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Insolvency 2021

Portugal: Law & Practice

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Law and Practice

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CONTENTS

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1. STATE OF THE RESTRUCTURING MARKET

1.1 Market Trends and Changes

General State of the Market

The Portuguese insolvency/restructuring market was, and still is, greatly impacted by the financial crisis of 2007–08, which led to a public debt crisis and the fall of three major Portuguese banks – *Banco Privado Português, SA,Banco Espírito Santo, SA* and BANIF - *Banco International do Funchal, SA* – as well as the nationalisation of Banco Português de Negócios, SA. Indeed, the current implications of these events are demonstrated by the fact that the number of insolvencies and restructurings with court intervention is still greater than that seen in 2007. Whereas the judicial insolvency and restructuring proceedings initiated during the first quarter of 2007 amounted to 992, the figure for the same period in 2021 was 2310.

Notwithstanding the above, the number of insolvency and restructuring proceedings with court intervention has been decreasing since 2014. This tendency remains the same for this year. Indeed, Portuguese courts declared 2491 insolvencies in the first quarter of 2020 and this figure fell to 2092 in the comparable period of 2021. However, it is worth noting that the proportion of legal entities being declared insolvent grew by 4.2 percentage points in the first quarter of 2021, although the absolute number decreased (from around 580 to around 575). As for in-court restructuring proceedings, the volume has decreased a lot since 2020, when 125 proceedings were initiated in the first quarter, whereas in the same period of 2021 the number was 62.

Most Impacted Sectors

A common tendency in the last year has been for the significative numbers of judicial insolvencies and/or restructurings (above 27%) to concern the transformative industries, wholesale and retail trade, and the repair of vehicles.

Costs

According to the information published, the average court costs incurred in insolvency/restructuring proceedings slightly increased since the first quarter of 2020, from EUR2,540.84 to EUR2,550.52, in the comparable period of 2021. This information does not, however, reflect other (substantial) expenses either paid directly by the parties or discounted from the insolvency estate (eg, legal advisors, liquidations costs and remuneration of the officeholder).

Duration

The average duration of restructuring proceedings finalised in the first quarter of 2021 was around five months. As for insolvency proceedings, the average duration of proceedings ended in the first quarter of 2021 was 67 months.

Expected Developments

The impact of COVID-19

Currently, the COVID-19 pandemic is among the main factors negatively influencing the growth of the global economy. Given that an economic downturn translates, invariably, into an increase in the numbers of insolvency/restructuring proceedings, the Portuguese government has approved a series of measures to mitigate the harmful effects of the pandemic, by hindering the usual consequences of an economic slowdown (redundancies and defaults).

Some of the relevant measures at place are the lay-offs (according to which the Portuguese government co-pays with the employer a percentage of the salary of employees who have been partially or totally suspended), the state guarantees and the suspension of the company directors' duty to file for insolvency within 30 days of the date on which they acknowledge (or should have become aware of) the insolvency situation.

These measures are still containing part of the effects of the pandemic in business failures, but the expectation is that, once they are revoked, the insolvency figures will rise sharply.

Directive (EU) 2019/1023

With the end of the primary transposition deadline for the Directive (EU) 2019/1023 on preventive restructuring frameworks, which was due on 17 July 2021, a legislative proposal on the transposition of the Directive is currently pending in the Portuguese Parliament (since the Portuguese government requested for an extension of the deadline for 17 July 2022).

Although the said proposal will still be subject to comments from stakeholders as well as to subsequent amendments, it is already clear that it aims to boost the economic recovery by helping companies, particularly SMEs, to recover from the adverse effects caused by COVID-19. For this purpose, the draft proposal comprises the following measures.

- Enlargement of the IA's responsibilities, thereby simplifying the proceeding and enhancing its efficiency, particularly with regard to the ranking of the creditors' claims.
- Adjustments concerning the mandatory partial distributions (*rateios parciais obrigatórios*), which shall be done upon the fulfilment of certain criteria and when a final distribution is not yet possible. The legal obligation of partial distributions was firstly amended in Portugal in the end of 2020 with relation to insolvency proceedings in situations where the liquidation proceeds are equal to or greater than EUR10,000, with the aim to boost the economy by providing liquidity to companies with claims over insolvent entities.
- Implementation of measures to enhance the accessibility of preventive restructuring proceedings and pre-insolvency workouts. With regard to this matter, the legislative proposal foresees a set of modifications to the Special Revitalisation Proceeding (*Processo Especial de Revitalização* or PER). The said modifications aim to enhance the equal treatment of creditors and to promote a flexible proceeding, which may be adapted in accordance with the company characteristics. The legislative proposal also clarifies that, upon the commencement of a PER, both (i) the obligation of the company directors to file for insolvency under certain circumstances and (ii) any pending enforcement proceeding against the debtor are suspended.
- Significant adjustments to the regime on discharge of debt (*exoneração do passivo restante*), in order to ensure the debtors (who are natural persons) a second opportunity.
- Enlargement of the scope of application of the early warning mechanism (created by Decree-law 47/2019, of 11 April 2019), in order to ensure that companies are aware of the insolvency risks associated to their economic situation.

On the one hand, the implementation of such measures will most certainly foster more efficient and swifter insolvency proceedings and reduce the cascade effect caused by companies' insolvency on the market. On the other hand, it will also create alternatives to companies in situation of economic distress or imminent insolvency, which may have as an effect a significant reduction in the number of insolvency proceedings commencing each year. In brief, these measures may compensate the adverse effects of the pandemic over companies' economic situation.

2. STATUTORY REGIMES GOVERNING RESTRUCTURINGS, REORGANISATIONS, INSOLVENCIES AND LIQUIDATIONS

2.1 Overview of Laws and Statutory Regimes

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), on recovery and insolvency judicial proceedings, including the Special Revitalisation Proceedings (*Processo Especial de Revitalização* or PER);
- the Extraordinary Procedure for Company Viability (*Processo Extraordinário de Viabilização de Empresas* or PEVE) (Law no. 75/2020), which establishes an urgent, temporary and extraordinary procedure (which may be used until 30 June 2023) aimed at companies in a recoverable situation of economic distress resulting from the COVID-19 pandemic;
- 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 Regulation (EU) 2015/848 of the European Parliament and of the Council, of 20 May 2015, on insolvency proceedings, which establishes co-ordination mechanisms and rules on conflicts of law for cross-border transactions; and
- the Directive (EU) 2019/1023 of the European Parliament and of the Council, of 20 June 2019, on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, thus providing for a minimum standard within the EU.

