere to the protocol during the negotiation period.

As a transitory measure, and during the first 18 months only (ie, until June 2019), the law allows companies in an insolvency situation to resort to this legal regime.

Main benefits: moratorium and tax benefits

The RERE is a desirable option because of the discretion of the creditors, which, in principle, are bound by a duty of confidentiality, and the agreement of the creditors, as it does not allow for a cramdown of dissenting creditors.

Despite not having the option of a cramdown, the deposit of the negotiation protocol before the Commercial Registry Office has the following benefits:

- the debtor will, up to the end of the negotiation period, benefit from a legal moratorium and freezing of the enforcement proceedings with respect to the adhering creditors, which are bound by the protocol;
- the essential service providers, irrespective of being parties to the negotiation protocol, are prevented from interrupting the supply of the services grounded on non-payment; and
- if the debtor becomes insolvent, the time limit for submission of the debtor to insolvency only begins after the end of the negotiation period.

Timing and majorities

The debtor is required to have the support of creditors representing at least 15 per cent of its unsubordinated debt in order to file for the RERE.

The negotiations must be concluded within three months, counted from the deposit of the negotiation protocol, which may be extended, unless the debtor becomes insolvent.

Legal and judicial effects/protection

Upon deposit of the protocol, the debtor stays in possession of its business but is prevented from performing acts of special importance as defined in the CIRE, unless otherwise provided in the negotiation protocol or if previously authorised by all creditors, directly or through the creditors' committee.

After the restructuring agreement has been filed with the commercial registry, the following takes place:

- Credit rights of the debtor and collateral on its assets shall be amended only in accordance with the terms specifically provided for in the restructuring agreement, provided that the respective holders are parties thereto.
- The judicial, declaratory, enforcement or precautionary claims, relating to credit included in the restructuring agreement and insolvency proceedings, where insolvency has not yet been declared, that have been instituted by a party to the restructuring agreement, are immediately extinguished.
- Any fresh money and attached guarantees explicitly referred to in the restructuring agreement or in the negotiation protocol (not used by the debtor for the benefit of the corresponding financial entity or an entity especially related to it) are ring-fenced from clawback actions, provided that a declaration is issued by a statutory auditor declaring that the restructuring agreement includes the restructuring of credit corresponding to at least 30 per cent of the total unsubordinated liabilities of the debtor and that, as a result of this, the financial situation of the debtor is more balanced, owing to a proportionate increase in assets over liabilities, and the debtor's equity is greater than its share capital.
- The restructuring agreement reached under the RERE, provides for the direct consideration, as expenses or losses of the fiscal year, the value of the credit that is subject to reduction, for the purpose of calculating the taxable income as long as the impairment loss has not been admitted, or is insufficient and provides the right to deduct the tax relating to the credit covered by these agreements. For these purposes, the restructuring agreement shall be accompanied by a statement issued by the statutory auditor certifying that the agreement includes restructuring of credits corresponding to at least 30 per cent of the total unsubordinated liabilities of the debtor and that, as a result, the financial situation of the company is more balanced by the increase of the proportion of the assets over the liabilities, and the equity capital is higher than the share capital.

Lastly, and importantly, is the possibility of applying for the PER to obtain the judge's approval of the restructuring agreement and enforce it on all creditors, irrespective of their acceptance, if the restructuring agreement is subscribed to by creditors representing the majorities required by the PER.

It is still too early to evaluate the impact of the RERE, which still requires some fine-tuning. Nevertheless, it certainly represents a breath of fresh air for Portuguese companies and may potentially cause a drop in the number of insolvency proceedings.

Debt-for-equity swaps

Type of proceeding

This new legal framework allows for conversion of companies' credit into capital, provided that the companies have a turnover equal to or higher than €1 million and the credits are not qualified as excluded credits.

Additionally, the law foresees 'loan-to-own' strategies, allowing for the acquisition of debt of a company with a view to its future conversion into share capital, thus enabling creditors to acquire shares in the debtor company.

Timing and majority

The majority required corresponds to creditors whose credit represents at least two-thirds of the company's total liabilities and a majority of unsubordinated credit and provided that, cumulatively:

- the company's equity is below its share capital; and
- 10 per cent or more of total unsubordinated debt (or, in the case of partial repayments of principal or interest, when related to 25 per cent or more of total unsubordinated debt) is in default for more than 90 days.

