GETTING THE DEAL THROUGH

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Law Business Research

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1 Legislation

What legislation is applicable to bankruptcies and reorganisations?

In Portugal, bankruptcy and reorganisation proceedings are governed by the same code, the Insolvency and Corporate Restructuring Code (CIRE), approved by Decree-Law No. 53/2004, of 18 March, which came into force on 15 September 2004.

According to CIRE, there is a single insolvency proceeding, in which the relevant creditors (gathered in a creditors' meeting) choose between one of two possible outcomes:

- the complete liquidation of the insolvent's estate and the subsequent distribution to the creditors; and
- the company's restructuring, through the approval of an insolvency plan.

There is also an out-of-court conciliation proceeding (PEC), approved by Decree-Law No. 316/98, of 20 October, amended by Decree-Law No. 201/2004, of 18 August, and mediated by the Institute for Assistance of Small and Medium Companies and Investments (IAPMEI).

Such proceedings allow companies in financial difficulties to achieve an extra judicial reorganisation by means of an agreement between the companies and their creditors.

2 Excluded entities

What entities are excluded from general bankruptcy proceedings and what legislation applies to them?

According to article 2, paragraph 2, of CIRE, the following entities are excluded from general insolvency proceedings:

(i) public law legal persons and state-owned entities;
(ii) insurance companies;
(iii) credit institutions and financial companies;
(iv) investment companies providing services that involve holding third-party funds or securities; and
(v) collective investment undertakings.

In relation to points (ii) to (iv) above, and in accordance with the above-mentioned legal provision, insolvency proceedings are only applicable to the extent that the proceedings are compatible with the applicable special legal frameworks.

Considering insurance companies, it is important to consider Decree-Law No. 94-B/98, of 17 April, amended by Decree-Law No. 251/2003, of 14 October, and Decree-law No. 90/2003, of 30 April, which establishes a set of measures for the recovery and reorganisation of insurance companies in the case of financial insufficiency, expressly excluding the application of CIRE. Credit institutions and financial companies are subject to the liquidation proceeding foreseen in Decree-Law No. 199/2006, of 25 October.

Moreover, the dissolution and liquidation proceedings of collective investment undertakings are governed by Decree-law No. 252/2003, 17 October, and by Portuguese Securities Market Commission Regulation No. 15/2003.

3 Secured lending and credit (immoveables)

What principal types of security are taken on immoveable (real) property?

In Portugal, the principal type of security over immoveable real property is the mortgage, which consists of an agreement entered into between the debtor and its creditor, by means of which immoveable real property is used as security for the payment of the respective debt or loan.

It is important to note that the effects of a mortgage depend on its registry in the relevant land registrar's office.

Title retention is another common security over immoveable real property, which consists of a contractual provision included in a sale and purchase agreement, whereby the seller retains the property right over the sold good until certain obligations are fulfilled by the buyer (usually the payment of the purchase price).

It is also important to take into consideration the right of detention, a contractual or legal security, which gives the creditor the right to retain possession of a particular asset belonging to the debtor until payment is obtained, as well as the right to request the judicial sale of such good, and to be paid with priority out of the sale proceeds.

4 Secured lending and credit (moveables)

What principal types of security are taken on moveable (personal) property?

In Portugal, the most common type of security over moveable personal property is the pledge. Such security consists of a deposit on personal property belonging to the debtor and delivered by the same to its creditor as a security for a debt or loan until the respective payment.

Portuguese law accepts that the parties may stipulate that the sale of the pledged good is made out of court.

Title retention and the right of detention (see question 3) may also apply to moveable personal property.

5 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available? Do any special procedures apply to foreign creditors?

To answer this question it is relevant to distinguish between two different scenarios, namely, before and after the declaration of insolvency.

In Portugal, before the debtor's declaration of insolvency, unsecured credits may, naturally, be enforced. However, for such purpose the creditors shall necessarily have the respective enforceable title (eg, a judgment ordering the payment, a cheque, a bill of exchange or any other document signed by the debtor as a recognition of his debt).

For specific and exceptional situations, defined in articles 406 to 411 of the Portuguese Civil Code, the courts may grant protection to creditors by means of a pre-judgment (concerning restraining orders,

attachments, etc). However, this protection is temporary and depends on the court's main and final decision.

Notwithstanding the above, it is important to stress that, in the Portuguese judicial system, enforcement proceedings are extremely time-consuming. This, however, does not happen, for example, with pre-judgement attachment proceedings, due to their urgent nature.

After the declaration of insolvency, all pending lawsuits concerning the insolvent's assets and all the lawsuits exclusively related to property issues (filed against the debtor) shall be appended to the insolvency proceeding, once the insolvency administrator requests such appending. On the other hand, and as foreseen in article 88, paragraph 1 of CIRE, the declaration of insolvency determines the suspension of all the enforcement measures.

We may conclude that, according to Portuguese law, after the declaration of insolvency, unsecured creditors may not enforce their rights outside of the insolvency proceeding. The declaration of insolvency precludes the initiation or continuation of enforcement proceedings against the debtor.

There is, nevertheless, an exception – an insolvency with limited features. In accordance with article 39, paragraph 1 of CIRE, whenever the judge concludes that the debtor's assets are not sufficient for the payment of the proceedings' costs and of the insolvent estate's debts, he declares the insolvency although its effects cease right afterwards, as well as all the limitations concerning filing lawsuits.

6 Courts

What courts are involved in the bankruptcy process? Are there restrictions on the matters that the courts may deal with?