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

2.2 Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

Voluntary Proceedings

In what concerns statutory restructuring proceedings, Portuguese law provides for three types: the PER and the PEVE (which require court intervention) and the RERE (which is an out-of-court restructuring proceeding). All of the three proceedings are voluntary (although PEVE is a temporary and extraordinary restructuring proceeding), requiring the debtors' initiative, as well as the engagement of (some) creditors.

Insolvency proceedings may also be voluntary, if initiated by the debtor (who may have a duty to do so).

Involuntary Proceedings

Under Portuguese law, the only involuntary proceeding is insolvency since it may be commenced regardless of the debtor's initiative through the intervention of its creditors, the Public Prosecutor Department or any person liable for the debt.

2.3 Obligation to Commence Formal Insolvency Proceedings

Mandatory Initiation of Insolvency Proceedings

Directors are required to file a request with the court for the declaration of the company's insolvency within 30 days of the date on which they acknowledge (or should have become aware of) the insolvency situation.

Notwithstanding, the COVID-19 pandemic outbreak and its negative economic effects have motivated the suspension of said obligation, which is therefore currently inapplicable.

Failure to Initiate Mandatory Insolvency Proceedings

If this request is not timely presented, serious wilful misconduct by the legal or de facto directors is presumed (although such a presumption may be rebutted). Consequently, the insolvency may be qualified as aggravated/culpable.

2.4 Commencing Involuntary Proceedings

Involuntary proceedings, which may be initiated regardless of the debtor's intervention, may be initiated by the creditors, the Public Prosecutor Department or any person liable for the debt in the events foreseen in Article 20 of the CIRE. These events evidence the debtors' insolvency (eg, failure to comply with payment obligations, abandonment of facilities or rushed or ruinous disposition of assets).

Creditors

Creditors allowed to initiate insolvency proceedings may do so regardless of the nature of their credit and may be conditional creditors.

Public Prosecutor Department

The Public Prosecutor Department may initiate proceedings in representation of the entities whose interests it is legally obliged to protect (eg, the tax authorities and social security office).

Procedure

The entity/person requesting the commencement of the insolvency proceeding must submit a petition to the court in which it:

- alleges the fulfilment of the requirements set forth in Article 20 of the CIRE;
- justifies the origin, nature and value of the claim;
- files all the elements regarding the debtor's assets and liabilities; and
- indicates means of evidence (including witnesses).

2.5 Requirement for Insolvency

Concept of Insolvency

Insolvency is defined as the inability of the debtor to fulfil its obligations as they fall due (cash flow test) or the situation where, according to accounting criteria, the liabilities of the debtor clearly exceed its assets (balance sheet test).

Insolvency as a Requirement for Initiating Proceedings

The debtor's insolvency, or imminent insolvency, is required only to initiate the insolvency proceedings (voluntary or involuntary). In contrast, the PER may only be initiated where the debtor is not insolvent. As to the PEVE, it may be commenced by companies whose assets exceeded its liabilities on 31 December 2019, and which are currently in a recoverable situation of economic distress, imminent insolvency or insolvency due to COVID-19.

2.6 Specific Statutory Restructuring and Insolvency Regimes

Given the systemic importance of the financial and insurance sectors and the need to protect depositors/insurance takers and beneficiaries, which/who are typically consumers, these are

subject to specific statutory insolvency/restructuring regimes.

Banking Sector

The General Regime for Credit Institutions and Financial Companies (Decree-Law No 298/92) sets out a specific regime for recovery and resolution planning, early intervention and the resolution of credit institutions. It confers the regulatory authorities (either the European Central Bank or the Bank of Portugal) with the power to impose:

- remedial measures (eg, a restructuring plan or the appointment of a supervisory board or a statutory auditor);
- intermediary measures (eg, the appointment of a provisional management board); or
- resolution measures, provided for cases of particularly serious financial turmoil (eg, disposal of the activity to a third party or internal capitalisation).

Additionally, Decree-Law No 199/2006, which transposes Directive 2001/24/CE sets out a specific regime for the voluntary and compulsory liquidation of credit institutions, financial companies, payment institutions and e-money institutions, by:

- establishing co-ordination measures among EU member states (eg, recognition of decisions concerning intervention measures imposed by regulatory authorities);
- solving issues relating to conflicts of law in the context of liquidation within the EU; and
- conferring the Bank of Portugal with the powers to revoke these companies' authorisations and to intervene in the liquidation process.

Insurance Sector

Law No 147/2015 sets out a specific regime applicable to the recovery of insurance and reinsurance companies. This regime sets out a range of prevention measures to be applied where there is a risk of financial deterioration, and which confers to the supervision authority (A *utoridade de Supervisão de Seguros e Fundos de Pensões* or ASF) the power to impose specific measures (eg, modifications to the share capital and closing of businesses) and to authorise, intervene in and supervise the liquidation of these companies. Insurance claims are preferential claims, and are specially protected throughout the liquidation proceedings.

3. OUT-OF-COURT RESTRUCTURINGS AND CONSENSUAL WORKOUTS

3.1 Consensual and Other Out-of-Court Workouts and Restructurings

The View of the Market

Creditors (particularly banks) and debtors favour out-of-court restructuring proceedings over statutory proceedings involving the intervention of the courts and the appointment of an office holder because they:

- maintain secrecy regarding the debtors' distressed financial conditions thus avoiding "bad press" prejudicial to the company's image and allowing the regular continuation of the business;
- secure greater value for creditors, by maximising the potential for credit recovery and preventing costs (eg, judicial expenses and remuneration of the insolvency administrator); and
- allow them to keep control over the company's activity.

However, with the introduction of the PER in 2012, informal restructurings came to lose relevance. The PER allows creditors to reach an agreement with the same level of legal certainty as a judicial proceeding, through the employment of a swift, simple and transparent process

that enables the cram-down of dissenting creditors. The beneficial tax regime applicable to the PER and the advantageous treatment of the new money provided within this proceeding have also contributed to the shift of the market from informal restructuring to the PER. The PEVE has similar advantages, with the benefit of being a faster proceeding. Nevertheless, the PEVE has not been frequently used, probably due to its stricter requirements.

Statutory and Consensual Restructuring Proceedings

This view of the market has been translated into lawmakers' attitudes towards facilitation and promotion of out-of-court restructurings. Indeed, these may occur either within pure, informal and "dejudicialised" negotiations and agreements, or within a proceeding following the RERE.