The proposal for conversion must be discussed at a general meeting of the debtor, held within 60 days of receipt of the proposal. In this period, the directors and managers of the company are entitled to begin negotiations with creditors. If no meeting is held within 60 days, if the conversion proposal is rejected or if the approved resolutions are not enforced within 90 days, the creditors may file for judicial enforcement of the resolutions.

Legal and judicial effects/protection

The shareholders are protected by a pre-emption right if debt is converted into capital by means of a capital increase. In this case, capital contributions by the shareholders shall be in cash and must be applied in the payment of the debt, which would be converted into capital, in accordance with the proposal submitted by the creditors. With regard to a capital increase, the equity needs to exceed the share capital amount at the time of the proposal.

The existing capital loss framework foreseen in article 35 of the Portuguese Companies Code, which has more stringent requirements for the declaration of capital loss, only sets forth a duty of information of the management body on the company shareholders who will be free to remedy the situation, if they choose to do so. However, the new legal framework, which aims to protect creditors' interest, allows creditors to resort to using this extrajudicial restructuring instrument and to force a cramdown of the equity by restructuring the balance sheet of companies with negative equity capital and strengthening their equity, and to enforce it judicially if necessary.

This legal framework excludes certain types of credit, such as credit from financial companies, credit institutions, investment firms, publicly held companies and entities integrated in the public business sector.

The novelty of this framework will necessarily require adaptation for companies, shareholders and creditors. There are doubts about the scope of some of the new provisions and there may also be problems when it comes to applying these provisions as the effects of implementation, in practice, have not been addressed.

Insolvency procedure

Type of proceeding

Insolvency procedures are universal enforcement procedures, whose purpose is to satisfy creditors' claims through the implementation of an insolvency plan or the liquidation and judicial sale of the insolvent's assets.

Timing and majority

The insolvency request may be filed by:

- the debtor within 30 days of becoming aware of the insolvency situation– or upon the moment it should have been aware (voluntary insolvency); or
- the creditors, at any time, based on the occurrence of certain events that determine the existence of an insolvency situation (mandatory insolvency).

Within three days of the insolvency request filed by the debtor and provided the debtor meets the necessary criteria, the court shall declare the insolvency. If a creditor files for insolvency, the debtor will be notified so that it may oppose the request, upon which the court shall decide.

After the declaration of insolvency, an insolvency administrator will be appointed, and the deadline for filing the credit claims (a maximum 30 days is permitted) and the schedule of the creditors' general meeting will be determined.

Legal and judicial effects/protection

The insolvency declaration will have an impact on the debtor and its directors, including on its debts and agreements not yet paid, on any pending proceedings and on any acts prejudicial to the debtor's assets.

The appointment of the insolvency administrator deprives the debtor of the administration and disposal powers over its assets, although the management bodies may remain in place. However, in the event of voluntary insolvency and upon request by the debtor or as agreed by the creditors, the debtor may ensure the administration of its assets.

The administrator shall evaluate and suggest whether the debtor should enter into liquidation or if an insolvency plan could be proposed, although the final decision belongs to the creditors' assembly, which will vote on the administrator's recommendation.

Insolvency plan

The insolvency plan is the only mechanism of recovery for a company within an insolvency procedure or after the declaration of insolvency of a company. It is the last tool that can be used to avoid full closure of the company.

The insolvency plan will be voted on at the creditors' general meeting (a quorum of one-third of the total debt with voting rights). Approval requires two-thirds of the votes, provided that half of the votes correspond unsubordinated debt. The plan will be binding on all creditors, regardless of whether they have taken part in the negotiations.

If the debtor defaults on the plan, any standstill and releases are rendered void and all credit becomes due. The Portuguese legal system does not allow the court to amend, on its own initiative, the recovery plan negotiated by the creditors.

If the insolvency plan is rejected by the creditors, liquidation will commence and the insolvent assets are sold to pay the creditors according to the respective ranking of credit.

Corporate group

Since June 2017, if an insolvent company has a control or group relationship with other companies, in respect of which insolvency proceedings exist, the judge, unofficially or by request, may designate the same insolvency administrator for all companies and designate another insolvency administrator with restricted functions who shall assess claims between debtors of the same group.