The insolvency proceeding must be filed in the court where the debtor's head offices or domicile are located. Such proceedings may also be filed in the court of the location of the centre of its main interests (COMI), that is, in the place where he usually administers his affairs.

Such petition shall be filed in a specific commercial court (eg, Lisboa, Sintra, Vila Nova da Gaia) whenever the geographical jurisdiction of such a court encompasses the relevant area. Otherwise, the insolvency proceeding shall be filed in the general district court whose geographical jurisdiction covers such area.

7 Voluntary liquidations

What are the requirements for a debtor commencing a voluntary liquidation and what are the effects?

The debtor is considered to be insolvent when he is not able to comply with his obligations that are due.

The debtor shall file the insolvency proceeding within 60 days from the moment he became aware of his insolvency. Moreover, the voluntary insolvency petition must include the following information:

- an indication as to whether the insolvency situation is existing or imminent;
- identification of the company's directors and of its five major creditors;
- the debtor's commercial certificate issued by the commercial registry office, or the debtor's civil certificate issued by the relevant civil registry office;
- a list of all the known creditors and details of all pending lawsuits against the debtor;
- a comprehensive explanation of the company's activities over the previous three years, as well as all the debtor's establishments;
- identification of all the debtor's shareholders and associates and of those who may be liable for the company's debts;
- a list of all the company's assets and rights, regardless of their nature;
- all the accounting books of the company;
- a list of all the debtor's employees; and
- a document that demonstrates the representation powers of the directors, as well as the resolution that approved the insolvency proceedings.

After the filing of the aforementioned petition, the declaration of insolvency has to be issued within three subsequent working days of the debtor realising his insolvency.

8 Involuntary liquidations

What are the requirements for creditors placing a debtor in involuntary liquidation and what are the effects?

The insolvency proceeding may be filed by any of the creditors, regardless of the nature of their credits, as well as by any person who is responsible for the debtor's debts and by the public prosecutor.

In order to demonstrate the insolvency situation of a particular debtor (the test of insolvency), at least one of the following requirements should be met:

- general default of the debtor on its payments and obligations;
- the disappearance of the company's directors or shareholders, or the abandonment of the debtor's head office or main establishment, due to its liquidity problems and without an appropriate substitute being appointed;
- dissipation, abandonment and rushed or ruinous liquidation of the company's assets and fictitious constitution of credits;
- debtor's failure to pay, within six months of the filing of the involuntary insolvency, one or all of the following:
  - tax liabilities;
  - social security obligations;
  - monetary employment obligations;
  - any rent, leasing, purchase or loan contract secured by a mortgage regarding the premises of the company; and
  - in certain cases, when liabilities clearly exceed the company's assets according to the last approved balance sheet or when there is a delay of at least nine months in approving the accounts of the company.

Moreover, filing by a third party or creditor must include the following elements, if the information is available:

- the identification of the company's directors and of its five major creditors; and
- the debtor's commercial certificate issued by the commercial registry office, or the debtor's civil certificate issued by the relevant civil registry office;

However, even after the eventual declaration of insolvency, the liquidation of the debtor's assets is not a definite outcome. In fact, as referred above, after the declaration of insolvency all creditors gather in a creditors' general meeting in order to choose between a liquidation of assets and the company's restructuring (through the approval of an insolvency plan).

9 Voluntary reorganisations

What are the requirements for a debtor commencing a financial reorganisation and what are the effects?

As mentioned above, there is a single insolvency proceeding in which the respective creditors choose between a liquidation of assets and the company's reorganisation. Both proceedings start with the same formalities and requirements.

It is, however, important to stress that an insolvency plan may be prepared by the debtor itself and filed in the proceedings. The specific issues related to the insolvency plan will be analysed below.

10 Involuntary reorganisations

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects?

There is a single insolvency proceeding in which the respective creditors choose between a liquidation of assets and the company's reorganisation. Both proceedings start with the same formalities and requirements. It is only important to stress that an insolvency plan may be prepared and submitted by any creditor or group of creditors whose credits represent at least one-fifth of the total credits approved by the court or listed in the creditor's provisional list.

11 Mandatory commencement of insolvency proceedings

Are companies required to commence insolvency proceedings in particular circumstances? If proceedings are not commenced, what liabilities can result?

Whenever the directors (and shadow directors) of a company become aware or ought to become aware of the insolvency, they have a legal obligation to file for insolvency within 60 days of acquiring such knowledge. This legal obligation is also applicable when the insolvency situation is imminent.

Directors who fail to perform this obligation are presumed responsible for the insolvency. Such presumption is refutable, but the burden of proof lies with the directors.

If the court considers the directors responsible for the insolvency, it can order their legal incapacity and prevent them from performing any commercial activities, including acting as directors, for two to 10 years. The court may also order that such directors cannot in any circumstances be considered as creditors of the insolvent company, and make them pay back to the insolvent estate any amounts already received by the same as a result of any personal claim against the insolvent company.

12 Doing business in reorganisations

Under what conditions can the debtor carry on business during a reorganisation? What conditions apply to the use of assets and to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities?

The debtor can apply to restructure the company by presenting an insolvency plan. Such plan may be defined in a very free and flexible way to allow the debtor to carry on business during the reorganisation without restrictions.

Thus, as long as such plan is agreed to by the majority of the creditors and accepted by the court it will be valid and will be in effect. Unless the approved plan clearly provides thus, creditors' rights secured by guarantees in rem cannot be affected by it.

Once approved and validated by the court and any possibility of appeal has been exhausted, the insolvency procedure ends unless the plan stipulates otherwise. In practice, it is not common that when a restructuring is approved the debtor retains the sole administration of its assets. Usually it is defined in the plan that the debtor's activity is supervised by the insolvency administrator appointed by the court and under supervision of the creditors' committee.