Despite these intentions, the RERE is not widely used in the market because it brings few advantages when compared both to the pure informal consensual restructuring and to the PER, especially, considering that the RERE does not allow for a cramming-down of creditors who do not engage in the negotiations. For this reason, the RERE is not discussed herein.

3.2 Consensual Restructuring and Workout Processes

The time and proceedings depend on the debtors' size, the seriousness of the situation and the number and type of creditors involved.

Process and Timings

The negotiations are informally carried out, with no appointment of committees, although each party appoints its representatives and attorneys.

Simple restructurings are usually concluded within three to four months, and more complex restructurings in eight to 12 months.

The Position of the Creditor

Creditors do not generally accept any compromise on the suspension or limitation of their rights (eg, enforcement rights), but, in practice, they refrain from exercising such rights while negotiations are ongoing.

Creditors generally require full disclosure during negotiations (typically regarding accounts, assets and the business of the debtor). In more complex restructurings, creditors sometimes require an audit and a viability plan made by specialised entities.

Debtor's Undertakings

Besides the usual undertakings present in finance agreement (eg, negative pledge clauses, limitation on indebtedness), the creditors naturally require a greater control over the debtors' activity in a restructuring scenario. Therefore, the agreement usually imposes on the debtor more stringent information obligations and consent requirements applicable to changes in articles of association, members of corporate bodies and capital structure. Moreover, a controller is frequently appointed by the creditors to monitor the execution of the agreement. The debtor will co-operate with the controller by granting it access to books, records and accounts and a seat on board meetings. Where the creditors are banks, the borrower frequently accepts to transfer any payments received to accounts opened with the creditors and it is prevented from opening accounts with other credit institutions.

Typical Outcome of Negotiations

Restructuring agreements typically include solutions such as:

- restructuring of the payments schedule (eg, periods of grace, extension of repayment dates and decrease of interest rates);
- datio in solutum (transfer in lieu of payment);
- sale of assets;

• reduction in activity; and
• increased compromise by the owners.

However, it is not common for creditors to accept changes in their relative positions or to subordinate their claims to those of other creditors.

3.3 New Money

In out-of-court restructuring proceedings, new money may be injected by the creditors taking part in the negotiations or by the debtor's owners, in accordance with the provisions of the restructuring agreement.

New Money Provided by Creditors

The injection usually takes the form of new loans or facilities, in which each creditor participates in proportion to its claim. The debtor (or its owners) grants security over free assets or assets already encumbered in favour of the same creditors (second charge).

Although it is not common, it would not be unusual for trade creditors to extend payment facilities regarding the supply of assets/goods required for the debtor to continue operating its business.

New Money Provided by Owners

Creditors may require the debtors' owners to provide new money in the form of a share capital increase, supplementary share capital or a shareholders' loan. New money provided by owners is not secured.

Priority

Creditors and debtors cannot create a priority structure that differs from the one provided for in the law.

3.4 Duties on Creditors

Principle of Good Faith

Creditors are subject to the general principle of good faith while negotiating and performing the restructuring agreement. Among other aspects, this principle requires creditors to disclose information, keep negotiations secret, communicate clearly and act loyally.

Specific Duties in the Context of RERE

Ministers' Resolution 43/2011 defines a set of guiding principles applicable in the context of the RERE (eg, co-ordination and disclosure duties among creditors and the obligation to refrain from acting against the debtor).

3.5 Out-of-Court Financial Restructuring or Workout

Inability to Cram-Down Dissenting Creditors

Out-of-court restructuring agreements only bind the signatory parties; they cannot be imposed on, or modify, any rights of non-subscribers. Where cramming-down is necessary, creditors may negotiate an out-of-court revitalisation plan with the debtor and subsequently initiate a formal judicial proceeding (PER or PEVE) to execute it. However, this alternative is feasible only if the plan is endorsed by a certain majority of creditors and ratified by the court under the PER or the PEVE.

Majority Requirements in Credit Agreements

Credit agreements with multiple lenders typically require amendments to be in writing and unanimously approved by the lenders. Consequently, renegotiations – especially in the context of a workout – require the support of all lenders, and mechanisms to bind dissenting lenders are not usually available.

The Redundancy of the Cram-Down Feature

Although cramming-down is not available in out-of-court restructurings, these agreements are not perceived as unworkable since:

• certain solutions adopted do not require such feature (eg, changes in the shareholding structure or composition of management

bodies, new money or security provided by owners); and
- the capital structure of many debtors relies almost exclusively on banking loans and, given that banks that are repeated players in the restructuring market, there may be an incentive to swiftly and successfully reach an agreement.

4. SECURED CREDITOR RIGHTS, REMEDIES AND PRIORITIES

4.1 Liens/Security

Mortgages and Pledge

Creditors can take security over real estate and movable property subject to public registration (cars, boats and aeroplanes) through mortgages, created through public deeds, and 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 the 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 it 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 a special treatment upon the insolvency of the debtor.

4.2 Rights and Remedies

Enforceability of Liens/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.

Intercreditor Covenants

As a rule, intercreditor 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.

How Secured Creditors Block 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 a privileged distribution when compared to a no-plan scenario.

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.

4.3 Special Procedural Protections and Rights

Secured creditors are involved in the general insolvency proceeding since the assets comprising their security form part of the insolvency estate. Notwithstanding this, they are treated in a special category for insolvency law purposes,

to the extent that they hold a security in rem or a special statutory security.

In particular, in addition to the right of being paid ahead of other creditors from the proceeds of the sale of the secured asset, they are entitled to several special rights, namely, interest due to these creditors is not treated as a subordinated claim up to the value of the secured asset and they receive compensation for damages emerging from the delay in the sale of the assets subject to security, unless such delay is attributable to them.

5. UNSECURED CREDITOR RIGHTS, REMEDIES AND PRIORITIES

5.1 Differing Rights and Priorities

Priority Waterfall

Within an insolvency proceeding, the creditors' priority waterfall is as follows:

- secured creditors holding security in rem will be paid in advance of other secured creditors, from the proceeds of the sale of the assets subject to the security;
- other secured creditors (eg, creditors benefiting from a general statutory security) will be paid in advance of unsecured creditors, and pro-rata within the same category;
- unsecured creditors; and
- subordinated creditors.

