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Peter K Newman

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PREFACE

I am very pleased to present this 14th edition of *The Restructuring Review*. Our intention is to help general counsel, government agencies and private practice lawyers, as well as other professionals, investors and market participants, understand the prevailing conditions in the global restructuring market in 2021. This edition seeks to highlight some of the more significant legal and commercial developments and trends during this period.

I would like to thank Chris Mallon, the editor of the first 12 editions of this book, and Dominic McCahill, the editor for the 13th edition, for their time and dedication to ensuring the publication of this review on an annual basis. Both have now retired from the partnership at Skadden and I am honoured to continue their work.

The covid-19 pandemic has dominated the global political and economic landscape since it emerged in early 2020 and will continue to do so throughout 2021. The impact of the pandemic has been felt far and wide, from the devastating human costs to the severe impact on the world economy. All countries have faced material consequences from the pandemic and the vast majority have imposed multiple lockdowns and sweeping travel restrictions to help fight the spread of the coronavirus through their populations. At the time of writing, no country has emerged from the pandemic and all countries maintain some level of restrictions on movement and interaction of people to limit virus spread.

The world economy faced extreme challenges in 2020 due to the pandemic. Faced with total losses of revenue at the outset of the pandemic, businesses in many sectors appeared likely to be swept into a tidal wave of insolvencies and liquidations. Many workers lost jobs and the prospect of extreme levels of unemployment appeared imminent. But at least in some significant respect, the blow was softened by financial support to businesses and workers offered by governments and central banks around the world. In fact, government support measures in many cases more than offset (at least temporarily) the damage wrought by the pandemic as many jurisdictions reported year-on-year decreases in restructuring and insolvency activity. Markets around the world continued their pre-pandemic ascents and deal activity hit new record highs, including in an exuberant market for blank cheque acquisition vehicles known as 'SPACs'.

The development of numerous vaccines and the commencement of unprecedented global roll-outs of vaccination programmes has brought hope that brighter days are ahead in 2021 and 2022. While some have predicted that the world economy will recover rapidly in 2021 and 2022 as vaccine distribution proliferates and countries ease or eliminate pandemic related restrictions, others warn of a rude awakening as new covid-19 variants emerge, government support measures are withdrawn and pandemic-inspired changes to consumer

behaviour impact businesses built in a pre-covid world. Only time will tell how quickly the world is able to recover from the pandemic as well as when, and to what extent, the world will return to pre-pandemic life.

In light of all this unprecedented disruption, it is unsurprising that the past year has been an interesting one in the restructuring and insolvency space. Last year, many jurisdictions introduced new laws, rules and practices related to the restructuring and insolvency of troubled businesses. While some of these changes arose specifically in reaction to covid-19, many others were introduced as part of a broader trend of reform of insolvency and restructuring law many years in the making. As can be seen in the following chapters, many of these new laws and reforms have already been used to help businesses in an exceptionally challenging year and no doubt will continue to be used and further developed in the global efforts to recover from the pandemic.

I hope that this edition of *The Restructuring Review* will continue to serve as a useful guide at a crucial moment in the evolution of restructuring and insolvency law and practice internationally. I would like to extend my gratitude to all the contributors for the support and cooperation they have provided in the preparation of this work, and to our publishers, without whom this would not have been possible.

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London
July 2021

Chapter 17

PORTUGAL

João Tiago Morais Antunes, Teresa Madeira Afonso and Petra Carreira[1]

I OVERVIEW OF RESTRUCTURING AND INSOLVENCY ACTIVITY

In early 2020, the Portuguese economy was still slightly expanding (although having registered a deceleration for the second year in a row), but this progression came to an abrupt and unprecedented halt with the beginning of the covid-19 pandemic in March. The pandemic crisis significantly affected economic activity in Portugal in 2020 and, at the time of writing, its consequences are far from over. The entire business sector has been affected and even viable companies are generally facing enormous difficulties related to a lack of liquidity.

The numbers of restructuring and insolvency procedures are expected to rise in the next months and years but, so far, the measures enacted to mitigate and contain the economic and financial multiple impacts of the pandemic have been effective in preventing a sudden upsurge of insolvencies.