It is also common to stipulate that the debtor may not assume any obligation without the previous agreement of the insolvency administrator when it comes to acts out of the ordinary course of business.

Regarding acts in the ordinary course of business, it is usually stipulated that the debtor may act freely unless the insolvency administrator objects.

An exception to this is any situation is when sales have already been provided for under an approved restructuring plan.

In order to protect the creditors who continue to supply goods and services after the insolvency plan is approved, the suppliers must ensure that the plan provides for such credits to be paid first if new insolvency proceedings are filed against the debtor before the plan is accomplished.

13 Rejection and disclaimer of contracts in reorganisations

Can a debtor undergoing a reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party?

A debtor undergoing a reorganisation cannot reject or disclaim an unfavourable contract. Contracts remain valid and enforceable. However, it is common that pre-filing obligations may be restructured under an approved plan.

Nevertheless, before the filing of an insolvency plan aiming for restructuring, and almost immediately after the insolvency declaration by the court, the insolvency administrator may have a relevant role due to the effect that the insolvency declaration has on contracts.

The insolvency declaration suspends compliance with bilateral contracts that are not yet fully complied with by any of the parties.

It is for the insolvency administrator to decide which of those contracts shall be executed or not fulfilled. If the administrator does not decide in due time, the other party to the contract may settle a reasonable time limit for the insolvent administrator to make that decision. If there is no answer, the contract is deemed not fulfilled.

If a contract is not fulfilled, none of the contracting parties may ask for the restitution of what was already provided. If the insolvent company has complied with its obligation and the other party has not, the insolvent estate may ask for its compliance or its value. If the insolvent company has not complied with its obligation, the other party is entitled to claim its value within the insolvency proceedings. The compensation for the losses caused by not complying with the contract also constitutes a credit over the insolvency.

Besides establishing such general principles, there are specific provisions applicable to the following contracts. These are:

- purchase and sale;
- promissory contract;
- future contracts;
- lease;
- mandate;
- rendering of services;
- proxies;
- pledges and assignment of credits;
- consortium and other forms of cooperation;
- set-off; and
- drawing account.

Portuguese law also establishes that, in principle, any contractual clause that derogates such regime is null and void.

14 Sale of assets

In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets? In practice, does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

In liquidations, the sale of specific assets out of the ordinary course of business and the sale of the entire business of the debtor is done by the insolvency administrator, whose activity is controlled by the judge and by the creditors' committee. If there is no creditors' committee the designated powers remain with the creditors' general meeting.

In order to sell the entire business of the debtor or to sell any asset out of the ordinary course of business for over €10,000 representing

at least 10 per cent of the value of the entire insolvency estate, the insolvency administrator needs to obtain the creditors' consent either given by the creditors' committee or the creditors' general meeting.

The purchaser acquires the assets 'free and clear' of claims.

The concept of 'stalking horse' bids in sale procedures is not known in our system. It is possible, however, to sell through private negotiation and in such case it would be possible to obtain a similar result.

Credit bidding in sales would probably collide with the equal treatment of all creditors. As long as that rule is not violated it is possible to arrange such procedure.

15 Stays of proceedings and moratoria

What prohibitions against the continuation of legal proceedings or the enforcement of claims by creditors apply in liquidations and reorganisations? In what circumstances may creditors obtain relief from such prohibitions?

All pending enforcement proceedings against the insolvent company are suspended after the insolvency declaration.

Furthermore, any proceedings concerning assets of the insolvent company should be appended to the insolvency proceedings after the insolvency declaration. There is no relief from such prohibitions.

16 Arbitration processes in bankruptcy

How frequently is arbitration used in insolvency proceedings? What limitations are there on the availability of arbitration in insolvency cases? Will the court allow arbitration proceedings to continue after an insolvency case is opened?

Arbitration is not used in insolvency proceedings. The rule is that these proceedings must be held in state courts.

Regarding the effects of any arbitration clauses in agreements where the insolvent is a party, whenever the result of the arbitration can have an impact on the insolvency estate, Portuguese law states that the effects of such clauses are suspended, without prejudice to provisions of international treaties.

Regarding the continuation of arbitration proceedings pending when an insolvency case is opened, they should proceed but the judicial administrator shall replace the insolvent and the other party is not prevented from claiming its credit in the insolvency procedure.

An arbitration clause contained in a judicial restructuring plan or in an extrajudicial one should be enforceable, although it has not been tested yet.

Reference should be made to the the Conciliation Proceeding (PEC), approved by Decree-Law No. 316/98, of 20 October, amended by Decree-Law No. 201/2004, of 18 August, and mediated by the Institute for Assistance of Small and Medium Companies and Investments (IAPMEI).

Such proceedings are subject to the same insolvency tests and aims as an agreement between the debtor and all or some of the creditors envisaging the company's recovery. The company's shareholders may also take part in the agreement.

The parties are free to settle the agreement terms, and IAPMEI analyses the debtor's capability to fulfill the proposed agreement and monitors its execution.

If at any stage IAPMEI considers that economical recovery is not viable, it orders the termination of the proceedings.

17 Set-off and netting

To what extent are creditors able to exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?

Set-off is allowed if the amounts owed by both the insolvent company and its creditor to each other are both enforceable, due and payable.

After the insolvency declaration it is possible to set off mutual debts provided the requirements for set-off could be considered as met prior to the insolvency declaration.