Rights of Each Class of Creditor

Each class of creditor has the right to be paid in accordance with the priority waterfall above. The particular situation of subordinated creditors, who enjoy fewer voting rights than the general body of creditors, is worth noting in this context.

Additionally, some specific types of creditors within some classes enjoy special treatment. For instance, tax and social security credits may not be reduced, an employees' representative has a seat on the creditors' committee and creditors whose claim is grounded on shareholder loans may not request the insolvency of the debtor.

5.2 Unsecured Trade Creditors

It is generally accepted that the debtor can keep trade creditors whole during a restructuring process, at its discretion, to the extent that the goods and services provided are essential for the preservation of its economic activity or the value of its assets.

Essential common services cannot be withheld from the debtor during the PER (water, electricity, electronic communications, etc); these costs will be qualified as credits over the insolvency estate if the debtor is declared insolvent within two years of the beginning of the negotiation period in the restructuring process (PER) and will, therefore be paid ahead of secured creditors.

5.3 Rights and Remedies for Unsecured Creditors

The most relevant right attributed to unsecured creditors is the right to vote in proportion to the value of their credits.

This right is especially relevant on the occasion of the approval of the insolvency/restructuring plan, which require a qualified majority vote, and of the replacement of the official liquidator in an insolvency context allowing unsecured creditors to influence the outcome of these proceedings.

5.4 Pre-judgment Attachments

Precautionary Measures within Insolvency Proceedings

On its own initiative, or upon a request from a creditor, the insolvency court may adopt precautionary measures to avoid any detriment to the financial status of the debtor, (eg, appointment

of a temporary insolvency administrator) before the insolvency declaration.

Precautionary Measures outside Insolvency

Aside from this and previously to the initiation of an insolvency/restructuring proceeding, under Portuguese law, creditors fearing that the debtor may cause irreparable damages to their rights may petition the court to take the measures necessary to protect them (eg, freezing the debtors' assets).

Notice to the Debtor

Precautionary measures can be issued before the debtor is notified, in cases of urgency.

5.5 Priority Claims in Restructuring and Insolvency Proceedings

Debts of the Insolvency Estate

Administration expenses and fees charged by the insolvency administrator are considered credits over the insolvency estate and have priority over all secured claims.

Tax and Employee Claims

Some tax and social security claims benefit from statutory securities and will rank above unsecured credits; their exact position in the waterfall will depend on the special/general nature of the statutory security attached to the tax claim.

Employees can also benefit from a statutory security.

These creditors rank below creditors benefiting from security in rem.

New Money in the Context of a PER

New money lent to the debtor in a PER will benefit from a general statutory security if the debtor is subsequently declared insolvent.

6. STATUTORY RESTRUCTURING, REHABILITATION AND REORGANISATION PROCEEDINGS

6.1 Statutory Process for a Financial Restructuring/Reorganisation

As noted in **2.2 Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership**, the PER, the PEVE and the RERE are the two statutory restructuring proceedings under Portuguese law. Given the reduced importance of the RERE, the focus of this section will be the PER and the PEVE.

The PER

Purpose of the PER

The PER is a special proceeding for companies facing a recoverable situation of imminent insolvency or economic distress, and it is not to be used as a substitute for insolvency proceedings. Instead, it aims to allow a company to engage in negotiations with its creditors towards its revitalisation.

Overview of the process

It is initiated by a written request subscribed to by the debtor and creditors representing at least 10% of non-subordinated credit (or a lower percentage in certain limited cases), which includes the following:

- a declaration by the company of its ability to recover;
- a joint declaration of the debtor and the above-mentioned percentage of creditors expressing willingness to engage in negotiations;
- a declaration by a certified accountant attesting that the company is not insolvent;
- ancillary documents required in insolvency proceedings (eg, a list of creditors, pending lawsuits, shareholders, assets and employ-

ees; a description of the debtor's activities; and annual accounts, management and audit reports and legal certification for the last three years); and
- a proposal for recovery plan, with a description of the company's situation in terms of assets, financing and revenue cash flows.

Upon the receipt of this request, a judge appoints a provisional judicial administrator (PA). The court's order is published, formally initiating the PER. Subsequently, within 20 days of this publication, the creditors make their credit claims to the PA. Within five days, the PA drafts a provisional creditors' list, which is published and may be contested in court in the next five business days. Oppositions are decided by the court within the same deadline, and the definitive list is defined.

Once this occurs, negotiations between creditors and the debtor start and last for two months (extendable once for one month).

Role of the court

Negotiations are conducted out of court, under the organisation and supervision of the PA. The court's main role is to decide on the oppositions to the creditors list and to ratify (or refuse to ratify) the recovery plan approved by the creditors. Non-ratification occurs if there is any infringement of non-neglectable procedural rules or infringement of material rules. Notably, creditors shall be treated equally, and creditors' positions shall not, without their consent, be less favourable than the positions they would have had in a non-approval scenario.

The recovery plan – approval, ratification and potential challenges

The plan's approval requires a vote of creditors representing at least one third of the creditors list and a favourable vote of two thirds of the issued votes, with more than half of such votes corresponding to non-subordinated credits; or a favourable vote of more than half of the issued votes, provided that more than half of these votes correspond to non-subordinated credits.

Ratification (or non-ratification) of the recovery plan may be contested through a single appeal to an appeals court (whose decision is final).

Upon the ratification of the recovery plan, the debtor and all creditors (including non-voting creditors, unknown creditors and creditors that have not claimed or have contingent claims regarding facts that occurred on or prior to the PA's appointment) are bound to its terms, which may include a cram-down of the credits and/or the restructuring of repayment conditions, the provision of collateral and the transfer of assets to creditors.

If the recovery plan is not approved, the PA communicates the end of the negotiations and gives an opinion on whether the company is insolvent, in which case the PER is extinguished and insolvency proceedings are initiated; otherwise the PER is extinguished, and the debtor cannot initiate a new PER for the next two years.

Timings

The PER is usually concluded within six to eight months.

A faster track

Alternatively, the PER may follow a shorter form, being initiated by the presentation of a pre-negotiated extrajudicial recovery plan signed by the debtor and creditors representing the above-mentioned majority, with all ancillary documents. In such cases, following the PA's appointment and the notification of non-subscriber creditors for oppositions to the provisional creditors list, the judge decides on the plan's ratification as described above.

These shorter proceedings are usually concluded (upon the final ratification decision) within two to four months.

Absence of confidentiality
These proceedings are not confidential, being available for consultation by interested parties. The main decisions regarding the proceedings are made public.