Furthermore, there is the possibility of piecing together the debtor's insolvency proceeding with another entity that is liable for the former's debts.

Conclusion

Although it is premature to assess the impact of the measures that have been introduced, it is clear that the current insolvency and restructuring legal framework in Portugal favours an out-of-court recovery process, encouraging consensual solutions and ensuring a balance between the interests of the parties involved in a restructuring process and being in line with EU insolvency legislation.

These revised out-of-court restructuring proceedings will likely drive future changes, as they will be concluded much faster than court proceedings, which is a crucial aspect to consider.

Furthermore, the new mechanisms allow highly leveraged debtors to restructure their financial debt in a more efficient, structured and protected way, to the extent that they have the necessary support of the required majority of creditors.

Nevertheless, the choice between proceedings in court and out of court will depend on the nature of the credit, the sustainability of the debtor, and the number of creditors and how sophisticated they are.

Maria João Ricou
Cuatrecasas

Maria João Ricou is the managing partner of Cuatrecasas in Portugal. She is a member of the firm's executive board and head of the banking, finance and capital markets practice.

With extensive experience and in-depth knowledge of the banking, finance and capital markets sectors, Maria has focused her practice mainly on banking operations, regulatory matters, debt restructurings, structured finance (particularly securitisation structures), corporate finance and all kinds of equity and debt capital markets transactions.

Maria is considered a lead partner in the European Banking & Finance Deal of the Year, 2017 by *The Lawyer*.

Maria holds a law degree from the Catholic University of Lisbon Law School, 1984. She has been a member of the Portuguese Bar Association since 1984 and is a member of the International Bar Association.

Manuel Requicha Ferreira
Cuatrecasas

Manuel Requicha Ferreira has been a partner in the banking, finance and capital markets practice of Cuatrecasas in Portugal since 2016, and has been with the firm since 2006.

The main projects on which he has advised in recent years include, in particular, structured finance and corporate finance and financing operations through simple or structured debt issues, from public or private entities and public offers of distribution or takeovers. He has extensive experience in and in-depth knowledge of restructuring.

Manuel holds a law degree from the University of Coimbra Law School, 2004, and has a postgraduate degree in securities law from the University of Lisbon Law School, 2007 and a master's degree in banking and capital markets law from the University of Lisbon Law School, 2011.

In 2007, Manuel won the CMVM (the Portuguese Securities Market Commission) Award.

Cuatrecasas is a law firm present in 12 countries with a strong focus on Portugal, Spain and Latin America. It has a multidisciplinary team of more than 1,000 lawyers that advise on all areas of business law, organised by business and industry-specific practice areas. It combines maximum technical expertise with business vision. Through 16 offices on the Iberian Peninsula and 11 international offices, desks and country groups, Cuatrecasas connects regions through a model that offers the best team for each case, depending on the jurisdiction, specialty area and complexity required. Each year, the firm advises on some of the largest and most significant transactions, as well as complex and high-profile litigation and arbitration proceedings in Iberia and other important jurisdictions. Cuatrecasas maintains close relationships with leading companies in every sector and thus possesses invaluable experience advising on the most complex aspects of every specialty area. The firm works with a new approach to client service, combining collective knowledge with innovation and the latest technologies to offer contemporary, efficient advice and to provide solutions to the most complex situations, creating value for the client, the team and the environment.

Praça Marquês de Pombal, 2
1250-160 Lisbon
Portugal
Tel: +351 21 355 38 00
Fax: +351 21 353 23 62

www.cuatrecasas.com

Maria João Ricou
mjoaoricou@cuatrecasas.com

Manuel Requicha Ferreira
manuel.requichaferreira@cuatrecasas.com

As well as daily news, GRR curates a range of comprehensive regional reviews. This volume, the *Europe, Middle East and Africa Restructuring Review 2019*, contains insight and thought leadership from 26 pre-eminent practitioners from these regions. Inside you will find chapters on Cyprus, France, Greece, Italy, Mauritius, the Netherlands, Portugal, Slovenia, Spain and Switzerland; on the amended EU Insolvency Regulation, and Brexit ('a retrogressive step for the UK insolvency market'); and how the Spanish pre-pack tool compares with the UK's – and lots more.

Visit globalrestructuringreview.com
Follow @GRR_Alerts on Twitter
Find us on LinkedIn

ISBN 978-1-83862-230-5