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Insolvency 2024

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Portugal: Law & Practice

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PORTUGAL

Law and Practice

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1. Overview of Legal and Regulatory System for Insolvency/ Restructuring/Liquidation

1.1 Legal Framework

Within the Portuguese jurisdiction, the most relevant statutes governing financial restructurings, reorganisations, liquidations and insolvencies of business entities are the following:

- the Insolvency and Recovery Code (*Código da Insolvência e da Recuperação de Empresas* or CIRE) (Decree-Law No 53/2004);
- the Extra-Judicial Regime for Corporate Recovery (*Regime Extrajudicial de Recuperação de Empresas* or RERE) (Law No 8/2018), which provides a specific legal regime for out-of-court recovery agreements;
- the regime for converting credits into capital created by Law No 7/2018 of 2 March; and
- the Regulation (EU) 2015/848 of the European Parliament and of the Council, adopted on 20 May 2015, on insolvency proceedings, establishing co-ordination mechanisms and rules on conflicts of law for cross-border transactions.

In addition, note should be taken of the rules on the voluntary dissolution and liquidation of companies, and on directors' duties within insolvency/restructuring procedures established by the Companies Code, as well as some specific regimes applicable in certain sectors, particularly financial, such as:

- the General Regime for Credit Institutions and Financial Companies (Decree-Law No 298/92);
- the Regime for Voluntary and Compulsory Liquidation of Credit Institutions (Decree-Law No 199/2006);
- the General Regime on the taking-up and pursuit of the business of insurance and reinsurance (Law No 147/2015);
- the Asset Management Regime (Decree-Law No 27/2023); and
- the Regulation on the Market in Crypto-assets (Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023).

1.2 Types of Insolvency

Voluntary Proceedings

The relevant voluntary proceedings provided for in the Portuguese legal system are:

- the Special Revitalization Proceeding (*Processo Especial de Revitalização* – PER);
- the Extra-Judicial Regime for Corporate Recovery (*Regime Extrajudicial de Recuperação de Empresas* – RERE); and
- the Special Procedure for Payment Agreement (*Processo Especial para Acordo de Pagamento* – PEAP).

These proceedings require the debtor's initiative, as well as the engagement of (some) creditors. Insolvency proceedings may also be voluntary, if initiated by the debtor.

Involuntary Proceedings

Insolvency proceedings are involuntary when commenced, regardless of the debtor's initiative, through the intervention of:

- its creditors;
- the Public Prosecutor's Department (when representing entities whose interests it is legally obliged to protect, such as tax authorities or the social security office); or
- any person liable for the debt.

1.3 Statutory Officers

In the Portuguese legal system, the statutory officers are typically:

- the judicial administrator – designated as "provisional judicial administrator" or "interim administrator" within the PER and PEAP and "insolvency administrator" within insolvency proceedings;
- the creditors' committee – it may be created or waived depending on the existence of certain preconditions laid down by law;
- the creditors' meeting, composed of the insolvency creditors; and
- the business recovery mediator who intervenes within the RERE procedure.

Interaction of Officers With the Directors of the Debtor

As a general rule, the declaration of insolvency deprives the insolvent's directors of their powers of administration and disposal of the assets of the insolvent estate, even if the board of directors remains in operation. The directors of the debtor are obliged to provide all the relevant information requested by the insolvency administrator, the creditors' meeting or the creditors' committee, and to provide any co-operation requested of them by the insolvency administrator.

The insolvency administrator interacts more closely with the debtor's directors, particularly in PER, or in the context of the insolvency proceedings where the management is entrusted to the debtor. In this context, the judicial administrator supervises the debtor's management, and in certain cases, consents to or intervenes in acts considered to be of special relevance.

The creditors' committee does not typically establish a direct relationship with the debtor's directors, its main role being to supervise the activity of the insolvency administrator.

The creditors' committee or the creditors' meeting (if there is no creditors' committee) must consent to legal acts that (according to CIRE) are of special importance to the insolvency proceedings.

Selection, Appointment and Replacement of Officers

Judicial administrator

The judicial administrator is appointed by the judge, who may accept the debtor's request for a specific person to be appointed on a reasoned basis (once the assumptions set out in CIRE have been met).

As a rule, the judicial administrator is chosen from among those on the official lists. The appointment of a person not included on said list can take place in duly justified cases.

The judicial administrator appointed by the court may be replaced by another person elected by the insolvent's creditors, provided that the respective legal requirements are met.

The creditors' committee

This is usually comprised of three or five members appointed by the judge, with the largest creditor as president and the others representing the various classes of claims, except for subordinated claims. Where applicable, the committee should also include a representative of the employees. The creditors' meeting has certain powers in connection with setting up, dispensing, replacing or appointing additional members of the creditors' committee.

The creditors' meeting

The creditors' meeting is comprised of all the debtor's creditors.

The business recovery mediator

The business recovery mediator is appointed by the Agency for Competitiveness and Innovation (*Agência para a Competitividade e Inovação* – IAPMEI, I.P.).

