INSOL Europe/LexisPSL Joint Project on 'How EU Member States recognise insolvency/restructuring proceedings commenced in third country states'—Portugal

05/03/2021

Restructuring & Insolvency analysis: This article looks at how Portugal would recognise insolvency or restructuring proceedings commenced in a third country state. In particular, it considers whether the English Part 26 scheme or Part 26A restructuring plan would be recognised in Portugal. Written by Alberto Nunez Lagos, the Portuguese country co-ordinator for INSOL Europe and David Sequeira Dinis and Luis Bertolo Rosa at Uria Menendez Lisboa.

Q1. Has your country adopted the United Nations Commission on International Trade Law Model law on insolvency?†If not, does it intend to do so in the near future?†

No

Q2. What are your country's private international law provisions for the recognition of insolvency proceedings commenced in countries outside of the EU Member States (ie Third Party†States like the UK)?

(1) The recognition of insolvency proceedings commenced in third-party states is governed by the provisions of sections 288 et ss of the Portuguese Insolvency and Corporate Recovery Code (PICRC).

(2) The general rule laid down in the PICRC is that any judgment opening insolvency proceedings handed down by a court of a third-party state shall be recognised in Portugal if the debtor's COMI is situated outside the territory of all Member States of the European Union.

The same general rule applies to (i) preservation measures taken after the opening of insolvency proceedings as well as to (ii) any decisions taken with a view to carrying out or closing the proceedings (but see section 4 below).

However, there are two exceptions to this general rule. Recognition shall be refused in the event that:

> '(a) The jurisdiction of the court of the third-party state was not based on the same (or equivalent) criteria foreseen in the PICRC, ie the debtor's seat, domicile or COMI; or
>
> (b) The effects of recognition would be manifestly contrary to the public policy of the Portuguese State.'

(3) Provided that the abovementioned conditions are met, the competent Portuguese court shall order the publication in Portugal of:

> '(a) the essential content of the judgment opening insolvency proceedings;
>
> (b) the decision appointing the insolvency practitioner; and
>
> (c) the decision closing the insolvency proceedings.'

In this regard, the PICRC draws a distinction between two types of situations. If the debtor has an establishment in Portugal, then (i) the abovementioned publications shall be ordered ex officio by the Portuguese court and (ii) the competent court shall be the one with jurisdiction over the area where the establishment is situated. By contrast, if the debtor does not have an establishment in Portugal, then (i) the publications have to be requested by the foreign insolvency practitioner and (ii) the competent court shall be the courts of Lisbon. In either situation, the competent court is always a court of first instance (and not a court of appeal).

(4) On a different note, the PICRC contains a specific provision that restricts significantly the scope of the general rule described in section 2 above.

This specific provision states that:

> 'the decisions handed down in a foreign insolvency proceeding may only be enforced in Portugal after being reviewed and confirmed; however, such decisions do not have to be final and definitive (res judicata) in order to be reviewed and confirmed.'

According to some of the most influential Portuguese legal scholars, the general rule and the specific provision translate into the following:

> '(a) Pursuant to the general rule, the foreign insolvency practitioner may act in Portugal in accordance with the powers granted to him by the laws of the third-party state (provided that the judgment opening the insolvency proceedings has been duly publicised in Portugal);
>
> (b) However, in order to resort to the Portuguese courts or the Portuguese authorities and enforce (coercively) the decisions handed down in the foreign insolvency proceeding, it is necessary for the decision to be reviewed and confirmed.'

(5) In the scenario mentioned in section 4, the revision and confirmation of the decisions handed down in the foreign insolvency proceedings shall be carried out in accordance with the Portuguese Code of Civil Procedure.

In a nutshell, the key steps of the revision and confirmation proceeding are the following:

> '(a) The applicant (eg, the foreign insolvency practitioner) shall file an application for the revision and confirmation of the foreign decision with the competent Portuguese court of appeal. The defendant shall be the person(s) against whom the applicant wishes to enforce the foreign decision. If the identity of the person(s) is unknown, then the application may be filed against "unknown adversaries", who shall be represented by the Public Prosecutor.
>
> (b) The defendant(s) shall be summoned to submit a statement of reply within 15 days.
>
> (c) The applicant may then counter-reply within 10 days.
>
> (d) After any steps deemed indispensable by the judge have been taken, the parties and the Public Prosecutor have 15 days to present their final arguments.
>
> (e) Finally, the court of appeal hands down its decision, which is subject to appeal to the Supreme Court.'

Having said that, the rule in this type of proceedings is that the Portuguese court of appeal shall not analyse the merits of the foreign decision and may only refuse to confirm it in the event that:

> '(a) There are doubts regarding the authenticity or content of the foreign decision;
>
> (b) The jurisdiction of the foreign court has been established fraudulently or the decision relates to a matter over which Portuguese courts have exclusive jurisdiction. This could be the case in relation to insolvency proceedings if the insolvent-debtor is (i) an individual domiciled in Portugal or (ii) an entity with separate legal personality, a company or a partnership whose seat is located in Portugal;
>
> (c) There is lis pendens in relation to a case pending before a Portuguese court, except if it was the foreign court that prevented jurisdiction;
>
> (d) Portuguese courts have already issued a final and definitive decision (res judicata) in relation to the same issue, except if it was the foreign court that prevented jurisdiction;
>
> (e) The defendants were not duly summoned to the foreign proceedings and/or the foreign proceedings did not comply with the adversarial principle and/or the principle of equality of the parties;
>
> (f) The foreign decision is deemed incompatible with the international public policy of the Portuguese State;
>
> (g) A final and definitive judgement has established that the foreign decision resulted from a crime committed by the foreign judge in the exercise of his/her functions;
>
> (h) A document is presented to the Portuguese court of appeal whose existence the defendant was unaware of (or could not use in the foreign proceedings), provided that such document alone is deemed sufficient to modify the decision in favor of the defeated party; or
>
> (i) The foreign decision is based on a sham litigation and the foreign court has not prevented the parties from reaching their goal.'