The lockdown and temporary suspension of the majority of commercial activities between March and May impacted directly on the tourism and hospitality sectors (which, in 2019, represented approximately 8.7 per cent of the GDP), creating pressure on the solvability of companies and businesses. Lay-off regimes, low interest rates, rent moratorium regimes, deferral of certain taxes and extension of credit lines with public guarantees and the extension of bank moratoriums have contributed to mitigate – even if merely delaying – the default risk of companies and the subsequent increase of restructuring and insolvency procedures.

In addition, as from 7 April 2020, and as long as the exceptional and temporary legal measures set in response to covid-19 pandemic remain in force, debtors are not under the obligation to file for insolvency, a legal provision that other EU countries have also adopted in similar terms, which main purpose is to create a stay in insolvency numbers. However, said legal provision does not preclude a creditor's right to file for the insolvency of a debtor, and if the debtor is in a pre-insolvency situation and recovery is still possible, it may initiate pre-insolvency procedures at its disposal, such as the Special Revitalisation Process (PER) or the Extrajudicial Business Recovery Scheme (RERE)[2]. In addition, if the difficulties faced by the company were caused by the covid-19 pandemic, it may also initiate an Extraordinary

1 João Tiago Morais Antunes is a partner, Teresa Madeira Afonso is a managing associate and Petra Carreira is a senior associate at PLMJ.

2 The PER (*Processo Especial de Revitalização*) was enacted by Law No. 16/2012 of 20 April and the RERE (*Regime Extrajudicial de Recuperação de Empresas*) was enacted by Law No. 8/2018 of 2 March.

Recovery Process (PEVE)[3] a special process aimed exclusively at companies that are either in a difficult economic situation or in an insolvency scenario due to the covid-19 pandemic but are still viable.

According to the publicly available information so far, courts registered an increase of 3.2 per cent in the number of corporate insolvencies in 2020 compared with 2019, with the hospitality sector most significantly affected, with an increased variation of 57 per cent compared to 2019.[4] Figures published by the Portuguese Ministry of Justice are only available for the first three quarters of 2020, and in this period there were 7,440 insolvency and restructuring procedures filed (the majority concerning the insolvency of individuals), against 9,216 in the same period in 2019.[5]

II GENERAL INTRODUCTION TO THE RESTRUCTURING AND INSOLVENCY LEGAL FRAMEWORK

The Portuguese insolvency and company restructuring legal framework is mainly governed by Decree-Law No. 53/2004, dated 18 March (CIRE), as last amended by Decree-Law No. 84/2019, dated 28 June.

Over the past decade, the Portuguese legislator enacted several amendments to the insolvency and companies restructuring laws and created new pre-insolvency procedures based on extrajudicial negotiations with minor court intervention (eg, the PER) or fully out-of-court procedures (eg, the RERE), in an effort to shift the focus to the restructuring of companies before they become insolvent, and to render legal solutions more supple and efficient. These changes, aimed at creating a pre-emptive regime, where action is to be taken before the company becomes insolvent, were accompanied by the legislator's concern of ensuring that, during any insolvency or restructuring procedure, the interests of all stakeholders are duly weighted and considered.

One of the basic principles of these pre-insolvency procedures is to allow a debtor to, in good-faith and voluntarily, initiate a conversation with its creditors for the restructuring of its debts and pre-emptively avoid its insolvency. Another common trait of these procedures is that they assume that the debtor, in close cooperation and discussion with its creditors, prepare a recovery plan that will set modified terms and conditions applicable to its debts and which main purpose should be its financial recovery.

Not all creditors are required to participate in the negotiations of the PER, but once the recovery plan is voted by a majority of creditors and approved (homologated) by the court, it shall be deemed binding upon all creditors, even those that did not vote or that voted against the approval of the plan provided that their credits had already been constituted when the PER started. The PER is an urgent and hybrid procedure that should be swift to ensure that its goal – recovery of the company – is effectively achieved. As such, the law sets forth a term

3 The PEVE (*Processo Extraordinário de Viabilização de Empresas*) was enacted by Law No. 75/2020 of 27 November.

4 Source, comparing corporate insolvency processes (with exclusion of restructuring procedures): https://barometro.informadb.pt/barometro-tecido-empresarial/setorial.