The PEVE
Purpose of the PEVE
The PEVE is an ad hoc urgent public proceeding, aimed at companies which have found themselves to be in a difficult economic situation or in an imminent or current situation of insolvency as a result of the COVID-19 pandemic, but which can still be made economically viable.

Overview of the process
It is initiated with the voluntary submission of an application by the company, with the competent court to declare insolvency, together with the following elements:

- a written declaration signed by the company's board of directors proving that the current economic situation of the company is a result of the COVID-19 pandemic and that the company meets all the necessary conditions for viability;
- a copy of the documents proving the company's difficult economic situation;
- a list of creditors; and
- a viability agreement, signed by the company and creditors representing the same majorities mentioned above with regard to the approval of a recovery plan in a PER.

Upon the receipt of this request a provisional judicial administrator (PA) is appointed and there is a 15-day period during which creditors may challenge the list of creditors presented by the debtor or request the non-approval of the viability agreement. The court has a ten-day period to decide on the said claims and on the approval or non-approval of the agreement. Therefore, the court plays a similar role in the PER and in the PEVE.

Timings
The limited statistical data available at the moment shows the PEVE is concluded in up to three months.

The PER and the PEVE
The PEVE and the PER have many similarities, as the commencement of either of them:

- suspends any insolvency proceeding commenced against the debtor;
- suspends the enforcement proceedings pending against the debtor and precludes creditors from initiating new enforcement proceedings;
- narrows the debtor's rights on asset disposition, as in both proceedings the company cannot perform acts of special importance without prior written authorisation of the PA; and
- forbids the withholding of essential common services from the debtor, among others.

6.2 Position of the Company
Effect in Claims against the Company
After the appointment of the PA, any pending enforcement proceedings filed against the debtor are automatically suspended, and no further proceedings shall be filed after such date.

Effects on the Company's Activity and Management
The company shall continue to operate its business, 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 companies' viability or the creditors' rights, such as the sale of the business or rel-

evant assets, acquisition of property, conclusion of long-term agreements, assumption of liabilities and provision of collateral); without the PA's approval, the said transactions have no effect. However, if there is a concern over poor management, the debtor's management powers may, upon the court's decision, be restricted even further.

New Borrowing

The company may borrow money during recovery proceedings. Such credits benefit from a statutory right of lien over all the debtor's movable assets. Additionally, collateral provided by the company to secure new money remains valid even if insolvency is declared in the next two years.

6.3 Roles of Creditors

During the PER, the creditors negotiate and vote the restructuring plan.

Classes of Creditors

During the PER, creditors are not put in separate classes. Negotiations where creditors discuss the plan and their voting intentions with the PA are typically conducted on an individual basis. Notwithstanding this, it is frequently the case that the PA holds meetings where the most relevant creditors (ie, those necessary to form the majority required to approve the plan) are simultaneously present.

Organisation and Representation of Creditors

There is no requirement for a creditors' committee under the PER but, according to Ministers' Resolution 43/2011, creditors may create commissions or appoint one or more representatives to negotiate with the debtor. Additionally, creditors are not required to be represented by a lawyer in these negations although that is often the case.

Disclosure of Information

Creditors are provided with the same documents required for an insolvency proceeding, which include, inter alia:

- the accounts of the company;
- its shareholding structure;
- a list of major creditors;
- the recovery plan; and
- a list of members of corporate bodies.

Creditors may also request, from the PA or the debtor, any information relevant to assess the financial situation, the terms of the plan and their relative position vis-à-vis other creditors to enable a comparison with their situation had the debtor been declared insolvent and liquidated.

Duties

The guiding principles set forth in Ministers' Resolution 43/2011 concerning co-ordination and disclosure duties imposed on creditors are applicable in the context of the negotiation of both a PER or a PEVE.

6.4 Claims of Dissenting Creditors

Cramming-Down of Dissenting Creditors

Claims of dissenting creditors may be modified without their consent if the recovery plan is approved by the required majority and ratified by the court.

Opposition

Dissenting creditors may oppose such ratification by showing that creditors were not treated equally or were left in a position worse than they would have been in in an insolvency scenario.

6.5 Trading of Claims against a Company

Credits may be traded during the PER.

The PA receives notice of the transfer and defines/updates the list of creditors according-

ly. The PA may require additional information to ascertain the authenticity of the transfer.

6.6 Use of a Restructuring Procedure to Reorganise a Corporate Group

Upon the request of the PA, or on the court's own motion, a PER or a PEVE concerning companies in a control or group relationship may be joined. In such cases, the same PA may be appointed for all of them.

6.7 Restrictions on a Company's Use of Its Assets

Portuguese law does not impose special restrictions on the company's use of its assets. Notwithstanding this, the recovery plan may establish limitations (eg, creditors' authorisations).

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

In addition, where use of the assets amounts to an "act of special importance" (eg, the long-term lease of an asset), the prior authorisation of the PA is required.

6.8 Asset Disposition and Related Procedures

General Description

During the PER, the company may dispose of an asset within the normal operation of its business.

Where such a disposition is an act of special importance, it is subject to the PA's prior written authorisation. In the absence of this authorisation, the sale has no effect. In particular, the sale of any of the following is qualified as such:

- the business itself;
- any asset that is required to ensure the maintenance of the business activity;
- interests held in other companies;
- real estate; or
- any asset exceeding 10% of the value of the total assets of the company.

Sale's Execution

A sale of assets or business is executed by the company's management unless otherwise determined by the court.

The Position of the Purchaser

The purchaser acquires good title although liens and encumbrances over the assets remain effective, unless they are cancelled by the secured creditor. The risk of annulment of these sales in later insolvency proceedings is mitigated if they are authorised by the PA and/or provided by the recovery plan approved by the creditors.

The Creditors' Position

Creditors may bid for assets being sold. Although the debtor and the PA are not bound to give preference to creditors, it is prudent to consult the creditors for this purpose. Hence, the sale in market conditions is reassured, and the risk of later annulment becomes less likely to materialise.

Pre-negotiated Sales

Sales and similar transactions negotiated prior to the PER may be executed during the proceeding, subject to the PA's authorisation, in cases of special importance.

6.9 Secured Creditor Liens and Security Arrangements

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

6.10 Priority New Money

New money required for the continuation of the business may be secured with liens/secu-

rity. Both the agreement of new money and its liens shall be 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 and the PEVE.