Statutory Roles, Rights and Responsibilities of Officers

Judicial administrator

Within a PER, the provisional judicial administrator must monitor the debtor's business, confirming that it is maintained, and act during the process in such a way as to ensure that in the end the creditors approve the plan that allows the business to be revitalised.

The provisional judicial administrator also has the duty to receive claims, draw up the provisional list of claims, supervise negotiations between the debtor and creditors, authorise the carrying out of particularly relevant acts, receive the vote on the plan and confirm its approval/non-approval.

Within insolvency proceedings, the insolvency administrator has several duties, including the following:

- to seize, administer and liquidate the assets and rights comprising the insolvent estate (if applicable);
- to decide whether to terminate ongoing contracts on the date of the declaration of insolvency;
- to obtain the consent of the creditors' committee or creditors' meeting when legally required;
- to draw up the insolvency plan (if applicable);
- to represent the insolvent in out-of-court and judicial proceedings regarding all patrimonial-related subjects relevant to the insolvent estate; and
- to annul acts detrimental to the insolvent estate ("claw-back actions").

Judicial administrators report to the court, the creditors' assembly and to the creditors' committee, and are liable when, in culpable breach of their legal and statutory duties, they cause damage to the insolvency creditors and/or the insolvent estate. The liability attributed to judicial administrators can be statutory, civil and/or criminal.

The creditors' meeting

The creditors' meeting has some decision-making powers, including:

- its responsibility to decide whether the insolvency proceedings will continue, with a view to liquidating the assets, or whether they will continue with a view to approving a recovery plan; and
- to approve or reject the debtor's insolvency plan.

If a creditors' committee has not been appointed, the creditors' meeting will also consent to the practice of legal acts that are of special importance to the insolvency proceedings (such as the sale of the company, its establishments or all its stock, the purchase of real estate, the execution of new long-term contracts, etc).

The creditors' committee

The creditors' committee's main functions are:

- supervising the work of the insolvency administrator and co-operating with the administrator in the performance of their duties; and

- consenting to the practice of legal acts that (according to CIRE) are of particular importance to the insolvency proceedings.

The business-recovery mediator

The mediator provides technical assistance within the RERE procedure, particularly in the negotiations phase.

2. Creditors

2.1 Types of Creditors

According to CIRE, there are two criteria by which to classify creditors:

- the moment of claim constitution (claims against the insolvent estate v insolvency claims); and
- the nature of the claim (secured, preferential, common or subordinated).

Claims Against the Insolvent Estate v Insolvency Claims

The structural difference between claims against the insolvent estate and insolvency claims is as a rule based on the following criterion:

Claims against the insolvent estate

Claims against the insolvent estate are the court fees of the insolvency proceedings; the insolvency administrator's fees; the debts arising from the administration, liquidation and distribution of the insolvent estate; debts arising subsequent to the declaration of insolvency and from agreements that cannot be or have not been terminated by the insolvency administrator, ie, essentially the claims that arise from events that occurred after the insolvency declaration.

The claims against the insolvent estate are paid in full when due and do not need to be claimed within the insolvency proceedings.

These claims benefit from priority over the insolvency claims. It must be ensured that the insolvent estate has sufficient means to pay the remaining claims against the insolvent estate, namely, the fees of the insolvency administrator and the court costs.

Insolvency claims

Insolvency claims are those that arise from events that occurred before the date of the declaration of insolvency. They are paid according to the insolvency proceeding rules (paritas creditorum principle), considering their nature and type. These claims must be made before the insolvency administrator within the insolvency proceeding, otherwise they cannot be paid in said proceeding.

Secured, Preferential, Non-preferential and Subordinated Insolvency Claims

Insolvency claims are usually ranked according to their substantive nature. The rule is that the settlement of these claims takes place according to this classification and only once all claims of a higher rank have been paid in full.

Therefore, within insolvency proceedings, the creditors' priority waterfall is as follows:

- Secured claim – this is a claim guaranteed by a specific asset. A claim benefiting from special credit privileges (ie, privileges over specified assets of the debtor) is handled as a secured claim. This will be paid in advance of the claims of other secured or preferential creditors, from the proceeds of the sale of the assets subject to the security.

- Preferential claim – this is a claim arising from general credit privileges (ie, privileges over the generality of the assets of the debtor) and will be paid in advance of the claims of unsecured creditors, and pro rata within the same category (the law provides for precedence between several general credit privileges), from the proceeds of the sale of the assets of the debtor.
- Non-preferential claim – also called a "common" or "ordinary" claim, this is the residual classification for claims that do not benefit from a guarantee or privilege and are not subordinated, and will be paid pro rata within the same category.
- Subordinated claim – subordinated claims are those that will only be paid when all the non-preferential credits are fully satisfied. The subordination can arise either from a contractual arrangement or legal determination. The law also establishes a ranking between subordinated claims of different types (eg, shareholder loans are the last claims to be paid).

Each class of creditor has the right to be paid in accordance with the priority waterfall above.

2.2 Priority Claims in Restructuring and Insolvency Proceedings

Within the context of insolvency proceedings, there are some cases where priority claims prevail over others within the same category, or for some reason benefit from special treatment.

