

FORUM SHOPPING IN INSOLVENCY CASES - MORAIS LEITÃO GALVÃO TELES SOARES DA SILVA

Posted on 14/11/2011



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In Portugal, forum shopping in insolvency proceedings is now a reality and has proved successful in a number of high profile cases, says Helena Soares de Moura, insolvency specialist at Morais Leitão Galvão Teles Soares da Silva in Lisbon.

"When parties know in advance the serious delays in some courts it is sometimes considered an option to try to get things to move faster. It is not a common 'scheme' in Portugal but it has been used."

Most usually, such a strategy is adopted when the competent court according to the insolvent company's headquarters (HQ) is overwhelmed. Debtors may then prove receptive to the idea of changing their HQ to expedite proceedings.

"As attractive as it may be, creditors cannot control such a decision. Only the debtor is able to 'choose' the court that will rule it insolvent. If a struggling, although viable, company has an urgent

need to approve an insolvency plan it can find it takes up to two years to conclude proceedings in a major commercial centre."

Such a process echoes the trend that has emerged across the EU under the European Insolvency Regulation, notes Soares de Moura. "The possibility to search out better insolvency regimes has gained popularity. Nevertheless legislators inevitably have suspicions over debtors that cross borders with the sole purpose of finding a different system."

Within Portugal the benefit of such an approach is to gain time, she says. "When we look at cross-border forum shopping, EU and national legislators may try to limit pre-insolvency migration and some national rules now impose obstacles to it."

Europe's courts have tried to develop a common approach, she concludes. "In general, they are willing to accept a pre-insolvency migration provided that the entire centre of main interest (COMI) is moved. A migration after the debtor has filed for insolvency may though be considered fraudulent. In such cases, what was an apparent gain can turn out to be a huge drawback."