However, set-off cannot be permitted if:

- the debt to the insolvent estate arose after the insolvency decision;
- the insolvency creditor acquired its right from a third party after the insolvency was declared by court;
- it regards the debts of the insolvent for which the estate is not liable; or
- it is between debts to the insolvent estate and subordinated claims against the insolvent estate.

As to set-off in restructuring, the law does not have any provision. Nevertheless it is possible to say that insolvency law does not affect the obligations that are incurred by parties after an insolvency plan is approved and during its execution and therefore the only relevant criteria would be the criteria foreseen in the general law regarding any set-off.

18 Intellectual property assets in insolvencies

May an IP licensor or owner terminate the debtor's right to use it when an insolvency case is opened? To what extent may an insolvency administrator continue to use IP rights granted under an agreement with the debtor? May an insolvency representative terminate a debtor's agreement with a licensor or owner and continue to use the IP for the benefit of the estate?

In such a situation the general rules regarding bilateral contracts should be applied as there are no specific rules as to IP agreements in CIRE. In general, clauses providing for the automatic termination of an agreement due to the opening of insolvency proceedings will be considered invalid.

19 Post-filing credit

May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is given to such loans or credit?

In order to protect the creditors who continue to supply goods and services after the insolvency plan is approved, the suppliers must ensure that the plan provides for such credits to be paid first if a new insolvency is filed against the debtor before the plan is accomplished.

In the case of liquidation, such debts would be considered as insolvency estate debts and, therefore, would be paid first.

20 Successful reorganisations

What features are mandatory in a reorganisation plan? How are creditors classified for purposes of a plan and how is the plan approved? Can a reorganisation plan release non-debtor parties from liability, and, if so, in what circumstances?

An insolvency plan may have two different purposes: the survival of the company, or part or all of its business, as a going concern; or a more advantageous realisation of its assets than would be effected in the event of a liquidation.

The insolvency plan may contemplate: a share capital increase of the insolvent company; a moratorium; or the pardon or reduction of the credits over the insolvent company (whether principal or interest).

The insolvency plan should not violate the creditors' equality of treatment principle.

The insolvency plan must be discussed and approved by two-thirds of the votes at the creditors' general meeting, provided that the creditors' general meeting is attended by creditors that represent one-third of the total voting rights.

Once approved, the insolvency plan is homologated by the court within 10 days of the assembly and produces its effects over all the credits whether or not they have been claimed and approved and whether or not the creditor has approved the plan.

The insolvency plan ceases its effects in respect to a determined credit if the debtor fails to comply, with interest, 15 days after being challenged for it by the creditor, or in respect of all the credits if the debtor is declared insolvent in a new insolvency procedure. Creditors are classified as follows, in order of priority:

- specific preferential credits (only the preferential credits that are specifically related to an asset);
- secured credits (those that are guaranteed by mortgages, pledges, among others);
- general preferential credits (the preferential credits that are not specifically related to an asset, eg, the credits related to social security or tax debts);
- common credits (all the credits not included on other types);
- subordinated credits (which shall be graduated after all the remaining insolvency credits).

It is important to mention that the insolvency plan may release non-debtor parties from liability if the creditors agree to this during the creditors' general meeting.

21 Expedited reorganisations

Do procedures exist for expedited reorganisations?

Several important changes regarding the reorganisation procedure were introduced by the new law.

In the prior legislation, the reorganisation procedure, which was a separate process from the bankruptcy process, followed strict and inflexible rules regarding the measures that could take place.

After 15 September 2004, the reorganisation procedures assume the format of an insolvency plan, which may be prepared and submitted by the debtor, by anyone responsible for the insolvent's debts, by the insolvency administrator or by any creditor or group of creditors whose credits represent at least one-fifth of the total credits claimed and recognised. It is important to emphasise that the insolvency plan can only be submitted after the insolvency declaration and after the first creditors' meeting, in which all creditors decide the future of the insolvent company.

Regarding restructuring, the insolvency plan can contain almost all the measures that the debtor, the insolvency administrator or any creditor consider relevant and useful for the success of the plan, obeying only, among other concrete requirements in very specific situations, to the main principle of equal treatment for all creditors.

22 Unsuccessful reorganisations

How is a proposed reorganisation defeated and what is the effect of the plan not being approved? What if the debtor fails to perform a plan?

The insolvency plan is submitted to the court, following a decision taken by a majority of creditors present in the first creditors' meeting.

Although the law minimises the court's intervention in the process, it also establishes a juridical control, performed by the judge, of the insolvency plan, prior to its acceptance.

Even before the creditors become familiar with the plan's content, the court has to analyse it and make a judgment about its legal admissibility.

The rejection of the insolvency plan by the court is appealable. However, its acceptance is not.

If the insolvency plan is accepted by the court, it must be discussed and approved as mentioned in question 20.

The creditors, at the general meeting, might not approve the insolvency plan and, in this case, the procedure must continue with the liquidation of all the company's assets, following the rules legally applicable.

However, if the insolvency plan is approved it is subject to another juridical control, the court's homologation as mentioned in question 20.

If the court considers that the insolvency plan violates the rules applicable to the approval proceedings or the rules applicable to the content of the plan, it must reject the insolvency plan and offer the creditors the opportunity to solve the confirmed violations. If this does not occur, the court must call a general creditors' meeting to decide about the possibility of recovering the company, or proceed to liquidation.

The rejection of the plan by the court can also be required by the debtor or any creditor in specific circumstances, such as the allegation that the actual situation of the creditor is less favourable in an insolvency plan scenario than in the absence of any plan or that the plan illegitimately favours any creditor. If so, the court must act as in the above-mentioned case.