5 Source, compiling all insolvency, restructuring and special payment processes filed (corporate and individuals): https://estatisticas.justica.gov.pt/sites/siej/pt-pt/Paginas/Movimento-de-processos-nos-tribunais-judiciais-de-1-instancia.aspx.

of two months (extendable for one other month) for the negotiation of the recovery plan between the debtor and creditors and is usually concluded within less than six months before first instance courts.

The RERE, contrary to the PER, is a fully out-of-court formalised negotiation mechanism and starts with the registry of a recovery plan proposal (protocol) by the debtor and creditors representing at least 15 per cent of the debtor's liabilities, to be submitted at the Commercial Registry Office. This plan is not subject to voting by the creditors and is only binding upon those that chose to adhere to it, although is possible to subject the plan to approval by the court whenever it is voted by creditors representing the majorities foreseen for the PER procedure.

i Insolvency procedure

Under Portuguese law, the insolvency procedure is defined as a special universal enforcement procedure aimed at the repayment of the companies' creditors. This can be achieved under an insolvency plan, to be agreed between the debtor and its creditors (and approved by the court), which can seek the recovery of the debtor or determine the liquidation of its assets with the subsequent distribution of the resulting profits to its creditors, once the debts of the insolvency estate are duly paid[6] and in accordance with the ranking of the creditors' claims.

In both insolvency and pre-insolvency proceedings, creditors have a central role and are the ones that, ultimately, dictate the future of the debtor.

The insolvency procedure, as set forth under the CIRE, is a de-judicialised process, in which the intervention of the court, albeit very relevant and needed in some circumstances, is mainly limited to the phases comprising the ruling of the insolvency of the debtor, the homologation of the insolvency plan and the determination of the ranking of the credits' claims; in its intervention, the court is given a wider margin for its decisions, since it is not restricted to the review of facts alleged by the parties in dispute before the court.

ii When is a debtor deemed insolvent?

As a general rule, a debtor is deemed to be insolvent when it is unable to pay its debts as they fall due. This is particularly so when there is a general failure by the company to pay its debts to the tax and customs authority or the social security, to its employees, or to the landlord or mortgage lender of the premises where the company operates.

A company will also be deemed insolvent if it is proved, to the satisfaction of the court, that the value of the company's assets is significantly lower than the amount of its liabilities (debts), pursuant to applicable accounting principles. This second standard, however, is an open-ended concept where applicability demands a necessary review of the financial and economic status of the relevant company and is subject to certain exclusions.

Portuguese law also attributes legal relevance to a situation of imminent insolvency of the debtor, whenever the insolvency request is filed by the latter. As such, although the main rule under Portuguese law is that the status of insolvency should be assessed under the existing factual situation, should the directors determine that the company will become insolvent

6 The insolvency estate is an autonomous estate formed as a result of the general apprehension of the assets of the debtor and is comprised of all the assets and rights that are owned or held by the debtor.

soon, they should file for insolvency if they consider that the company is not susceptible of recovery. The concept of imminent insolvency can be summarised as the situation where the debtor will not, in all likelihood, be able to pay its debts when they become due.

When the debtor is a company, it must file for insolvency within 30 days after the date on which it becomes aware (or the date when it should have become aware) of its state of insolvency. Alongside the debtor, any creditor is entitled to demand that a debtor is declared insolvent as is the Public Prosecutor's Office, inter alia, subject to the fulfilment of certain additional requirements, such as the generalised suspension of payment by the debtor of its debts.

Considering that the longer the debtor struggles in a difficult financial situation the harder it will be to ensure a successful outcome of an insolvency, with all legal and commercial consequences applicable, the CIRE determines that companies have a legal duty to file for insolvency. The breach of this duty may lead the court to rule the insolvency as wrongful (culpable insolvency) and may entail the enforcement of several civil and criminal consequences. As mentioned above, this legal duty to file for insolvency is suspended as long as the measures of response to covid-19 are in force.

iii Effects of declaration of insolvency and creditors' claims

A declaration of insolvency has a wide impact on the debtor, the entities that are connected with the debtor and on its ongoing business, and its effects are extensive. In addition to setting forth several conduct obligations for the debtor, the effects of the insolvency declaration include, inter alia:

a the transfer of the management powers to the insolvency administrator (as a general rule);
b the apprehension, for immediate delivery to the insolvency administrator, of all the assets of the debtor;
c the suspension of all enforcement proceedings against the debtor;
d the creditors will only be entitled to exercise their rights against the debtor within the insolvency procedure; and
e the acceleration of all the insolvent's debts, except for those subject to conditions precedent.