6.11 Determining the Value of Claims and Creditors

Within the PER, the value of each claim is determined in the list of creditors prepared by the PA, which may be challenged by the creditors. In such cases the value is determined by the court.

Creditors without an economic interest in the company (ie, creditors which would not receive any amounts upon the liquidation of the debtor) do not have a differentiated treatment for the purpose of valuation of claims. However the lack of economic interest results, in practice, in these creditors being prevented from opposing the recovery plan adopted within the PER on the grounds that they are treated worse than they would otherwise have been.

6.12 Restructuring or Reorganisation Agreement

The recovery plan approved by the creditors can only be ratified by the court if it complies with the equal treatment of creditors, and provided no creditor is worse off. The plan may limit/reduce/affect credits, but shall not modify or terminate agreements without the consent of the counterparty.

6.13 Non-debtor Parties

The PER does not release co-debtors or guarantors. Moreover, these co-debtors/guarantors, upon being subrogated in the original creditor's position, may not demand a higher amount from the debtor than the amount resulting from the recovery plan.

6.14 Rights of Set-Off

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, having been admitted, set-off is always subject to the prior authorisation of the PA if it qualifies as an act of special importance. With the increasing use of the PEVE, the same controversy may arise for this proceeding.

6.15 Failure to Observe the Terms of Agreements

The company fails to comply with the recovery plan when it is defaulting for more than 15 days as of written notice of the creditor, in which case a moratorium or waiver provided for in the plan ceases to be effective. Where, following such an event, the company becomes unable to pay its debts when they fall due, the creditor may request the company's insolvency.

6.16 Existing Equity Owners

The recovery plan does not, in general, change the company's ownership structure; thus, existing 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 that they receive any dividends, or any other payment, from the company while the plan is in force.

7. STATUTORY INSOLVENCY AND LIQUIDATION PROCEEDINGS

7.1 Types of Voluntary/Involuntary Proceedings

The Purposes of Insolvency

The main purpose of an insolvency proceeding is the satisfaction of creditors' claims, primarily through the recovery of the business integrated in the insolvency estate and, where recovery is not possible, through the liquidation of the insolvency assets and the distribution of the proceeds amongst the creditors. To a certain extent, the CIRE is flexible in allowing creditors to opt for either alternative.

Initiating Insolvency Proceedings

Insolvency proceedings usually commence via the lodging of an application in court presented by the debtor, the creditors or the Public Prosecutor Department, together with documentation evidencing the insolvency situation.

The application lodged by a creditor must include information regarding the nature and amount of the credit, the identification of the debtor's managers (both in fact and law) and its five biggest creditors (not including the applicant), and the debtor's commercial registry certificate. If the applicant is the debtor, then it is important to indicate whether the company's situation of insolvency is current or imminent, and to include the documents set out in Article 24 of the CIRE, such as a list of all known creditors and a clear explanation of the company's activity over the last three years.

Creditors' Claims

The court's decision declaring the insolvency of the debtor grants creditors (and the Public Prosecutor Department) a maximum of 30 days to claim their credits (including conditional credits) before the insolvency administrator (IA). Creditors must lodge their claim together with several elements evidencing the existence of the credit, its origin, classification (ie, secured or privileged), due date, and accrued interest. Credits recognised in a previous court decision must also be claimed within the insolvency proceeding.

Recognition of Credits

Within 15 days as of the end of the credit claim period, the IA prepares and publishes a list of recognised credits and respective terms and conditions (eg, identification of the creditor, nature of the credit, amount and accrued interest, and the existence of guarantees/security), as well as a list identifying the credits that were not recognised (including the motives for non-recognition).

Within ten days as of the deadline for the IA to present these lists, any person with a legal interest can challenge the list of recognised creditors through a request lodged before the court based on the unlawful inclusion or exclusion, or on the inaccuracy of the amount or classification of the recognised credits. The court will then issue a decision concerning the existence and correct classification of the credits.

Outside this period, it is still possible for a creditor to request the recognition of a credit and the separation or restitution of assets within the insolvency proceeding. The separation request is made against the insolvent estate, the creditors and the debtor at any time until the end of the insolvency proceeding. The claim for the recognition of credits can only be filed until the latest of the following deadlines:

- within six months following the final judgment declaring the insolvency (res judicata); or
- within three months as of the constitution of the credit.

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Trading of Claims

These credits may be traded amongst creditors and with third parties prior to, or even throughout, the insolvency proceedings, as the only impact that this action has on the claim is the identification of the creditor.

Attachment and Stays on Judicial Proceedings

All pending judicial proceedings regarding the insolvency estate assets filed against the debtor or even third parties, which may determine variations in the value of the insolvency estate, and all judicial proceedings with an exclusive patrimonial nature filed by the debtor, are attached to the insolvency proceeding if the IA so requests, on the grounds of convenience, considering the purpose of the proceeding.

Enforcement proceedings or other measures requested by the insolvency creditors that affect the insolvency estate, as well as arbitration disputes, shall be suspended.

Effects on the Management Powers

The declaration of insolvency immediately removes the directors' powers and transfers to the IA the power of administration of the assets belonging to the insolvency estate.

Occasionally, the court may rule that management bodies keep control over the company's business (usually without retribution), provided that:

- the debtor has requested to retain control of its business;
- the debtor presents an adequate restructuring plan;
- there is no expected disadvantage for the creditors or for the insolvency proceedings; and
- the person or legal entity who initiated the insolvency proceedings agrees with the debtor's request.

Effects on Contracts

The rules regarding the effects of the declaration of insolvency over pending contracts are mandatory; thus, contractual clauses contravening or revoking them are void.

As a rule of thumb, contracts entered into between the debtor and a creditor that have not yet been completely performed are suspended until the IA decides on their performance or non-performance. The creditor may determine a reasonable date before which the IA must issue this decision. If no decision is made by this date, it is presumed that the IA has decided not to perform the contract. Note, however, that special rules apply to some contracts (eg, indivisible obligations, sale with ownership reservation and similar contracts, sale without delivery, promissory contracts, forward transactions, leases, mandates and management contracts).

Credits emerging from contracts whose effects the IA decided not to suspend are generally debts over the insolvency estate, and rank above most other credits.

Set-Off

Following the declaration of insolvency, creditors may set-off their credits with debts of the insolvency estate if at least one of the following requirements is fulfilled:

- the legal requisites (maxime reciprocity) of set-off are verified prior to the date of the declaration of insolvency; and/or
- the credit/claim and counterclaim concern money or another fungible of the same type and quality asset, and the claim is judicially enforceable.