Considering the homologation of the insolvency plan, the company must adhere to it in all its terms. If it does not, the insolvency plan ceases its effects as referred to in question 20.

With the approval of an insolvency plan, the insolvency procedure ceases, as do all the limitations concerning the submission of lawsuits against it. Therefore, the rights of the creditors can only be satisfied in another procedure presented against the company.

23 Bankruptcy processes

During a bankruptcy case, what notices are given to creditors? What meetings are held? How are meetings called? What information regarding the administration of the estate, its assets and the claims against it is available to creditors or creditors' committees? What are insolvency administrators' reporting obligations? May creditors pursue the estate's remedies against third parties?

The law establishes a unitary proceeding concerning the insolvency declaration. Only after that can the process continue as a restructuring or a liquidation.

Considering that the liquidation scenario corresponds generally to a bankruptcy process, we will consider only the liquidation proceeding.

When the petitioner presents the insolvency proceeding, and if that process is presented by a creditor or the public prosecutor, he does not have, indeed cannot have, information about all the creditors of the company. CIRE, therefore, establishes that a majority of the notices that are most relevant, so that the creditors may defend their rights, must be published in the Portuguese Official Gazette and registered at the debtor's commercial registry. The Ministry of Justice also maintains a computerised registry of the relevant decisions that take place in insolvency proceedings. Relevant facts that must be observed include:

- any precautionary measures taken before the insolvency declaration;
- the insolvency declaration;
- the schedule of creditors' general meetings;
- the closure of the insolvency proceeding requirement and the schedule of the creditors' general meeting to decide it; and
- the insolvency proceedings final decision.

Likewise, the declaration of insolvency, the schedule of the creditors' meetings and the closure of insolvency proceedings are also notified by registered mail to the petitioner, the debtor and the five major creditors, if that information is available. After the insolvency declaration, the insolvency proceeding is a public procedure and all the lawsuits concerning the insolvent's asset must be appended to it. Therefore, any creditor or interested party can consult the process in order to access all available information.

However, the insolvency administrator has reporting obligations, concerning his actions in the administration of assets in the insolvency and liquidation, before the court and the creditors' committee. Specifically, he must present to the court, every three months, a report concerning the status of the insolvency administration and liquidation. However, the court can, at any time, request that information. The insolvency administrator also has to produce accounts regarding the insolvency administration and liquidation within 15 days after he ceases his functions and every time the court asks him to do so.

The insolvency administrator, in a liquidation scenario, has exclusive powers to administer the insolvent estate, being responsible for assessing and quantifying the claims against the debtor, apprehending all the assets of the insolvent, collecting the insolvent credits and bringing legal actions against the insolvent's debtors or administrators. Therefore, he is entitled to represent the insolvent in judicial procedures regarding the insolvent estate.

Creditors or interested parties can file suit to exercise the claw back of the relevant transaction. The claw back cannot be initiated or will be stayed if the administrator avoided the transaction in the meantime.

24 Creditor representation

What committees can be formed (or representative counsel appointed) and what powers or responsibilities do they have? How are they selected and appointed? May they retain advisers and how are their expenses funded?

The court, when declaring the insolvency of a company, calls for a creditors' meeting and if information about the insolvent's creditors is available, forms a creditors' committee.

The creditors' meeting and the creditors' committee are the only two committees formed in an insolvency proceeding.

The creditors' meeting is formed by all the creditors of the insolvent, representing their own interests. The decisions are taken, generally, by a majority of votes and, in certain circumstances, by a qualified majority of two-thirds of the credits represented. When votes are taken, voting rights are by value of credits. In principle each euro claimed by the creditor will grant one vote in the assembly. Preferential creditors do not have special voting rights and do not vote as a separate class, but proposals cannot alter their repayment priority without their consent.

The creditors' meeting is sovereign over almost any matter. It can debate every issue, such as the decision to liquidate the insolvent's assets or to proceed with the insolvent's restructuring, to discuss and approve, or not, the insolvency plan, to form or to dissolve the creditors' committee or to change any of its members, to replace the insolvency administrator, to deliberate over the closure of proceedings, etc.

Otherwise, the creditor's committee is composed of three or five members and two substitutes. The members of the creditors' committee are normally representative of the largest creditors and must include representatives of the different categories of creditors, such as banks, suppliers and employees.

The creditors' committee has major relevance in the insolvency proceedings. The insolvency administrator must report to this committee, which can require him to provide any information about the administration and liquidation of the insolvent's assets. The sanction of the creditors' committee is also needed for certain actions. The creditors' committee also has the legitimacy to, in certain circumstances, ask the court to replace the insolvency administrator.

Beyond that, the creditors' committee will monitor the activities of the insolvency administrator and cooperate as is deemed necessary. As well as the insolvency administrator, the creditors' committee can be advised by any counsellors in technical areas if specialist advice is deemed necessary.

The members of the creditors' meeting and of the creditors' committee are not paid, although they can ask for the payment of any expenses incurred in the exercise of their functions. Those expenses are considered credits over the insolvent estate and are paid before any other credit, along with the court's costs, the insolvency administrator's remuneration, etc, as provided in article 51 of CIRE.

Usually, the creditors themselves pay the expenses of the individuals they nominate for the creditors' committee.

25 Insolvency of corporate groups

In insolvency proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be pooled for distribution purposes?

Usually, when two or more companies of the same corporate group are insolvent and file for insolvency, they do it in separate procedures.

Nevertheless, the same insolvency administrator can be designated, particularly if the proceedings are initiated by the debtor and he suggests to the court the appointment of a particular insolvency administrator. If the insolvency proceeding is filed by any creditor or the public prosecutor, although a particular insolvency administrator can be suggested, usually the administrator is randomly selected according to an official list.