In addition, by default, if no other specific provisions apply, a contract under execution will be subject to a standstill until the insolvency administrator determines, on a case-by-case basis, if it must be terminated or complied with and performed by the debtor. The CIRE also has specific provisions governing the basis on which the insolvent, or its counterpart, may be entitled to a compensation as a result of the insolvency administrator's decision. Moreover, CIRE sets forth specific rules determining the effects of the declaration of insolvency to certain types of contracts.

The insolvent company and its five major creditors are notified of the insolvency declaration by the court. Furthermore, the insolvency declaration ruling is advertised publicly, posted in an official website run by the Justice Ministry[7] and on the insolvent's registered office.

The creditors will then be entitled to submit a claim with the insolvency administrator requesting that he or she recognises its credits. The insolvency administrator shall assess and

7 Site: www.citius.mj.pt/portal/consultas/consultascire.aspx.

review the claims filed and list all the creditors of the debtor. In this list, the administrator shall qualify and rank – as privileged, secured, common or subordinated – the credits claimed by each creditor, which can be ultimately challenged by the creditors and the debtor. Any challenges to the list will be definitively decided by the court.

iv Liquidation or recovery

The outcome of the insolvency procedure will, as a general rule, be decided in a creditors meeting, where the creditors will decide one of two possible outcomes:

a recovery of the company and maintenance of its activity, under an insolvency plan, determining the terms and conditions applicable thereto, including the possible survival of the company under the debtor or determining its transfer to a third party; or
b liquidation of the insolvency estate and subsequent distribution of the profits to the creditors.

The most relevant principles that structure the insolvency procedure and by which the insolvency plan – when applicable - shall always abide, are the rule of equal treatment of all creditors among each class of creditors and that no creditor can be in a worse position with the approval of the recovery plan than it would be if the company was to be liquidated.

The insolvency plan may be prepared and proposed by the debtor, the insolvency administrator, the entities legally liable for the debts of the insolvency or by creditors that represent at least one fifth of non-subordinated credits. The content of the plan is freely set by the debtor (or by those others who may propose it) and may foresee a countless combination of solutions for the recovery or reorganisation of the company, being some of the most common those that set forth payment moratoriums, credit haircuts, corporate restructurings such as shares capital decreases and increases or debt-for-equity swaps.

The proposed plan is discussed and approved in another creditors assembly, when, with a quorum of a third of the total of the credits with voting rights attached, it is favourably voted by more than two thirds of the votes issued and as long as more than half of those issued votes correspond to credits that are not ranked as subordinated credits (excluding abstentions).

Subsequently, the plan must be judicially approved by the court, which shall control its legality. Any creditor may request the court to refuse the approval of the plan, in particular if the plan does not pass the best interest of creditors' test, (i.e., if the creditor justifies to the court that it would be in a better situation if the company had been liquidated instead of having the insolvency plan approved).

v Claw-back actions

The insolvency administrator and the creditors may file claw-back actions against acts carried out by the debtor, before the declaration of insolvency, that were detrimental to the insolvency estate.

Under the CIRE, and as general rule, any detrimental acts, carried out (or omitted) within two years before the beginning of the insolvency proceedings (i.e., the date the declaration of insolvency of the debtor is rendered by the court) may be clawed back by the insolvency administrator when:

a said acts diminish, frustrate, hinder, compromise or delay the satisfaction of the creditors' rights; and

b the third party involved acted with wrongful intent.[8]

The Law sets forth a rebuttable presumption of wrongful intent of the third party when the transactions were carried out less than two years before the declaration of insolvency and the third party is (or becomes) related to the debtor.

The law also identifies certain transactions that may be clawed-back without the need to confirm the existence of any of the requirements summarised above; for example: granting of *in rem* security as collateral for obligations that already existed, when created less than six months before the declaration of insolvency; gratuitous transactions carried out less than two years before the declaration of insolvency and repayment of shareholders' loans made during the year before the declaration of insolvency.