For instance:

- Creditors who finance the activity of the company within the PER or within the execution of the recovery plan (interim financing), have a credit over the insolvent estate and/or (under certain conditions) benefit from general movable credit privilege, graduated before the general movable credit privilege granted to employees. This privilege extends to credits resulting from interim financing granted by creditors, partners, shareholders and any other persons specifically related to the company.
- As mentioned in **2.1 Types of Creditors**, claims against the insolvent estate (such as court fees of the insolvency proceedings; the insolvency administrator's fees; debts arising from the administration, liquidation and distribution of the insolvent estate; debts arising subsequent to the declaration of insolvency and from agreements that cannot be or have not been terminated by the insolvency administrator) will be paid as they fall due.
- Tax and social security credits held by the Portuguese Republic cannot be subject to a haircut in a PER or in a recovery plan.
- A representative of the employees having insolvency claims will be nominated by the judge as a member of the creditors' committee, regardless of the value of the credit.
- In the context of the PER, if certain requirements are met, creditors can be classified according to the existence of sufficient common interests, regardless of the ranking resulting from the application of the general rules.

2.3 Secured Creditors

Liens and Security

In Portuguese law, there is a variety of liens and security that can be placed on the debtor's assets, most notably the following:

Mortgages and pledges

Creditors can take security over real estate and movable property subject to public registration

(cars, boats and aeroplanes) through mortgages, which are subject to public registration.

Movable property that is not subject to public registration (eg, intellectual property, shares, bank accounts and financial instruments) is commonly used as security through the creation of a pledge.

Mortgages and pledges confer on creditors the right to be paid ahead of common creditors up to the value of the mortgaged/pledged property belonging to the debtor or a third party.

Retention of title

Retention of title is mostly used by trade creditors and suppliers, allowing them to maintain title over goods supplied until the debt is fully discharged. Retention of title is also commonly used to take security over vehicles, because this security can be publicly registered.

Financial collateral

Financial instruments and cash in bank accounts can be provided by a borrower to a lender under a financial collateral arrangement that benefits from special treatment upon the insolvency of the debtor.

Rights and Remedies

Enforceability of liens and security

Secured creditors will, in principle, be able to enforce their liens/security in a restructuring/insolvency process and will not be allowed to enforce such rights outside that process.

It is important to highlight that, as a rule, inter-creditor covenants will not limit the enforceability or the discretion of secured creditors in restructuring or insolvency scenarios, even if the breach of such covenants can trigger bilateral claims between creditors.

Stay in security enforcement

Secured creditors are subject to a general stay in formal insolvency/restructuring proceedings, which is automatically triggered by the judicial decision declaring the insolvency, or appointing a provisional officer for the debtor, respectively.

Special procedural protections and rights

In addition to the right to be paid ahead of other creditors from the proceeds of the sale of the secured asset, a secured creditor who has a guarantee in rem over the asset to be sold shall be told about the type of sale and be informed of the base price or the price of the planned sale of a specific entity and has the right to be compensated if it proposes the purchase of the asset by the secured creditor itself or by a third party for a price higher than that of the planned sale or of the base price, should the sale occur at a lower price. Furthermore, creditors with a guarantee in rem may receive compensation for damages emerging from the delay in the sale of the assets subject to security, unless such delay is attributable to them.

Right to block restructuring/insolvency plans

Any creditor can challenge a formal restructuring/insolvency plan by claiming that the end result will be less favourable for its interests when compared with the hypothetical absence of such a plan. As a result, secured creditors can block restructuring and insolvency plans that do not give them privileged distribution when compared to a no-plan scenario.

2.4 Unsecured Creditors

Restructuring proceedings, and insolvency proceedings in particular, restrain the exercise of creditors' patrimonial rights outside the proceedings.

While the insolvency proceedings are pending, the insolvency creditors may only exercise their patrimonial rights in said proceedings, which means that the exercise of rights such as retention of title or set-off can only be carried out in accordance with CIRE rules, as follows.

The holders of retention of title are generally handled as secured creditors (although recently Decree-Law No 48/2024 has established that the right of the holder of a retention of title over an immovable asset to be paid with preference over other creditors only applies in cases where the claim ensures the reimbursement of expenses to maintain it or increase the value of the asset). Setting-off is limited by virtue of the declaration of insolvency. It is only lawful where the legal requirements for the setting-off were met prior to the declaration of insolvency or if the insolvency claim became enforceable prior to the counterclaim of the insolvent estate. Subordinated claims may never be subject to setting-off.

In a PER, after the appointment of the provisional judicial administrator, pending enforcement actions against the debtor are suspended and creditors are prevented from requesting new enforcement proceedings. This means that creditors may use the general means at their disposal to exercise their rights against the debtor in the PER, except for those that determine the enforcement of their claim.

3. Out-of-Court Restructuring

3.1 Out-of-Court Restructuring Process

Out-of-court restructuring agreements may be obtained through the conversion of credits into share capital or through a RERE procedure which has the following principal characteristics.

Subject and Scope of the Procedure

Conversion of credits into share capital

This regime aims to restructure the company financially through the elimination of (all or part of) its liabilities, by giving creditors the right to force the shareholders of certain companies to consider proposals to convert their claims into share capital.