The insolvency administrator can request the aggregation of proceedings that refer to companies that form a corporate group or are under the same control.

In any case, the proceedings preserve the companies' individuality. They remain formally and materially autonomous, particularly regarding assets and liabilities.

26 Modifying creditors' rights

May the court change the rank of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?

The provisions concerning credit ranking or priority are imperative. After the submission of the credit claims, the insolvency administrator analyses the claims and prepares a list containing all the credits recognised. That list can be challenged or not challenged; in either case, the court produces a final decision about the verification and ranking of credits. In this decision, the court must apply the provisions regarding credit ranking or priority; such provisions cannot be changed in any situation. A change to creditors' priority of payment can be contained in an insolvency plan, however. The change will be valid if the affected creditors give their assent to it, it is discussed by the creditors' general meeting and it does not violate significantly the principle of equality of treatment of creditors.

27 Enforcement of estate's rights

If the insolvency administrator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong?

As mentioned above, the insolvency administrator in a liquidation has exclusive powers to administer the insolvent estate, being responsible for bringing legal actions against the insolvent's debtors or administrators.

Nevertheless, if there is a certain legal action that is deemed necessary to recover the insolvent's assets and there are no funds in the insolvency estate, the creditors themselves, particularly those who form the creditors' committee, may finance those actions, although its fruits always revert to the insolvency estate.

These actions are considered acts of administration and liquidation of the insolvency estate, so any funds made available to perform them are considered credits over the insolvency estate and are paid before any other credit.

Creditors or interested parties can file a suit to exercise the claw back of the relevant transaction as mentioned in question 23.

28 Claims and appeals

How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Are there provisions on the transfer of claims? Must transfers be disclosed and are there any restrictions on transferred claims?

Creditors must claim the payment of their credits in the insolvency proceedings, even if they were previously recognised by the court.

When filing their claims, the creditors should give details of the nature, amount (principal and interest) and due date of the claim; if the claim is subject to any condition; if it is a common, subordinated, guaranteed or privileged claim; the existence of any personal guarantees regarding the claim and who the guarantors are; and the applicable interest rate.

The credit claim is submitted to the insolvency administrator, by hand or registered mail, in the term established in the insolvency declaration decision, which cannot exceed 30 days, starting, for most creditors, on the day the insolvency declaration decision is published in the Portuguese Official Gazette. If any creditor is personally notified of the insolvency declaration decision, the term to submit the credit claim starts on the day of that notice.

The insolvency administrator analyses those credit claims and compares them with the insolvent's accounting books. After that, and within 15 days after the end of the period for filing the credit claims, he must prepare a list containing all the credits related to the insolvent. In this list, the insolvency administrator can recognise the credits claimed, recognise them in a different way considering the claim or challenge them. The credits can also be challenged by another creditor, or the creditor himself can challenge the list produced by the insolvency administrator if he does not recognise his credit in the exact terms of the claim.

A credit or the list may be challenged and submitted to a court review. The court, after hearing the creditors' committee, may settle a date for the hearing and taking of evidence.

After that, a final decision is produced by the court, which decides whether or not the credit shall be approved.

The judicial verification and ranking of credits may be challenged in a higher court.

Once the term to claim credits has elapsed, creditors may still claim their credits through a lawsuit brought against the insolvent estate, the other creditors and the debtor. This lawsuit must be filed within one year after the declaration of insolvency.

The law does not establish any particular provisions regarding the transfer of claims. Transfers of claims are generally admitted according to the Portuguese Civil Code. Once a transfer of claim is verified, the transferee must give notice to the court through a particular process: transferee enabling. Once admitted, the transferee maintains all the privileges and guarantees associated with the credit, he is recognised as an insolvency creditor and can also be part of the creditors' committee instead of the original creditor.

29 Priority claims

What are the major privileged and priority claims in liquidations and reorganisations? Which have priority over secured creditors?

There are four ranks of creditors: preferential, secured, common and subordinated.

After having paid the debts of the insolvent estate and the court's costs, the administrator proceeds with the payment of the credits recognised and verified by the court, according to the following order:

- specific preferential credits;
- secured credits;
- general preferential credits;
- common credits; and
- subordinated credits.

The preferential credits can be specific. This includes the preferential credits that are specifically related to an asset, such as employees who have a preferential credit over the premises where they work. The preferential credits can be general. This includes preferential credits that are not specifically related to an asset, for example, the preference of the petitioner and the credits related to social security or tax debts.

It is relevant to emphasise that the general preference given to credits related to social security, tax debts, credits held by the Portuguese state or municipal authorities cease with the insolvency declaration decision.

Despite this general rule, the law establishes a time limit for those credits to be considered as general preferential credits. Indeed, the referenced general preferential credit comprises the credits set up within 12 months before the declaration of insolvency. This kind of credit, constituted before that time limit, is considered common.

Secured credits are credits guaranteed by mortgages and pledges, among others.

Subordinated credits are those held by individuals or companies that are considered to be specially related to the insolvent in a way that causes a reasonable doubt about its subsistence. Interests of non-subordinated credits, constituted after the insolvency declaration, are also considered subordinated credits.

All the credits that are not preferential, secured or subordinated are considered common.

In a reorganisation scenario, the above classification rules can be altered in an insolvency plan.

30 Liabilities that survive insolvency proceedings

Do any liabilities of a debtor survive an insolvency or a reorganisation?

The liquidation only discharges the debtor of its liabilities if the product of the sale of the assets is enough to settle all credits claimed, which rarely occurs. In that event, any outstanding sums are delivered to the debtor.