The CIRE confers special protection to transactions carried out within the scope of pre-insolvency restructuring procedures (such as the PER or RERE), with the purpose of providing the debtor with adequate means to finance its recovery.

vi Directors' duties

One final note should be made to the duties of directors. Upon the declaration of insolvency of the company, its directors must carry on their duties while losing their right to be remunerated for their services. In addition, a director of an insolvent company must be mindful of its actions as it may also be under the obligation to compensate the creditors if its actions lead to a diminishing of the insolvency estate, particularly if said actions occurred within the three years before the declaration of insolvency of the debtor.

As mentioned above, if the debtor breaches its duty to file for insolvency, the court may rule that the insolvency as wrongful. In addition, CIRE also sets a presumption, not subject to rebuttal, whenever the directors (either registered or shadow directors) carry out certain activities expressly qualified under the CIRE as detrimental to the creditors.

When the insolvency is qualified as wrongful, several sanctions may be applicable to the directors. These include the inhibition of performance of acts of commerce for a period of up to 10 years, the prohibition to be appointed to the board of other entities, the payment of compensation to the creditors and even criminal sanctions, in the case of wilful intent to cause damage.

III RECENT LEGAL DEVELOPMENTS

As outlined above, new legislation relating to insolvency and restructuring was introduced in 2020 to support businesses and individuals, to address the challenges resulting from the impact of the coronavirus pandemic. These measures were essentially as follows:

a the temporary suspension of the duty to file for insolvency within the legal time limit set for this effect;

b the adoption of a new extraordinary legal framework aimed at companies facing a difficult economic situation or an insolvency scenario, both imminent and actual; and

c the introduction of one-off amendments to existing pre-insolvency procedures.

8 A third party shall be assumed to be acting with wrongful intent when it knew, at the time of the performance of the act, that: (1) the debtor was insolvent; (2) the act was detrimental to the insolvency estate and the debtor was in an imminent insolvency situation; and (3) the insolvency procedure was already underway.

The first step towards reacting against the pandemic from an insolvency and restructuring standpoint was the suspension of the obligation to file for the insolvency of a company based on over-indebtedness or on the inability to pay its debts as they fall due. This suspension took effect from 7 April 2020. Notwithstanding, the creditors remained in power to file for the insolvency of a debtor.

As the pandemic crisis continued to weigh on economic activity, liquidity concerns, among other things, became more severe and revealed the need for further legislative responses.

As such, the Portuguese government has adopted an economic and social stabilisation plan to respond to the economic and social difficulties caused by the pandemic. One of the measures provided for in this plan was the creation of a new extraordinary process aimed exclusively at companies that are either in a difficult economic situation or in an insolvency scenario owing to the covid-19 pandemic, but are still viable: the PEVE.

The PEVE was first announced by the Portuguese government in June 2020 and, as mentioned above, was later established in Law No. 75/2020, dated 27 November 2020. This law came into force on 28 November 2020 and is in effect until 31 December 2021, subject to a possible extension.

As a preliminary note, the PEVE provides for shorter time limits than other preventive restructuring frameworks and enjoys a super-urgent nature, meaning it takes precedence over any other proceedings of an urgent nature, such as insolvency and PER procedures. Also, the PEVE is free of court costs.

The PEVE is designed to reach an out-of-court debt restructuring agreement between the company and creditors corresponding to a legally established majority vote and to have it approved by a court (the 'viability agreement').

The decision to approve the viability agreement binds the company, the creditors who vote in its favour and the creditors indicated by the company in the list of creditors, even if they did not take part in the out-of-court negotiations or voted against the agreement.

As a general rule, when the initial application for PEVE is filed, the company cannot have any PER procedure pending and needs to prove that it meets the necessary conditions for its viability.

The company must also provide proof that on 31 December 2019 the company's liabilities were lower than its assets. In other words, the company must provide proof that the difficulties it is facing stem from the pandemic situation.

At the company's request, it is possible that different companies with which the company is in a control or group relationship can also submit to a PEVE and the corresponding proceedings be joined.

After the initial application is filed, the court shall be responsible for checking and ensuring that all requirements and preconditions for commencing a PEVE are met. If this is the case, the court will appoint a chartered administrator, who will be responsible for giving an opinion on whether the proposed viability agreement offers reasonable prospects of ensuring the recovery of the company. This opinion is relevant to the outcome of the PEVE, because it may serve as a basis for the court to decide whether to approve the proposed viability agreement.