Filing a RERE

A RERE is aimed at corporate companies that are in financial stress or an imminent insolvency situation but are nevertheless able to recover.

A RERE depends on the initiative of the debtor accompanied by unrelated creditors representing 15% of its liabilities.

The Procedure and Duties of the Parties

Conversion of credits into share capital

The proposal to convert credits into capital depends on some assumptions, namely:

- Relating to the value of the company's equity and the value of outstanding claims –
  - (a) the company's equity must be below the share capital; and
  - (b) non-subordinated claims against the company amounting to more than 10% of the total non-subordinated outstanding claims are in default for more than 90 days or, in the case of instalments of partial reimbursement of capital or interest, provided that they relate to non-subordinated claims with a value exceeding 25% of the total non-subordinated claims.
- It must be supported by a report drawn up by a certified auditor showing that legal assumptions have been verified.
- Shareholders always have priority in capital increases, on the grounds that the increase

must be made in cash, which must be used to redeem the credits that, under the terms of the proposal, would be converted into capital.
- The general meeting must be held within 60 days of receiving the proposal for its appreciation and decision making.
- If the general meeting is not held or the proposal is not approved, the creditors can apply for judicial authorisation to the court with jurisdiction over the insolvency proceedings, as long as the legal requirements are met.

Filing a RERE
- The debtor has no duty to file a RERE, but if a debtor and its creditors want the negotiations aimed at reaching a restructuring agreement to have the effects of a RERE, they must sign a negotiation protocol and deposit it in the Commercial Registry Office.
- The negotiating period cannot exceed three months from the date of the request for deposit of the protocol.
- During negotiations until the agreement is signed and executed, the relationship between the parties is governed by duties of co-operation and good faith.
- Creditors who decide to take part in the protocol cannot withdraw from the commitments undertaken in it before the deadline for negotiations has expired, unless there has been a gross breach by the debtor of its duties.
- Once the negotiation protocol has been deposited, the debtor must maintain the normal course of business and is prevented from carrying out acts of special relevance, unless duly authorised by the creditors.
- With the submission of the protocol or during the negotiations, the debtor may request the support of a business recovery mediator, who provides technical assistance, particularly during the negotiations phase.
- The protocol has effects on pending legal proceedings, namely, by suspending the insolvency proceedings and extinguishing any enforcement actions brought against the debtor.
- Suppliers of services essential to the debtor's activity are prevented from interrupting the supply of these services during the period of negotiations, for debts for services rendered prior to the deposit of the protocol.
- The effects of the protocol are not binding on creditors who are not involved in the negotiation process.

3.2 Legal Status

Conversion of credits into share capital – if the shareholders do not exercise their right of pre-emption, they may be disadvantaged by the entry of new partners into the debtor's share capital.

Filing a RERE only binds the signatory parties which means the RERE cannot be imposed on, or modify, any rights of non-subscribers.

4. Statutory Restructuring, Rehabilitation and Reorganisation Proceedings

4.1 Opening of Statutory Restructuring, Rehabilitation and Reorganisation

Considering the residual use of the RERE, the focus of this section will be the PER.

The PER is designed for corporate entities that are in a difficult economic situation or in a merely imminent insolvency situation, but still susceptible to recovery. It is a voluntary procedure.

A PER is initiated through an application to the court subscribed by the debtor (who must be a

corporate entity) and creditors representing at least 10% of non-subordinated credits (or a lower percentage in certain, limited cases), expressing their willingness to engage in negotiations.

Alternatively, a PER may also be initiated through the submission by the company of an out-of-court recovery agreement signed by the debtor and creditors representing one of the majorities needed to approve a recovery plan. In this case, the PER is a shorter procedure.

4.2 Statutory Restructuring, Rehabilitation and Reorganisation Procedure

Upon receiving the application and relevant documents for the PER, the court appoints a provisional judicial administrator ("PA"). This appointment is notified to the company (the debtor) and published online.

As from the date of the appointment of the PA, for a four-month period, which can be extended for another month ("standstill period"):

- all pending enforcement proceedings against the debtor are stayed;
- all insolvency proceedings against the debtor are stayed (as long as no judgment declaring insolvency has been handed down); and
- all limitation and prescription periods applicable to the company are suspended.

After the appointment of the PA, the process is as follows:

- creditors have 20 days to lodge their claims;
- the PA issues a provisional list of claims;
- any creditor may challenge the provisional list of claims; and
- the court rules on any challenges.

Once the deadline to challenge the provisional list of claims has passed, out-of-court negotiations are initiated between the debtor and the creditors.

The negotiation period lasts for two months and may be extended once for one month, upon prior written agreement entered into by the PA and the debtor.

As to the content of the recovery plan:

- any right or claim may be restructured according to the recovery plan (except tax and social security claims), including the rights or claims of dissenting creditors;
- it may include, among other things, a cram-down of the credits and/or the restructuring of repayment conditions, the provision of collateral and the transfer of assets to creditors; and
- it may provide that some contracts will be signed to obtain new money required for the continuation of the business, which may be secured with liens/security by assets of the company (both the agreement to accept new money and its liens are immune to annulment in the case of a subsequent insolvency declaration).