If the assets of the debtor are (clearly) insufficient to settle the court costs and credit claims, the judge may determine the distribution of the cash amounts and terminate the liquidation. In this case, the debtor will regain control and management of its remaining assets and the creditors are allowed to enforce their unsettled credit rights against the debtor without limitation.

In reorganisations, on the contrary, the execution of the plan approved by he creditors will normally imply the settlement of the credits claimed, although the contents of the plan can vary substantially.

31 Distributions

How and when are distributions made to creditors in liquidations and reorganisations?

Distributions in liquidations are only possible after the issuance of the judgment on the rating of credit claims and acknowledgement of the claims. Secured creditors are paid through the sale of the underlying security in accordance with the established priority. Remaining balances are considered and treated as common credits. Common creditors are paid on a pro rata basis. Subordinated creditors are only paid when all common credits are settled.

Whenever the administrator is holding cash deposits that allow a distribution of at least 5 per cent of the balance of secured, common or subordinated credits, it should submit a distribution plan together with the opinion of the creditors' committee on such distribution. The judge will rule on the adequacy of the distribution, namely by insuring that it respects the ratings and privileges applicable. The final distribution is to be made by the office of the court when the file is closed. In reorganisation, the distributions are made in accordance with the approved plan.

32 Transactions that may be annulled

What transactions can be annulled or set aside in bankruptcies and what are the grounds? What is the result of a transaction being annulled?

Damaging acts or omissions carried out in the four-year period prior to the filing can be subject to avoidance to the benefit of the insolvency estate. Acts or omissions that diminish, frustrate, make difficult, endanger or delay the settlement of creditors are deemed damaging. Whenever the relevant act or omission occurs in the two-year period prior to the filing, mala fides, or awareness of the third party specially related to the insolvent, is assumed.

It is understood to be mala fides, if at the time of the act, any of the following were the case:

- the debtor was insolvent;
- the effect of the act was detrimental and insolvency was imminent; or
- the company was filing for insolvency.

Portuguese law also establishes 'unconditional avoidances'. The unconditional avoidance is established for a specific category of actions that are assumed to be damaging and, as such, do not permit proof to the contrary (assumptions iuris et de iure). These unconditional avoidances apply to:

- partition of property or inheritance where the insolvent's share essentially comprised cash and easily concealable valuables and the shares of other interested parties comprised property and other valuables, executed within one year prior to the filing for insolvency;
- gratuitous acts executed in the two-year period prior to the submission of the insolvency file;
- mortgages and pledges relating to pre-existing non-secured obligations or substitute obligations, executed in the six-month period prior to the submission of the insolvency file;
- bonds and other guarantees related to businesses without real interest for the insolvent, provided in the six-month period prior to the submission of the insolvency file;
- mortgages executed simultaneously with the underlying obligations, in the period 60 days prior to the submission of the insolvency file;
- payment or set-off of unmatured debts, within six months prior to the submission of the insolvency file;
- payment or set-off of debts under unusual commercial terms or under terms that the creditor is unable to request or judicially enforce in the six-month period prior to the submission of the insolvency file;
- onerous acts of the insolvent where the obligations of the latter clearly exceed those of the counterpart, executed in the year prior to the submission of the insolvency file; and
- settlement of shareholders' loans in the year prior to the submission of the insolvency file.

The avoidance of the transaction has retroactive effects and the parties to the voided act are required to return what was received under such act. The administrator is entitled to file a suit against the counterpart to obtain such effect coercively.

33 Proceedings to annul transactions

Does your country use the concept of a 'suspect period' in determining whether to annul a transaction by an insolvent debtor? May voidable transactions be attacked by creditors or only by a liquidator or trustee? May they be attacked in a reorganisation or a suspension of payments or only in a liquidation?

Regarding 'suspect periods' for certain transactions, entailing legal assumptions, see question 32.

The avoidance may be exercised merely through a termination notice issued by the administrator with retroactive effects. The right to avoid should be exercised within the six-month period after the knowledge of the act by the appointed administrator and, in any case, never after the two-year period after the opening of the insolvency proceeding or declaration of insolvency. However, if the contract is not executed, the avoidance can be declared without limitation. During the reorganisation of the debtor, the avoidance can be exercised by the administrator before the approval of the plan and after this date if the content of the plan implies that the file continues, namely, through a specific liquidation or partial liquidation.

Creditors or interested parties can file suit to exercise the claw back of the relevant transaction. The claw back cannot be initiated or will be stayed if the administrator avoided the transaction in the meantime.

34 Directors and officers

Are corporate officers and directors liable for their corporation's obligations? Are they liable for pre-bankruptcy actions by their companies? Can they be subject to sanctions for other reasons?

The corporate officers and directors are not liable for the insolvent's obligations. However, specifically concerning the tax debts of the company, the tax authorities hold the power of reverting the unsettled obligation to the former, including shadow directors.

The directors and shadow directors may be sanctioned in civil terms and in criminal terms for their conduct if the insolvency is considered to be due to mismanagement, that is to say, it results from the fraudulent action or serious fault committed within the three years prior to the filing for insolvency. There is a legal assumption of serious fault should the directors fail to apply for insolvency within 60 days from the moment when the company was de facto insolvent or to draft and submit the yearly accounts of the company.