The initiation of a PEVE has both procedural and substantial effects. With regard to procedural effects, the PEVE entails the suspension of any application for insolvency of the company, provided that the insolvency has not yet been declared, and of any debt recovery

proceedings. The latter proceedings shall be terminated if the viability agreement is approved, unless it provides for their continuation or where the claims in question in those actions are not covered by the viability agreement.

As far as the substantive effects are concerned, the PEVE prevents the suspension of the provision of essential public services to the company. The company is also prevented from performing any acts of relevance, as set forth in the CIRE, without first obtaining authorisation from the administrator to carry out the intended operations.

If the viability agreement is not approved by the court, all effects of the PEVE are extinguished. The ending of the procedure prevents the company from resorting to a new PEVE.

One of the main virtues of the PEVE is that it promotes both financing and self-financing, by its shareholders, to ensure the effective viability of the company. In fact, and with that aim (which is central to the recovery), the guarantees agreed between the company and its creditors will continue even if, at the end of the process, the company is declared insolvent within two years, provided that they are offered for the purpose of providing the company with the financial means it needs to operate. Also, the shareholders, or any person related to the company who finances its activities by providing it with funds with a view to making it viable, enjoy privilege in terms of claim qualification and ranking. Moreover, if the company is later declared insolvent, legal transactions provided for in the viability agreement that included the provision to the company of new pecuniary claims cannot be clawed back for the benefit of the insolvency estate.

As a rule, tax and social security claims remain unaltered. However, under the PEVE there is the possibility to reduce interest rates or prescribe other tax benefits, to achieve the financial viability of the company.

In addition to establishing the PEVE, Law No. 75/2020, dated 27 November 2020, also provides for a serious of one-off amendments to preventive restructuring procedures existing in Portuguese law, with a view to adapting them to the pandemic situation. Some of these measures are as follows:

a the three-month maximum deadline for the company to conclude negotiations on a recovery plan or payment agreement within a PER may be extended;

b any proposed insolvency plans may be granted up to 15 additional working days to be adapted to the context of the covid-19 pandemic;

c the RERE may be relied upon by companies who are insolvent as a result of the covid-19 pandemic, provided that they are still likely to become viable and certain requirements are met;

d partial prorating becomes mandatory in all pending insolvency proceedings where liquidation proceedings are deposited in excess of €10,000 (whenever certain requirements are met);

e applications for release and distribution to creditors of securities or guarantees provided under insolvency proceedings, PER or similar proceedings enjoy priority over any applications pending the decision thereon; and

f if there is a failure to comply with an approved insolvency plan due to events occurring after 7 April 2020, the 15-day time limit for regularisation – after which the moratoriums and waivers provided for in the plan expire – will not begin to run until Law No. 75/2020, dated 27 November 2020, is no longer in force.

IV SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND MOST ACTIVE INDUSTRIES

The year 2020 has been, in all aspects, an atypical year and the fact that the most relevant restructuring transactions in Portugal during that period were carried out with state intervention (e.g., TAP and EFACEC) demonstrates this fact.

In relation to recent trends and developments in insolvency and restructuring transactions, it should be highlighted that legislators' efforts to create, especially in the past decade, pre-emptive renegotiation tools that debtors can use when they are financially struggling, thus avoiding reaching an insolvency situation, have been successful. In fact, companies are now acutely aware of these negotiated recovery solutions and filing a PER is usually the first option taken by companies, and Portuguese insolvency and restructuring practitioners are prima facie called upon to provide counselling in these restructuring solutions, insolvency being a last resort, contrary to the situation less than decade ago.

Particularly in relation to the judicial approval of recovery plans under a PER, courts understand that the principles of equal treatment of creditors (with no creditors worse off) does not represent an absolute right of creditors, and that it can, in an exceptional regime as the PER is, be limited, allowing for different treatment of different creditors.

However, courts have recently questioned the scope of this standard, particularly when there is evidence that the differentiation of treatment between creditors is disproportionate, ruling that the approval of a recovery plan may not be carried out at the expense and sacrifice of a certain class of creditors for the benefit of others. Courts have determined that in the analysis and weighting of the interest at stake, the review should consider not only the level of haircut but also the percentage that a certain class of credits represents in the overall balance of the debtor, and have refused the approval of restructuring plans deemed unbalanced.