If none of the situations described in items (a) to (i) above apply, then the Portuguese court of appeal should confirm the foreign decision.

Q3. Would your country recognise an†English scheme of arrangement†(under Part 26 of the Companies Act 2006 (CA 2006)) or an†English restructuring plan†(under CA 2006, Pt 26A) now post-Brexit and on what basis? (e.g. Lugano Convention, Hague Convention, Rome I or other private international law rules)

In principle, yes.

It is important to highlight from the outset that Portuguese courts and Portuguese legal scholars have been entirely silent both before and after Brexit in relation to the grounds for recognition of an English schemes of arrangement or an English restructuring plan. It was not possible to retrieve a single ruling from the Portuguese upper courts (ie the courts of appeal and the Supreme Court) containing the slightest reference to an English schemes of arrangement or a restructuring plan. Consequently, our analysis is contingent on the absence of reliable guidance from previous court rulings and opinions from legal scholars.

The difficulty of providing a definitive answer to this question is compounded by the issues surrounding the characterisation of the English schemes of arrangement and the restructuring plan as (i) a public collective proceedings, for the purposes of the Regulation (EU) 848/2015, or (ii) a judgment on civil or commercial matters, for the purposes of the Recast Brussels Regulation, or even (iii) a court settlement, for the purposes of the same Recast Brussels Regulation.

In this scenario, the conservative approach would be to consider that the recognition of an English schemes of arrangement or the restructuring plan would be subject to the default provisions of the Portuguese Code of Civil Procedure on the recognition of foreign judgments (applicable to all civil and commercial matters). In the instant case, the foreign judgement would be the English court decision that sanctioned the English scheme of arrangement or the restructuring plan.

In a nutshell, the interest party (eg, the debtor) would have to institute a proceeding for the revision and confirmation of the English judgment with a Portuguese court of appeal. The key steps of this proceeding would be the following:

> ‘(a) The applicant would file an application for the revision and confirmation of the foreign decision with the competent Portuguese court of appeal. The defendant would be the person(s) against whom the applicant wished to enforce the foreign decision, in particular (i) the known creditors domiciled in Portugal and (ii) against unknown creditors (the latter being represented by the Public Prosecutor);
>
> (b) The defendant(s) would be summoned to submit a statement of reply within 15 days;
>
> (c) The applicant would then be entitled to counter-reply within 10 days;
>
> (d) After performing any steps deemed indispensable by the judge, the parties and the Public Prosecutor would have 15 days to present their final arguments;
>
> (e) Finally, the court of appeal would hand down its decision, which would be subject to appeal to the Supreme Court.’

The Portuguese court of appeal should review and confirm (ie, recognise) the English judgement, except in the event that:

> ‘(a) There are doubts regarding the authenticity or content of the English judgement;
>
> (b) The English judgement is not yet final and definitive (res judicata) according to the laws of England and Wales;
>
> (c) There is lis pendens in relation to a case pending before a Portuguese court, except if it was the English court that prevented jurisdiction;
>
> (d) Portuguese courts have already issued a final and definitive decision (res judicata) in relation to the case, except if it was the English court that prevented jurisdiction;
>
> (e) The defendants were not duly summoned to the English proceedings and/or the English proceedings did not comply with the adversarial principle and/or the principle of equality of the parties;
>
> (f) The English judgment is found to be incompatible with the international public policy of the Portuguese State;

(g) A final and definitive judgement has established that the English judgement resulted from a crime committed by the English judge in the exercise of his/her functions;

(h) A document is presented to the Portuguese court of appeal whose existence the defendant was unaware of (or could not use in the English proceedings), provided that such document alone is deemed sufficient to modify the decision in favor of the defeated party;

(i) The English judgment is based on a sham litigation and the English court has not prevented the parties from reaching their goal;

(j) The jurisdiction of the English courts had been established fraudulently or the judgement related to a matter over which Portuguese courts have exclusive jurisdiction; or

(k) The jurisdiction of the English courts has been established fraudulently or the judgement related to a matter over which Portuguese courts have exclusive jurisdiction.'

Item (k) could be a source of concern in some cases. For instance, Portuguese courts have exclusive jurisdiction in relation to insolvency and rescue proceedings of (i) individuals domiciled in Portugal and (ii) legal entities, companies and partnerships with registered office/seat in Portugal. Consequently, there is a risk of Portuguese courts refusing to recognise an English judgment sanctioning a schemes of arrangement or a restructuring plan of individuals domiciled in Portugal and of legal entities, companies and partnerships with registered office/seat in Portugal.

INSOL Europe/LexisNexis table of 'How EU Member States recognise insolvency/restructuring proceedings commenced in third country states'

A table produced by INSOL Europe in partnership with Lexis Nexis (also incorporating information from Lexology Getting The Deal Through) is now available here: INSOL Europe/LexisÆPSL Joint Project on 'How EU Member States recognise insolvency and restructuring proceedings of a third country': consolidated table.

We look at how EU Member States would recognise insolvency or restructuring proceedings commenced in a third country, such as the UK (post-Brexit), the US, Japan, Australia or Canada. As always, you should contact local lawyers in the relevant jurisdiction to check the current measures in force.

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