New kid in town: The corporate restructuring mediator

Catarina Serra introduces us to the new player in the Portuguese restructuring arena

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When the Eagles wrote the song "New kid in town" for their famous album "Hotel California" released in 1977, they were not obviously thinking of the professional Portuguese restructuring player just introduced, which goes by the name of "corporate restructuring mediator" (hereinafter: CRM).

Nevertheless, the metaphor may be helpful to understand the expectations created by the introduction of a new player on the field and the contradictions involved in the general rules applying to the CRM.

Where does the corporate restructuring mediator play?

Given the synchrony between the CRM and the new regime of out of court corporate restructuring[1] it was only natural to assume that he or she would be a core player in this regime and an *exclusive player* of this regime[2]. But such an assumption would be misleading: not only the appointment of a CRM in the regime of out of court corporate restructuring is optional but also his/her appointment can concern other settings (i.e. other restructuring arrangements or proceedings). It is possible to say that at most the CRM is a *natural* participant in out of court arrangements.

The law defines the CRM as the person who provides assistance to companies which find themselves either in economic distress or in actual insolvency and which plan to enter into negotiations with their creditors in order to reach an out of court restructuring agreement.

The only requirement for the appointment of a CRM is that the company should aim at restructuring: the economic and financial situation of the company (pre-insolvency or insolvency) seems to be completely irrelevant[3]. Despite the reference to the out of court nature of the restructuring, the legal instrument chosen to carry out the restructuring (out of court restructuring arrangements or formal restructuring proceedings) seems equally indecisive, since the only way an insolvent company may achieve restructuring is through formal (insolvency) proceedings[4]. This may lead to practical problems (of overlapping), considering that these proceedings revolve around a concurrent professional – the insolvency administrator/practitioner.

What are the duties of a corporate restructuring mediator?

The CRM has four core duties: to assess the company's economic and financial situation, to assess, together with the company's directors, the company's prospects of restructuring; to assist the company on the draft of a restructuring agreement and, finally, to help the company in the negotiations with its creditors.

In particular, in the new regime of out of court corporate restructuring, the CRM is expected to help the company to draw up a financial and economic assessment, which is meant to provide the elements necessary for the creditors to

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contemplate the restructuring.

There is only one provision concerning his/her role in the pre-insolvency proceedings, according to which the CRM is assigned the task of providing assistance to the company in the negotiations.

Weighing all this, it is arguable that, despite his *nomen juris*, the CRM is not a genuine mediator but rather some kind of advisor or consultant, acting (more) on behalf of the company and lacking the typical features (independence, impartiality, neutrality) that characterise the mediator. As a matter of fact, this is not surprising considering a substantial part of his remuneration is borne by the company.

How and by whom is the corporate restructuring mediator appointed?

Although the initiative belongs to the company only, the entity with the power to appoint the CRM is the so-called Institute for the Support of Small and Medium Enterprises (hereinafter: ISSME).

The CRM must have his/her name registered on an official list and the rule is that the appointment respects the sequential order, i.e., follow the criterion "first in, first out". In exceptional cases, the ISSME may "bend" the rule and appoint a different CRM if it presumes that the CRM who follows on the list lacks the skills and the experience required.

In any case – and this is indeed the point to be stressed – the company does not have a saying on the appointment of the CRM.

Now, a crucial factor for the company when requesting the appointment of a CRM is the expectation that there will be, at its side and on its side, someone endowed with the expertise to carry out the restructuring but, most of all, someone who is reliable and trustworthy. If the company is not given any chance to choose or contribute to the choice of "its" CRM, it is very unlikely that it will be motivated to request this appointment.

How and by whom is the corporate restructuring mediator remunerated?

The CRM's remuneration consists of a basic remuneration plus a remuneration to be paid in case of a successful conclusion of the restructuring agreement – a kind of success fee.

The payment of the basic remuneration is split into 3 instalments: the first to be paid after the appointment of the CRM; the second to be paid after the drawing up of the "restructuring plan" and the third after the closure of the negotiations. It follows that only the first instalment is completely sure, the latter depending on the fulfilment of certain conditions.

The rules on remuneration are not the clearest and should, therefore, be carefully read. Read in such a way as to ensure that the reference to the "restructuring plan" stands for a reference to the "*draft* of the restructuring *agreement*". Otherwise the second instalment will be either paid after the third or – what is worse – not paid at all (since the final version of the restructuring agreement may only come out of and after the negotiations) and the second and the third instalment will never be paid when the CMR is appointed outside formal or hybrid proceedings (since there may not be a restructuring plan, strictly speaking, but only a restructuring agreement).

As previously mentioned, the payment of the CRM's remuneration, as well as the reimbursement of all the expenses incurred is usually borne by the company, with the ISSME ensuring only the payment of the first instalment of the basic remuneration.

5. Global assessment

As a conclusive remark, it is submitted considered that the CRM emerges as a useful professional, though – let it be clear – he/she is not a mediator and the law failed to provide the most appropriate setting to foster the request for his/her appointment by the company.

But it is still early to predict the outcome of a new player on the field; so, for now, we should rather sing:

> "*There's talk on the street;*
> *it sounds so familiar.*
> *Great expectations,*
> *everybody's watching you.*
> *(…)*
> *There's talk on the street;*
> *it's there to remind you*
> *It doesn't really matter*
> *which side you're on".* ■

Footnotes:

1 The CRM was introduced by Law Nº 6/2018, of 22nd February, and the regime of out of court corporate restructuring was created by Law Nº 8/2018, of 2nd March.

2 This regime is absolutely out of court and unfolds into two sub-regimes: the first is designed to help the company to reach a restructuring agreement with its creditors (negotiation regime) and the second is designed to help the company carry out a previously negotiated restructuring agreement (agreement regime). On the topic, see Catarina Serra, "Recent amendments to the Portuguese Insolvency Law – The forces that determine the success of restructuring tools", in: *Eurofenix – The Journal of INSOL Europe*, 2018, 70, 38 ff.

3 Furthermore, it is not necessary for the company to enter into negotiations with the creditors or to intend to do it, for that matter.

4 When the company is insolvent, the term to file for insolvency is of 30 days, at the risk of severe consequences for the company's directors if they fail to fulfil this duty.

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