The PER is usually concluded within six to eight months in its standard form, and two to four months in its shorter form. The PER is publicly available for consultation by interested parties.

4.3 The End of the Restructuring, Rehabilitation and Reorganisation Procedure

The PER has the following possible outcomes:

- Approval of the recovery plan – If the approved recovery plan is confirmed by the

court, the recovery plan will bind all creditors, even the ones who have not filed their claims, or participated in the negotiations, or voted for (or against) the recovery plan.
- Non-approval or non-confirmation of the recovery plan – If the recovery plan is not approved by the legal majority of creditors, or if it is approved, but not confirmed by the court, the PER is terminated.

In the scenario of approval and confirmation of the recovery plan, if the debtor fails to comply with the recovery plan for more than 15 days as of receiving written notice from any creditor, any moratorium or waiver provided for in the recovery plan ceases to be effective. Thus, creditors may request the company's declaration of insolvency.

4.4 The Position of the Debtor in Restructuring, Rehabilitation and Reorganisation

The debtor may continue to operate its business during the PER under the PA's supervision. The PA's prior written authorisation is required for "acts of special importance" (ie, any act that may materially impact the company's viability or the creditors' rights, such as the sale of the business or relevant assets, acquisition of property, conclusion of long-term agreements, assumption of liabilities and provision of collateral). Without the PA's approval, said transactions have no effect.

Moreover, the debtor is required to refrain from acting in a way that could negatively affect the creditors' rights, guarantees and repayment prospects, or in any other way that is detrimental to the value of its assets.

The debtor may borrow money or seek funding during the PER. Such credits benefit from a statutory right of lien as described in **2.2 Priority Claims in Restructuring and Insolvency Proceedings**.

4.5 The Position of Office Holders in Restructuring, Rehabilitation and Reorganisation

As mentioned before in **1.3 Statutory Officers** under "Statutory Roles, Rights and Responsibilities of Officers", the office holder or PA in a PER is mainly responsible for:

- receiving the creditors' claims and drawing up the provisional list of claims;
- guiding and supervising negotiations between the debtor and its creditors;
- deciding whether to authorise "acts of special importance" to the debtor; and
- issuing an opinion on the debtor's economic situation.

4.6 The Position of Shareholders and Creditors in Restructuring, Rehabilitation and Reorganisation

Creditors' Position

During a PER, creditors (whose categories are referred to in **2.1 Types of Creditors** under "Secured, Preferential, Non-preferential and Subordinated Insolvency Claims") have the right to:

- lodge their claims;
- challenge the provisional list of claims;
- negotiate the recovery plan;
- vote on the recovery plan; and
- request the non-confirmation of the plan by the court if –
  (a) their situation under the plan is likely to be less favourable than that in which they would find themselves in the absence of any plan; or

(b) the plan provides any creditor with an economic value greater than the nominal amount of its claims.

No creditor (except those with claims arising from employment contracts) can enforce their claims against the debtor during the four-month period after the appointment of the PA in the PER ("standstill period"). During the same period, no creditor can carry out insolvency proceedings against the debtor.

Also, creditors cannot unilaterally refuse to comply with, settle, anticipate or amend essential executory contracts to the detriment of the debtor, in relation to debts constituted before the standstill period, when the only reason is non-payment.

During the PER, the exercise of set-off rights by creditors is a matter of controversy, especially whether such set-off rights are subject to general civil law rules or insolvency's more restrictive provisions. Moreover, set-off is subject to the prior authorisation of the PA if it qualifies as an act of special importance.

Claims against the debtor may be traded during the PER, subject to general civil law rules.

Secured Creditor Liens and Security Arrangements

Creditor liens and security arrangements may be released or affected by an explicit statement in the recovery plan, subject to the equal treatment of creditors, and provided no creditor is worse off than the others.

On this topic, it is important to highlight the priority of new money. Where this is required for the continuation of the business, it may be secured with liens/security. Both the agreement to accept new money and its liens are immune to annulment in the case of a subsequent insolvency declaration. These investments/loans may be secured by assets of the company, even if such assets are encumbered by pre-existing secured creditor liens/security, although the original creditor benefits from priority in the enforcement of that security.

Moreover, the CIRE grants new money creditors a statutory right of lien over all the debtor's current assets, ranked above the right of lien granted to employees, which is extended to the PER.

Equity Owners' Status

The recovery plan does not, in general, change the company's ownership structure, and equity owners usually retain their interest in the company.

Equity owners should be the first to bear the losses of the company in a situation of financial distress; therefore, it is unusual for them to receive any dividends, or any other payment, from the company while the recovery plan is in force.

5. Statutory Insolvency and Liquidation Procedures

5.1 The Different Types of Liquidation Procedure

The Liquidation Proceedings

Insolvency proceedings are universal enforcement proceedings aimed at satisfying creditors by liquidating the insolvent debtor's assets and distributing the proceeds to creditors.

The criterion for initiating a procedure is insolvency, defined as the inability of the debtor to fulfil its obligations as they fall due, or a situation

where the liabilities of the debtor clearly exceed its assets.