Finally, as mentioned above and as a direct consequence of the covid-19 pandemic, one the of most active industries in insolvency procedures initiated in 2020 was the services industry, with special emphasis on the tourism and hospitality sectors.

V INTERNATIONAL

Portugal did not adopt the UNCITRAL Model Law on Cross-Border Insolvency (1997).

Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (the EU Insolvency Regulation), which is a binding legislative act, is applicable in its entirety in Portugal just as it is applied across the EU.

The EU Insolvency Regulation is designed for the proper functioning of the internal market, which requires that cross-border insolvency proceedings operate efficiently and effectively. There are rules in the EU Insolvency Regulation that provide procedural uniformity for European cases in the area of insolvency law and related procedures. These include the parameters for establishing jurisdiction, choice of law and the recognition and enforcement of foreign insolvency judgments. Portuguese courts and practitioners shall follow these rules as set out therein.

The CIRE expressly provides for a 'conflict of laws rule' in respect of EU Insolvency Regulation. Article 275 of CIRE determines that the procedures regulated therein to which EU Insolvency Regulation applies are governed by the discipline contained in that instrument

and, in all other aspects, by the CIRE. Therefore, the provisions of the CIRE shall apply only to the extent that they do not contradict or impact the provisions of the EU Insolvency Regulation or other rules of European Union law or international treaties and conventions.

Likewise, Article 276 of CIRE provides that in the absence of any contrary provision, insolvency proceedings and their effects shall be governed by the law of the state in which the proceedings were initiated (*lex fori concursus*).

Article 288 of CIRE establishes that, where the centre of the debtor's main interests (COMI) is outside a Member State of the European Union, the declaration of insolvency in foreign proceedings will be recognised in Portugal except in the event that the jurisdiction of the foreign court is not based on the debtor headquarters or debtor's COMI criteria, or such recognition would lead to a result clearly contrary to the fundamental principles of Portuguese law.

Under Article 293 of CIRE, decisions taken in foreign insolvency proceedings can only be enforced in Portugal after having been reviewed and confirmed. Res judicata is not a necessary requirement for confirmation.

VI FUTURE DEVELOPMENTS

Portugal was hit hard by a third wave of the pandemic, which took hold in January 2021. At the time of writing, further legislation was being prepared and is pending approval before the Portuguese government and parliament to relieve the burden on businesses and individuals and support economic recovery. According to the legislative texts currently under discussion, new provisional measures suspending certain time limits and procedural acts in the context of insolvency proceedings, among others, are likely to enter into force soon, which will also have an impact on the very activity of the Portuguese courts.

Additional legislation is expected to be enacted in the coming months, as the impacts of the pandemic are far from over – especially those that stem not from covid-19 directly but from the consequences of battling it.

A further point to highlight for 2021–2022 is the intended implementation of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (the Directive on Restructuring and Insolvency). The Directive, as all other EU directives, does not have immediate effect on the Portuguese legal system and therefore needs to be transposed into national law by 17 July 2022.[9]

A number of legal solutions provided for in Directive (EU) 2019/1023 will remain at the discretion of the Member States, so we are particularly looking forward to analysing the specific solutions adopted by Portugal when implementing the Directive.

Some of the legislative objectives and instruments set by Directive (EU) 2019/1023 have already materialised in Portuguese legislation, but its transposition into domestic law may be

9 The deadline for transposing the Directive – 17 July 2021 – may be extended by up to one year for Member States that have 'particular difficulties' in implementing the Directive. The need to use this extension would have to be notified to the European Commission by 17 January 2021. Portugal has made use of this possibility and notified the European Commission of the need to extend the deadline for transposing the Directive until 17 July 2022.

decisive in preventing and mitigating the impacts of covid-19 on the national economy, and to overcome financial difficulties or avoid insolvency scenarios. Therefore, the present circumstances only increase the need to transpose Directive (EU) 2019/1023 into national law within the prescribed deadline for Portuguese companies and individual entrepreneurs, to benefit from the instruments designed therein to prevent insolvency.

Appendix 1

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João Tiago Morais Antunes is a partner in the dispute resolution practice at PLMJ. With almost 20 years' professional experience, he has specialised in dispute resolution, focusing particularly on restructuring and insolvency and civil, commercial, corporate and financial litigation. He has acted for clients from a range of sectors including banking, industry, information technology, healthcare, real estate and consumer goods.

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