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> THE AMENDMENTS MAY WELL BE NUMEROUS AND FLASHY, BUT DO THEY EMBODY A REAL SHIFT OF THE PORTUGUESE INSOLVENCY LAW?

Portugal:
Recent amendments to the Portuguese Insolvency Law: The forces that determine the success of restructuring tools

Before spring even blossomed, the review of the Portuguese Insolvency Law was completed with the issuance of Law Nº 7/2018 and Law Nº 8/2018 of 2 March 2018. The review began in 2017 with the Insolvency Act (hereafter IA) being amended by Law Decree Nº 79/2017, of 30 June. The amendments may well be numerous and flashy, but do they embody a real shift of the Portuguese Insolvency Law? Let us have a look.

Law Decree Nº 79/2017 amended the insolvency proceedings and, more importantly, the popular pre-insolvency hybrid proceedings known as "special revitalisation proceedings"[1]. Standing out among the latter amendments is the inclusion, once and for all, of non-traders (natural persons and entities other than companies) in the range of beneficiaries of pre-insolvency instruments[2].

The debate around the scope of the special revitalisation proceedings had burst four or five years before. Some argued that the proceedings were extended to non-traders/non-entrepreneurs, others sustained that they were limited to cases in which business or entrepreneurial interests were at stake. The legislator responded with the creation of the "special proceedings aimed at a payment agreement"[3], which apply only to non-traders/non-entrepreneurs, which, give or take, are identical to the special insolvency proceedings. This managed to put an end to the squabbling, but simultaneously showed that, in the legislator's perspective, business or entrepreneurial interests have never set a threshold.

Law Nº 7/2018 and Law Nº 8/2018 of 2nd March brought about other novelties.

The first piece of legislation put forward a special regime for debt-for-equity swap[4] turning it into a restructuring measure on its own, available outside the insolvency proceedings (and the framework of a restructuring plan) and regardless of the company's situation (insolvency or pre-insolvency). According to the new regime, shareholders may be crammed down by creditors through the judicial confirmation of the debt-for-equity swap, in which case the intervention of an insolvency practitioner is required[5].

If insolvency proceedings commence while the debt-for-equity swap is still ongoing, the latter is immediately terminated, to allow the insolvency proceedings to pursue. The rule is difficult to justify, considering that one of the restructuring measures provided for in the IA (hence, available when the company enters insolvency proceedings) is, precisely, the debt-for-equity swap.

But the most interesting novelty is the pre-insolvency instrument created by Law Nº 8/2018 – the regime of out-of-court corporate restructuring[6]. It unfolds into two sub-regimes: the first is designed to help companies to reach a restructuring agreement with its creditors (negotiation regime)[7] and the second is designed to help the company carry out a previously negotiated restructuring agreement (agreement regime)[8].

As a matter of fact, not much differentiates the restructuring agreement in question from the ordinary restructuring agreement the company may be able to reach out of court, mainly because its effects remain *inter partes* (i.e., it is only binding upon the parties). What is more, the requirements to enter the regime are quite demanding, especially the need to show a non-insolvency situation ascertained by a certified public accountant. Will the benefits be worth the trouble?

There are indeed a few advantages, triggered, as the case may be (negotiation regime or agreement regime), by the deposit of the negotiation protocol or the deposit of the

restructuring agreement in the Commercial Registry. By virtue of the deposit of the negotiation protocol and whilst the negotiation is ongoing, the term to file for insolvency is suspended and the company's suppliers are prevented from withholding performance or terminating essential contracts[9].

Once the company reaches a restructuring agreement and deposits it, there are tax advantages concerning certain transactions, individual enforcement actions brought by creditors who are parties in the agreement are bound to cease, and new financing is not to be declared void, voidable or unenforceable in the context of subsequent insolvency proceedings.

Still, there may be doubts as to the future use of the regime. The benefits seem insufficient to persuade the company to follow this regime rather than the traditional path of out-of-court negotiation. More importantly, the scheme entails serious restrictions to the creditors' rights and no significant compensation / motivation. One thing is for sure: the participation of a minimum percentage of creditors is required for the benefits to be enjoyed.

As always, the success of the tool will depend not so much on its adequacy to perform the restructuring, but rather on the creditors' perception of the tool's adequacy to pursue their economic interests. Probably the Portuguese legislator should have been more aware of this. ■

Footnotes:

1 In Portuguese: Processo Especial de Revitalização (PER). The proceedings were introduced in 2012. They instantly carved out an important place for themselves in the framework of instruments of Insolvency Law and have never ceased to gain ground.
2 There were, indeed, a couple of amendments to the special revitalisation proceedings. Such amendments, however, do not undermine nor diminish the validity of the statement above.
3 In Portuguese: Processo Especial para Acordo de Pagamento (PEAP).
4 All claims are convertible except shareholders' loans.
5 Other core features of the new regime are: the shareholders have pre-emption rights (if they want to, the shareholders may make contributions to be applied in the repayment of the creditors) and the debt-for-equity swap may be preceded by a capital reduction to zero, provided the shareholders are out of the money (meaning that, upon a valuation of the enterprise, they would not receive any payment or other consideration if the normal ranking of liquidation priorities were applied).
6 In Portuguese: Regime Extrajudicial de Recuperação de Empresas (RERE).
7 In the first case, companies may enjoy the assistance of a corporate restructuring mediator [in Portuguese: mediador da recuperação de empresas]. The new career was created by Law Nº 6/2018, of 22nd February.
8 The old instrument of the kind – the system for corporate out-of-court restructuring [in Portuguese: Sistema Extrajudicial de Recuperação de Empresas (SIREVE)] – was repealed on the same occasion. For all that matters, it never received much attention.
9 These are contracts which are necessary for the continuation of the day-to-day operation of the business.

> **ONE THING IS FOR SURE: THE PARTICIPATION OF A MINIMUM PERCENTAGE OF CREDITORS IS REQUIRED FOR THE BENEFITS TO BE ENJOYED**