The insolvency of a company is always considered due to mismanagement when the management:

- destroyed, damaged, ruined, hid or removed a considerable part of the assets;
- artificially created or aggravated liabilities or losses or reduced profits, namely, performed ruinous transactions to their benefit or to that of persons closely related to them;
- purchased goods by credit, reselling or delivering those goods in payment for a price distinctly inferior to current prices, before satisfying the credit obligation;
- disposed of assets for personal benefit or for that of a third party;
- undertook, in the name of the company, an activity for personal benefit or for that of a third party and in detriment thereof;
- adopted, for personal benefit or that of a third party, an exploitation of the company's deficit, notwithstanding being aware or being under the obligation to know that this would lead with great probability to a situation of insolvency;
- did not fulfil in substantial terms the obligation to maintain organised accounts, meanwhile maintaining fictitious accounts, double accounts or irregular accounts, with prejudice to the understanding of the economic or financial situation of the insolvent company; or
- repeatedly failed to fulfil their duties to submit the company to insolvency proceedings and collaborate in such insolvency proceedings.

The qualification of an insolvency as intentional will produce serious effects. The responsible persons may be held incapable for a period of two to 10 years and prevented from undertaking any trade or holding any duty on the board of any commercial or civil company, association or private foundation of economic activity, public or cooperative company for two to 10 years.

The qualification may furthermore result in the loss of credits over the insolvency or over the insolvent estate held by the persons affected by the qualification.

The directors and shadow directors may also be criminally sanctioned for insolvencies due to mismanagement or negligence and punished with a fine or with imprisonment for up five years or up to one year, respectively. These penalties may be aggravated if employees' claims within the insolvency are not fully satisfied.

35 Creditors' enforcement

Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

Portuguese law restricts the use of coercive force in civil law to the courts. It is generally understood that not even within the frame of arbitral tribunals can such coercive actions of attachment or seizure of assets take place.

36 Corporate procedures

Are there corporate procedures for the liquidation or dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

Portuguese law foresees corporate procedures for liquidation and dissolution of companies. These are normally out-of-court procedures commenced through a resolution of the shareholders meeting approving the winding-up of the company and the liquidation of its assets. There are also cases of administrative or judicial dissolution.

The assumption in the corporate procedures for liquidation and dissolution is that the assets of the company outweigh the debts and after the closing of the liquidation all debts are duly settled and the remainder is divided between the shareholders. After liquidation, the shareholders of limited companies are liable before the creditors for unsettled debts up to the amount they received in the partition.

37 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

Liquidations are formally concluded after the remaining distributions are made.

The liquidation can also be concluded at an early stage if the administrator asserts that the assets of the insolvent are insufficient to cover the court fees and remaining debts. Should this be the case, it refers the matter to the judge that will hear the insolvency hearing and the creditors and decide on the closing of the file.

The insolvency file also ends when the debtor ceases to be in an insolvency situation or when all creditors agree on the closing. In the first case, creditors are able to file an opposition to the debtor's application and the matter will be subject to trial.

The reorganisation will be formally concluded with the approval of the plan by the creditors, unless the execution of such plan requires or presupposes the continuance of the file.

38 International cases

What recognition or relief is available concerning an insolvency proceeding in another country? How are foreign creditors dealt with in liquidations and reorganisations? Are foreign judgments or orders recognised and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments? Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

As a member state of the EU, Portugal is bound by EC Regulation 1346/2000. This Regulation sets the jurisdiction of the EU member states regarding insolvency applications and other issues strictly connected with these applications. It also sets out several provisions about the applicable law in an insolvency proceeding and determines the system of recognition and enforcement of insolvency rulings pronounced by other member states. The EC regulation applies to insolvent companies or individuals that have their main centre of interests located in the territory of one of the EU member states, with an exception for Denmark. The EC Regulation does not apply to assets belonging to the insolvent estate located outside the EU. Concerning international jurisdiction, the EC Regulation determines that the member state within the territory of which the centre of the insolvent's main interests is situated shall retain jurisdiction to process the respective insolvency application. If the defendant is a company or legal entity, its registered offices shall be assumed to be the centre of its main interests (COMI). The EC Regulation establishes that the court of a member state or the administrator shall immediately notify known creditors that have their habitual residences, domiciles or registered offices in other member states.

Any judgment opening insolvency proceedings handed down by a court of a member state that has jurisdiction pursuant to the above-mentioned article 3 shall be recognised in all the other member states from the time that it becomes effective in the state where the proceedings are opened.

Outside the EU, the recognition and enforcement of a foreign insolvency judgment in Portugal requires that:

- there are no doubts regarding the authenticity of the document;
- the judgment is final in the awarding country and is not subject to any appeal;

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- the jurisdiction of the country that issued the judgment was not fraudulently created;
- the subject matter is not of the exclusive jurisdiction of Portuguese courts;
- there are no lis pendens or res judicata exceptions due to cases filed in Portugal, except if the foreign court anticipated jurisdiction;
- the defendant was duly served and the principles of defensc and equality duly observed; and
- the judgment does not offend the international public policy principles of the Portuguese state.

Portuguese courts hold exclusive jurisdiction for insolvency proceedings of physical persons residing in Portugal or companies and any other legal entities with registered offices in Portugal.

The Portuguese insolvency code also foresees a further jurisdiction provision determining that the Portuguese courts should accept insolvency proceedings refused by another member state's court on the basis that Portuguese courts should retain jurisdiction on it.

There are no other treaties on insolvency law that we are aware of.

The UNCITRAL Model Law on Cross-border Insolvency has not been adopted in Portugal.

39 Cross-border insolvency protocols and joint court hearings

In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?

We are not aware of any cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries apart from the above-mentioned EC Regulation 1346/2000, which makes an European liquidation proceeding applicable, in general terms, to all assets of a debtor whose COMI is in a member state, which will retain jurisdiction for the case.

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