The Subjective Scope of the Proceedings

Insolvency proceedings, which apply to both individuals and corporate entities in Portugal (with some differences), usually commence via the lodging of an application in court, which can be filed by the debtor, the creditors or the Public Prosecutor's Department.

Filing for insolvency may be an obligation, once the assumptions foreseen in the law are met.

5.2 Course of the Liquidation Procedure

The Effects of the Proceedings on the Debtor and on Ongoing Contracts

Once insolvency proceedings have begun, the debtor remains in place, as does its management, unless precautionary measures are requested – namely, the appointment of a PA with exclusive powers to manage the debtor's assets, or to assist the debtor in its management.

Contracts in force will, in principle, continue to be executed under the terms in which they were contracted until the insolvency is declared.

Interests at Stake in the Liquidation Proceedings

In insolvency proceedings, particularly if the debtor is to be liquidated, the interests to be defended are those of the creditors.

To this extent, the role of the insolvency administrator, whose mission is to liquidate the insolvent estate and pay the creditors, is particularly relevant.

The debtor has an obligation to co-operate with the insolvency administrator in this mission, as do the other insolvency bodies, such as the assembly and the creditors' committee.

5.3 The End of the Liquidation Procedure(s)

The liquidation proceedings may end in various situations listed in Portuguese law, such as:

- final pro-rata payment to creditors at the end of the liquidation; or
- a final judgment declaring the insufficiency of the insolvent estate, which means that it is insufficient to pay the costs of the proceedings and the estate's debts and no creditors of the insolvency will be paid.

5.4 The Position of Shareholders and Creditors in Liquidation

Insolvency affects creditors – both secured and unsecured – as well as the insolvent's shareholders.

Shareholders

One of the most important consequences of insolvency for the debtor's shareholders stems from the fact that the insolvency plan may provide for the share capital to be reduced to zero followed by a subsequent capital increase ("harmonium operation"), with the previous shareholders being deprived of ownership of the debtor's shares.

The typical means that shareholders have to defend their rights in insolvency proceedings are to file an opposition to the judgment declaring insolvency ("embargo") and to request the non-approval of the insolvency plan.

Creditors

The insolvency declaration may lead to the extinction of guarantees and credit privileges (provided that certain legal conditions are met).

In cases where guarantees and privileges are not extinguished by the declaration of insolvency, other relevant effects of insolvency on ongoing business are foreseen in the CIRE. The existence of guarantees for the fulfilment of these deals must be analysed on a case-by-case basis, since the solution to be given depends on the position that the insolvent takes in the deal.

Secured creditors are paid out of the proceeds of the sale of the secured assets, being able to purchase those assets, and are always consulted in the selling process. However, secured (or unsecured) creditors cannot prevent the insolvency administrator from liquidating the assets of the insolvent estate under the terms the administrator deems most appropriate.

In the liquidation phase, it is difficult to block or frustrate the proceedings, since the insolvency administrator, despite having a duty to consult the secured creditors and having to seek the consent of the creditors' committee to carry out particular relevant acts, has complete power to liquidate the debtor's assets and pay the creditors as quickly as possible.

The effects of the declaration of insolvency are maintained throughout the proceedings, whether they are for approval of a plan or for liquidation. Thus, there is no automatic or discretionary suspension of enforcement proceedings or of rights or liens, other than that provided for in the general terms already mentioned.

6. Cross-Border Issues in Insolvency

6.1 Sources of International Insolvency Law

The Portuguese law applicable to cross-border insolvencies varies according to whether the other country is:

- within the EU – in which case Regulation (EU) 2015/848 of the European Parliament and of the Council, of 20 May 2015, on insolvency proceedings applies; or
- a third country (outside the EU) – in which case the CIRE applies.

6.2 Jurisdiction

Both under Regulation (EU) 2015/848 and the CIRE, the place regarded as the centre of the debtor's main interests is the criterion used to determine which country has jurisdiction to open the main restructuring or insolvency proceedings. This means that the competent court will be the court of the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.

6.3 Applicable Law

Both under Regulation (EU) 2015/848 and the CIRE, the law applicable to insolvency proceedings and their effects will be that of the state within the territory of which such proceedings are opened, except where both regulations provide otherwise (eg, the law governing the third parties' rights in rem, set-off, and contracts relating to immovable property, among others).

6.4 Recognition and Enforceability

The procedures provided by Portuguese law for the recognition of a declaration of insolvency and the enforceability of foreign judgments

against the debtor vary according to whether the decision was issued within the EU or in a third country.

Within the EU

The effects of restructuring or insolvency proceedings opened in EU member states (excluding Denmark) and all related decisions adopted by member states' courts are automatically recognised and enforceable in Portugal, and are not reviewed by the Portuguese courts, which means that the decision regarding the insolvency produces the same effects in Portugal as under the law of the state where the proceedings were opened ("principle of mutual trust").

In spite of this, it may be necessary to present a request in court for the purpose of registering a foreign declaration of insolvency in the Portuguese Land Register and Insolvency Register.

However, the aforementioned general rules do not apply in certain cases.