However, set-off is not legally acceptable where:

- the debt was incurred after the declaration of insolvency, in particular as a result of the annulment of acts for the benefit of the insolvent estate;
- the insolvency creditor acquired his or her claim from another, after the declaration of insolvency;
- the insolvency estate is not responsible for the debts of the insolvent; and
- the claim to be set-off is subordinated.

Information Available to Creditors

Insolvency proceedings are dynamic; hence information is constantly being analysed and put forward to all involved parties. In particular, creditors have the right to be presented with a report prepared by the IA at the creditors' meeting. This report contains an analysis of information about the debtor (including the accounting information), and the IA's opinion about the prospect of maintenance of the debtor's business and whether an insolvency plan should be approved.

Distributions to Creditors

Creditors are paid with the proceeds of the sale of the assets belonging to the insolvency estate. These proceeds are used, at first instance, to pay the liquidation expenses and only the remaining part pays the credits in accordance with the amounts and ranking determined in the list of recognised creditors, as ratified by the court. Invariably, the proceeds are not sufficient to fully pay the recognised credits; thus, creditors are paid pro rata within each class.

Interim payments are available once there is a final decision on the credits' ranking and value. Payments are made in proportion to the creditors' claims.

7.2 Distressed Disposals

The sale of the assets belonging to the estate is a competence of the IA. Sales qualified as acts of special importance are subject to approval by the creditors' committee.

Once the insolvency declaration is final and the assessment report has been approved by the creditors' meeting, the IA promptly starts negotiating the sale of the assets.

The purchasers acquire the assets free and clear of claims and liabilities.

Secured creditors have a set of rights relating to the sale of the assets, which include:

- the right to be heard in relation to the proposed sale terms and conditions (including the price);
- the right to propose to purchase the asset for a higher price;
- where the insolvency administrator refuses this proposal, the right to be in the situation he or she would be in if the asset had been sold at the proposed price; and
- the right to be paid with the proceeds of the sale before any payment is made to other creditors.

It is possible to execute pre-negotiated sale transactions after the commencement of an insolvency proceeding, provided that such transactions are approved by the IA.

7.3 Organisation of Creditors or Committees

Creditors are organised in a creditors' meeting and a creditors' committee.

The Creditors' Meeting

The creditors' meetings are general assemblies of creditors composed of all creditors that decide on certain aspects of the insolvency

process where the consent of the creditors is legally required (eg, for the appointment of the insolvency administration and approval of the insolvency plan).

Creditors have the right to attend the meeting, which is presided over and convened by the judge and, unless otherwise determined by law, decisions are adopted by the majority of issued votes, without a quorum. As a rule, the credits are conferred with one vote per euro. Subordinated creditors are not entitled to vote, except to adopt the insolvency plan, and the judge decides on the votes conferred to conditional and litigious credits.

The Creditors' Committee

Prior to the first creditors' meeting, the court appoints a committee of creditors composed of three or five members (plus two substitutes), with the chair position preferably being attributed to the company's largest creditor. The choice of creditors' committee members ensures adequate representation of the various classes of creditors, except for subordinate creditors.

The committee is mainly responsible for assisting, and overseeing the activity of, the IA. In performing its duties, the committee may freely examine the debtor's accounts and request any information and documents it deems necessary from the IA. The members of the creditors' committee are not remunerated, but they are reimbursed for any expenses strictly necessary for the performance of their duties.

The creditors' committee is not a mandatory body.

8. INTERNATIONAL/ CROSS-BORDER ISSUES AND PROCESSES

8.1 Recognition or Relief in Connection with Overseas Proceedings

Within the EU

The effects of restructuring or insolvency proceedings opened in EU member states (excluding Denmark) are automatically recognised in, and not reviewed by the courts of, all other member states, under Regulation (EU) 2015/848 (principle of mutual trust). This rule applies unless the effects of this recognition manifestly infringe the member state's public policy (eg, when it is contrary to its fundamental principles, constitutional rights or individual liberties).

Third Countries

Decisions rendered in proceedings opened in third countries are recognised in Portugal, after revision and confirmation by a Portuguese court, which verifies 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.

8.2 Co-ordination in Cross-Border Cases

As far as it is known, no protocols or other arrangements have been entered into with foreign courts to co-ordinate cross-border proceedings.

However please note that, within the EU, Regulation (EU) 2015/848 establishes some co-ordination mechanisms, namely, concerning the 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 a member state other than the one where the insolvency proceeding was initiated. These mechanisms consist basically in duties of co-operation and information between courts and between courts and insolvency practitioners.

8.3 Rules, Standards and Guidelines

Within the EU

Under Regulation (EU) 2015/848, cross-border insolvency and recovery proceedings are opened where debtors have their main centre of interest (the place where the debtor regularly conducts the administration of its interests in a way ascertainable to third parties) or an establishment. The Regulation determines, as a rule, that the proceedings are governed by the law of the member state where they were initiated.

Third Countries

The determination of the law governing cross-border insolvency and recovery proceedings regarding debtors of third countries follows the CIRE, which establishes, as a general rule, that proceedings and corresponding effects shall be governed by the law of the country where they were initiated.

8.4 Foreign Creditors

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

8.5 Recognition and Enforcement of Foreign Judgments

Within the EU

As mentioned in **8.1 Recognition or Relief in Connection with Overseas Proceedings**, under the principle of mutual trust and the Regulation (EU) 2015/848, any ruling opening insolvency proceedings handed down by a court of a member state which has jurisdiction (excluding Denmark) shall be recognised in Portugal from the moment that it becomes effective in the State of the opening of the proceeding.

This means the rulings adopted by member states' courts are enforceable in Portugal without any previous revision or confirmation by the national courts.

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

In any case, the said rulings shall produce in Portugal the same effects as under the law of the State of the opening of proceedings.

However, the aforementioned general rules do not apply in the following cases:

- when the effects of the recognition are clearly incompatible with the Portuguese public policy (eg, the fundamental principles, constitutional rights and individual liberties);
- in the cases where Regulation (EU) 2015/848 provides otherwise (eg, the effects of the insolvency proceeding on the rights of a debtor over immovable property, a ship or an aircraft subject to registration in a public register shall be determined by the law of the member state under the authority of which the register is kept); and
- if a secondary insolvency proceeding has been commenced in Portugal, in accordance with Article 3, paragraph 2 and Article 20, paragraph 2 of the Regulation. In this case, the effects of the said secondary proceeding cannot be challenged in other member states, but any restriction of creditors' rights shall only produce effects vis-à-vis assets located within the territory of another member state

in the case of those creditors who have given their consent.

Third Countries

Rulings adopted by courts of third countries are recognised and enforced in Portugal upon revision and confirmation by a Portuguese court.

Said recognition depends on the fulfilment of a set of requirements laid down in the CIRE, namely:

- the foreign court's competence shall be based on the place where the debtor is domiciled or has the centre of its main interests, or an equivalent rule; and
- the ruling recognition cannot bring about a result that offends the basic principles of the Portuguese legal framework.

On this basis, national case-law tends to reject, for instance, the recognition of foreign rulings resulting in the expropriation of private property with no compensation to the owner.

After its recognition, the foreign ruling is publicised together with the foreign IA's appointment decision and the decision on the closing of the proceeding, which are subject to registration, notably in the Portuguese Land Registry. After recognition, the foreign decisions rendered within a foreign insolvency proceeding may be enforced in Portugal.

9. TRUSTEES/RECEIVERS/STATUTORY OFFICERS

9.1 Types of Statutory Officers

Under Portuguese law, the statutory officer appointed for conducting recovery or insolvency proceedings is designated as the "judicial administrator" and its rights and duties are governed by Law No 22/2013. The judicial administrator is designated as the "provisional judicial administrator" in the PER, and as the "insolvency administrator" in the insolvency proceeding.

9.2 Statutory Roles, Rights and Responsibilities of Officers

Provisional Judicial Administrator (PA)

The PA is responsible for:

- providing for the conservation and productivity of the debtor's estate;
- ensuring the continuation of the company's operation;
- avoiding, if possible, the deterioration of the economic situation of the company;
- assisting the debtor in managing its estate; and
- specifying the actions that the debtor is still empowered to undertake.

Insolvency Administrator (IA)

The IA's functions include:

- the liquidation of assets of the insolvent and payment of its debts;
- maintaining and exploring the rights of the insolvent and maintaining the exploitation of the company business;
- managing and disposing assets integrated in the insolvency estate;
- representing the insolvent in all patrimonial-related subjects relevant to the insolvency and in judicial proceedings concerning the insolvent or assets belonging to the insolvency estate;
- deciding whether to terminate contracts unperformed on the date of the declaration of insolvency; and
- annulling acts detrimental to the insolvency estate ("clawback actions").

Liability

The PA and the IA report to the court and to the creditors' committee and are liable for the dam-

ages caused to the creditors through negligent non-compliance with duties.

9.3 Selection of Officers

Appointment of the Judicial Administrator

The court appoints the judicial administrator (the PA or the IA) and may take the name indicated in the insolvency request into account when making its decision.

Replacement of the Judicial Administrator

The judicial administrator appointed by the court may be replaced by another person/entity elected by the insolvent's creditors, unless the court has concerns over the putative replacement's reputation or the possibility of retribution being sought by the creditors.

Besides this, the judicial administrator can only be replaced if it refuses to perform its functions, if there is a dismissal with fair cause or if a subsequent legal cause of inability prevents it from performing its functions arises.

Interaction with the Debtor's Management

Whenever the administration of the insolvent estate is entrusted to the debtor, the judicial administrator carefully supervises it, authorising or rejecting certain actions.

Who Can Serve as Judicial Administrator?

The judicial administrator must usually be registered in the insolvency administrators' official list and fulfil certain requirements. However, where the dimension of the company, the specificity of the business or the complexity of the proceedings so justifies, the registration requirement may not apply to the choice of judicial administrator by the creditors.

Attorneys are prevented from serving as judicial administrators, as provided for in the statutes of the Portuguese Bar Association. Differently, the statutes of the Certified Accountants Association do not prevent accountants from doing so, unless a conflict of interests resulting in a lack of independence or impartiality arises.

10. DUTIES AND PERSONAL LIABILITY OF DIRECTORS AND OFFICERS OF FINANCIALLY TROUBLED COMPANIES

10.1 Duties of Directors

Duties

Company directors have a duty to request the opening of insolvency proceedings.

Additionally, both company and insolvency law impose duties on directors aimed at protecting the creditors' interests, even before an insolvency situation.

A qualified standard of care applies to directors: the diligence of a careful and organised manager.

Liability Regime

Two different liability regimes apply in an insolvency context.

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

Insolvency law liability will apply when the insolvency has been created or deepened as a consequence of wilful or grossly negligent acts or omissions performed by directors (including shadow directors) in the three years preceding the insolvency proceeding.

Duties Vis-à-Vis Subsidiaries and Shareholders

Directors owe general duties of loyalty, information and protection to company affiliates and subsidiaries.

Directors are liable, vis-à-vis owners/shareholders, both directly for personal damages caused to shareholders and for damages resulting from the deterioration of the company's value emerging from acts or omissions carried out while in office. The direct liability of directors, vis-à-vis owners/shareholders, is seldom applied.

Sanctions

In insolvency proceedings, the conduct of the debtor's directors (over the previous three years) will be assessed to determine whether they have wilfully, or with serious misconduct, created or contributed to the insolvency or to its deepening. In this case, the directors may, inter alia, be prohibited from managing third party assets and from engaging in commercial activities or holding positions on the boards of companies and similar entities for two to ten years.

Criminal sanctions may also apply in special circumstances of gross negligence, wilful conduct or fraud.

10.2 Direct Fiduciary Breach Claims

Claims asserting the breach of duties owed by the directors to creditors (based on company or insolvency law) are launched exclusively by the IA.

11. TRANSFERS/ TRANSACTIONS THAT MAY BE SET ASIDE

11.1 Historical Transactions

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 the assets returned to the insolvent estate, provided that the counterparty acted in bad faith (ie, was aware of the insolvency or its imminence).

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, regardless of bad faith, except for special situations where the law always requires the proof of bad faith or other conditions.

11.2 Look-Back Period

The look-back period is two years before the onset of the insolvency proceedings.

11.3 Claims to Set Aside or Annul Transactions

The IA annuls 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.

These time restrictions do not apply to agreements not yet performed.

These annulments may only be carried out in insolvency and not in restructuring proceedings.

Any creditor may judicially challenge detrimental transactions (in favour of his or her own interest) provided that the IA did not annul them, and no later than five years after the transaction date.

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