Third Countries

Decisions rendered in proceedings opened in third countries will be recognised in Portugal, after revision and confirmation by a Portuguese court, and verification that the foreign court/authority's competence is based on the place where the debtor is domiciled or has its main interests, or an equivalent rule, and that the recognition will not bring about a result that offends the basic principles of Portuguese jurisdiction. This rule applies to insolvency declarations and all related decisions.

After recognition, the decisions rendered within a foreign insolvency proceeding may be enforced in Portugal.

6.5 Co-ordination in Cross-Border Cases

As per the information available, no protocols or other arrangements have been entered into with foreign courts to co-ordinate cross-border proceedings.

However, within the EU, Regulation (EU) 2015/848 establishes some co-ordination mechanisms, namely, concerning cases where main and secondary insolvency proceedings in relation to the same debtor co-exist, which may occur when the debtor has an establishment within the territory of a member state other than the one where the insolvency proceeding was initiated.

6.6 Foreign Creditors

Under insolvency or restructuring proceedings, foreign creditors are dealt with in the same way as Portuguese creditors, except for specific matters. The most relevant difference concerns the rules regarding creditors' notification.

7. Duties and Liability of Directors and Officers

7.1 Duties of Directors

General Statutory Duties

Directors of companies have the following general statutory duties.

Duty of care

The director shall (i) be available; (ii) have the skills and knowledge of the activity of the company adequate to their duties; and (iii) use in the performance of their functions the diligence of a cautious, thorough, and organised businessperson.

Duty of loyalty

The director shall act in the interest of the company, giving heed to the long-term interests of partners and considering the interests of the other company stakeholders (persons relevant for the sustainability of the company, such as its employees, clients and, last but not least, creditors).

Shift in Directors' Loyalty and Fiduciary Duties

It is generally understood that an insolvency or a potential insolvency situation should shift the directors' loyalty and fiduciary duties more towards the creditors' interests and the interests of other stakeholders, which should outweigh, for instance, the interests of the shareholders of the company.

There is no exact moment in time determining when this shift in the interests the director must take into account occurs. However, the following apply.

- An insolvent company has a legal obligation to file for insolvency within 30 days of the date it becomes (or should reasonably have become) aware of its situation of insolvency as a result of the cash-flow test (being unable to perform its obligations as they fall due). The initiative for filing for insolvency is the responsibility of the governing body in charge of the company's administration (eg, the board of directors) or, if such body does not exist, of any of its directors. If the company fails to timely submit the insolvency request there is the presumption (which can be refuted) of the existence of serious wilful misconduct by the legal or de facto directors, which can lead to the qualification of the insolvency as culpable.
- According to CIRE, relevant hints of insolvency include failure to pay: tax debts, contributions to social security, debts arising from employment contracts, rental of any type, or instalments of the purchase price or mortgage loan concerning the premises where the debtor has its activity or registered office. However, other events can have similar effects, such as the failure of the company to maintain certain permits or authorisations required for the pursuit of its activity, or failure to pay an insurance premium required for an activity, etc.
- From a corporate law point of view, certain events related to the deterioration of the financial situation of the company may require the board of directors to take certain actions. For instance, where half of the share capital has been lost, the directors must immediately inform the shareholders of the situation in a shareholders' meeting, so they can take the measures deemed appropriate.

7.2 Personal Liability of Directors

Under Portuguese law, two different liabilities' regimes may apply in an insolvency context.

Company Law Liability

Under the company law regime, directors are personally and jointly liable vis-à-vis creditors if the company becomes insolvent as a consequence of the breach of provisions aimed at protecting creditors' interests.

Insolvency Law Liability

According to the regime set out by CIRE, the insolvency of a company can be qualified as culpable or fortuitous. An insolvency is considered fortuitous where it was triggered by the debtor's distressed financial situation which arose in the normal course of business. On the other hand, as a general rule, an insolvency is qualified as

culpable where the situation was created or aggravated as a result of the conduct, by action or omission, involving wilful misconduct or gross negligence, of the company or of its directors, in the three years preceding the beginning of the insolvency proceedings.

Moreover, CIRE establishes presumptions juris et de jure, whereby insolvency is always qualified as culpable. This is the case when the directors of the company have:

- destroyed, damaged, rendered unusable, hidden, or made disappear, in whole or in substantial part, the company's assets;
- artificially created or aggravated damages or liabilities, or reduced profits, causing, in particular, the execution by the company of ruinous contracts for the benefit of the company's directors or people specially related to them;
- purchased goods on credit, reselling them or delivering them in payment for substantially less than the current price before satisfying the obligation towards the credit lender;
- used the company's assets for personal benefit or for the benefit of third parties;
- exercised under the guise of the legal personality of the company an activity for personal benefit or for the benefit of third parties, and to the detriment of the company;
- used the credit or assets of the company for personal benefit or for the benefit of third parties and to the detriment of the company, namely, to promote another company in which they have direct or indirect interests;
- pursued loss-making management, for personal benefit or for the benefit of third parties, despite knowing or having ought to have known that this would likely lead to the insolvency of the company;
- failed to comply with the obligation of keeping organised accounting, maintained fictitious or double accounting of the company, or committed a fault which hindered the understanding of the financial situation of the company; or
- repeatedly violated their obligations to be at court when duly summoned and to co-operate with the insolvency proceedings.

The insolvency administrator has exclusive legal standing to bring and enforce:

- legal actions for liability that is owed by legal and de facto directors to the debtor; and
- legal actions seeking compensation for damages caused to the generality of insolvency creditors due to the reduction of the debtor's assets forming part of the insolvent estate, whether such reduction occurred before or after the declaration of insolvency.

7.3 Duties and Personal Liability of Officers

Besides directors (legal or de facto), only chartered accountants and statutory auditors are expressly mentioned by the relevant legal provision as persons that may be affected by the qualification of the insolvency as culpable, although the indication of the persons is not supposed to be exhaustive (even where insolvency is qualified as culpable when the situation was created or aggravated as a result of the conduct, by action or omission, of the company or of its directors).

Members of the supervisory board are also subject to care and loyalty duties and are also subject to company law liability under the same terms as directors, as described in **7.2 Personal Liability of Directors**. More specifically, mem-

bers of supervisory bodies will be jointly and severally liable with the company's directors for their actions or omissions in the performance of their duties when the damage would not have occurred if the members of the supervisory board had fulfilled their surveillance obligations.

7.4 Other Consequences for Directors and Officers

The qualification of insolvency as culpable produces a range of substantive effects of a civil nature in the legal sphere of the persons affected (ie, the directors). In fact, when the insolvency is deemed as culpable the court may:

- bar the directors from managing the assets of third parties for a period of between two and ten years;
- bar the directors from carrying out any commercial activity for a period of between two and ten years, including holding a position at any statutory body in any commercial or civil company, association or private foundation, public company or co-operative;
- determine the loss of any credits on the insolvency or on the insolvent estate held by the directors and order the reimbursement of the assets or rights already received by them as payment of such credits; and
- sentence the directors to compensate the creditors of the company in an amount equal to their unfulfilled claims, on a joint and several basis.

Insolvency or substantial economic damage to a company may imply criminal liability for its directors if certain circumstances are met, such as:

- Intentional insolvency – if the directors:
  (a) act with intent to injure creditors and diminish the legal entity's assets, namely destroying, damaging, rendering useless or making part of its assets disappear;
  (b) fictitiously diminish the legal entity's net equity, simulating in any way an economic situation worse than the reality, or artificially creating or worsening losses or reducing profits; or
  (c) delay insolvency proceedings, by concealing the true economic situation of the legal entity.
- Negligent insolvency – if the directors indulge in gross negligence, prodigality or grossly exaggerated expenses, ruinous speculation or serious negligence in the exercise of their activity, create a state of insolvency and, despite being aware of the economic and financial difficulties of the legal entity, do not request timely recovery measures.
- Undue preference – if the directors, knowing the state of insolvency of the legal entity or foreseeing its imminence, pay debts not yet due or pay by means other than cash or customary amounts, or provide guarantees for debts to which the legal entity was not obliged, with the intention of favouring certain creditors to the detriment of others.

8. Setting Aside or Annulling a Transaction

8.1 Circumstances for Setting Aside a Transaction or Transfer

Transactions executed before the beginning of the insolvency proceedings that diminish, hinder, obstruct, jeopardise or delay the satisfaction of insolvency creditors may be annulled and/or terminated and the assets returned to the insolvent estate, provided that the counterparty acted in bad faith (ie, was aware of the situation of insolvency, of the commencement of insolvency proceedings, or that the insolvency was imminent

and that the transaction was detrimental to the insolvent estate).

Bad faith is presumed in the case of transactions between related parties. Specific transactions (eg, agreements with no consideration for the insolvent, the repayment of obligations not yet due, the encumbrance of assets to secure pre-existing obligations, or the reimbursement of shareholders' contributions in the year before the beginning of the insolvency proceedings) may be annulled and/or terminated, regardless of bad faith.

However, this action is subject to a look-back period of two years before the onset of the insolvency proceedings, which means that any act that took place more than two years before the onset of the insolvency proceedings cannot be set aside.

This remedy applies to transactions that are valid and to which the debtor is contractually obliged. If there are other grounds for the annulment or cancellation of a transaction, general rules are applicable.

8.2 Claims to Set Aside or Annul a Transaction or a Transfer

The insolvency administrator is responsible for annulling transactions by sending notice to the relevant counterparty, within six months of the acknowledgement of the transaction, but no later than two years after the insolvency declaration (except if the transaction has not yet been performed, in which case, the annulment may be declared, without any time limitation, by way of defence).

The validity of the annulment of the act against subsequent transferees presupposes their bad faith, except in the case of universal successors or if the new transfer operates through a donation.

The annulment has retroactive effect and the situation that would have existed if the act had not been carried out or omitted, as the case may be, must be restored. The object provided by the third party will only be returned if it can be identified and separated from those belonging to the remaining part of the estate. When this circumstance does not occur, the obligation to return the corresponding amount constitutes a debt of the insolvent estate to the extent of the respective enrichment on the date of the declaration of insolvency, and a debt of the insolvency as to any remainder.

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