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# Insolvency 2023

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**Portugal: Law & Practice**

Manuel Magalhães, Mafalda Ferreira Santos, Francisco Boavida Salavessa and Maria José Lourenço
Sérvulo & Associados

# PORTUGAL


## Law and Practice

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# 1. State of the Restructuring Market

## 1.1 Market Trends and Changes

### General State of the Market

Since 2021, there has been an upward trend in the number of insolvency and restructuring proceedings in Portugal.

Indeed, the number of insolvency and restructuring filings during the first quarter of 2023 increased 23% over the comparable period in 2022. The number of businesses declared insolvent reached a peak during May 2023.

The confluence of several global events has had a relevant impact on the economic landscape in Portugal. The conflict in Ukraine has disrupted global supply chains and increased the cost of energy and raw materials. Portugal, like many other European countries, relies heavily on imports, and any disruption in the global flow of goods has a significant impact on its industries. The resulting higher prices for energy and commodities have substantially impacted the operational costs of Portuguese companies, further straining their economic and financial viability. Furthermore, the European Central Bank's (ECB's) decision to increase interest rates has added to the financial distress of Portuguese companies. Higher interest rates mean increased borrowing costs for businesses, which can be particularly burdensome for companies already struggling due to other external factors. Many Portuguese businesses had taken loans in order to cope with previous economic challenges, and the rate hike has strained their ability to meet their financial obligations.

In addition, the recent resurgence of the Israel-Palestine conflict could trigger fluctuations in the price of oil, natural gas, and other crucial resources, directly affecting the economy worldwide and thus the Portuguese economy, which strongly depends on energy imports. Climate change has compounded these challenges. Portugal, like much of Southern Europe, has been experiencing a decrease in rainfall, leading to drought conditions and reduced agricultural productivity. The lack of rainfall has harmed crop yields and driven up food prices. This, in turn, has negatively affected the financial health of agribusinesses and food-related industries. Despite the measures taken by the Portuguese government to address these challenges, including offering support to affected industries and promoting economic diversification, all these factors may increasingly handicap companies across various sectors and prevent them from meeting their financial obligations. This could lead to reduced economic growth and an uncertain future for many businesses, and thus, an increase in the number of insolvency proceedings.

### Most Impacted Sectors

The main sectors affected, in a trend similar to last year, are: manufacturing (21%); transportation (17%); construction (16%); wholesale and retail trade (11%); and general services (8%). Most of the companies declared insolvent are based in the largest cities, such as Lisbon, Porto, Braga, Aveiro and Leiria.

Due to its economic relevance, it is worth pointing out that one insolvency proceeding initiated in 2021 – Groundforce (the leading ground handling provider in Portugal) – is still ongoing.

### Costs

According to published official information, the average court costs incurred in insol-

vency/restructuring proceedings amount to EUR2,599.36.

### Duration

The average length of insolvency proceedings up to the judicial declaration of insolvency stands at approximately one month.

However, if all the phases of insolvency proceedings are taken into consideration (from the beginning to the end), the average duration of said proceedings is about 71 months.

### Expected Developments

#### *The impact of the international scene and the aftermath of COVID-19*

COVID-19 caused, in 2020 and again in 2021, an impact with many consequences still to be assessed, and just as the economy was progressively recovering from those adverse effects and adapting to work in a post-pandemic environment, those consequences were significantly amplified by the conflict in Ukraine. In fact, said conflict has led to a complex global energy crisis, the rise of commodity prices and of interest rates, supply chain disruptions, inflation, and a significant cost-of-living increase.

The geopolitical tensions have affected investors' confidence, which has influenced financing conditions and economic stability. Additionally, the ECB's monetary policy, including the increase in interest rates, has played a crucial role in shaping financial conditions in the Eurozone, leading to higher financing costs for businesses and individuals and strongly impacting their ability to meet their financial obligations. This has consequently made a major contribution to the increase in insolvencies.

Climate and environmental changes also play a role.

The most recent reopening of the Israel-Palestine conflict will be a further source of economic problems in Europe and consequently in Portugal, since the Middle East is a significant energy producer and any disruption in the region will affect prices and will lead to more economic and financial challenges, particularly in the most vulnerable sectors and industries.

Given that an economic downturn invariably translates into an increase in the number of insolvency and restructuring proceedings, the Portuguese government has approved a series of measures to mitigate these harmful effects by hindering the usual consequences of an economic slowdown (redundancies and defaults). This is known as the Portuguese Recovery and Resilience Plan (in the amount of EUR22,2 billion in both non-repayable support and loans from the Recovery and Resilience Facility or RRF).

Although the first quarter results were encouraging, all the factors described above would seem to predict an increase in the number of insolvencies, both for individuals and companies.

#### *Transposition of Directive (EU) 2019/1023*

The transposition of Directive (EU) 2019/1023 took place through Law No 9/2022 on 11 January, which introduced several relevant changes in the Insolvency and Recovery Code (Decree-Law No 53/2004), with two subsequent amendments. A significant part of those changes deals with the legal regime of the special revitalisation proceeding (*Processo Especial de Revitalização* or PER), both substantively and procedurally.

The transposition of said Directive comprises the following key measures:

- the insertion of a new voting mechanism for recovery plans in the context of special

revitalisation proceedings, by categories of creditors, applicable to large companies;
- strengthening of the protection given to new money made available to the company during the revitalisation proceeding;
- the obligation to make partial payments to creditors in insolvency proceedings, allowing the insolvency administrator to make payments more promptly;
- clearing up compensatory labour claims within the insolvency proceeding;
- clarification of the concept of "special relationship" with the debtor for the purpose of ranking credit as subordinated; and
- extension of the scope of application of the early warning mechanism (Decree-Law 47/2019 of 11 April 2019), to ensure that companies are aware of the insolvency risks associated with their economic situation.

The implementation of such measures is expected to foster more efficient and swifter insolvency proceedings and reduce the cascade effect on the market caused by companies' insolvencies, and also create alternatives for companies in a situation of economic distress or imminent insolvency, which may result in a significant reduction in the number of insolvency proceedings. However, given the short period of time that has passed since the law's implementation, as well as the serious impact of the factors mentioned above in the economy worldwide, it is not yet possible to assess the real impact of these measures with certainty.

*Revocation of COVID-19 legislation*

With the dwindling of the pandemic, the Portuguese legislator decided to revoke many of the laws and extraordinary measures approved within the context of COVID-19.

Law No 31/2023, of 4 July 2023, revoked all legislation related to COVID-19 that had direct impact on the insolvency legal framework, namely Law No 4-A/2020, of 6 April 2023, which had suspended the deadline for company directors to file for insolvency (within 30 days of becoming aware of the insolvency situation). Therefore, since 5 July 2023, said deadline has been in force again.

It is fair to anticipate that the next insolvencies to be declared may trigger questions related to the fulfilment or non-fulfilment of the directors' duty to file for insolvency, with the consequent liability for the breach of said duty.

Additionally, the Extraordinary Company Viability Process (*Processo Extraordinário de Viabilização de Empresas* or PEVE) regime expired on 30 June 2023, due to the non-extension of the validity period and can no longer be used by companies for recovery.

## 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);
- 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; and
- 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.

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

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

### Voluntary Proceedings

Portuguese law provides for two types of statutory restructuring proceedings: the PER (which requires court intervention) and the RERE (which is an out-of-court restructuring proceeding). Both of these proceedings are voluntary, requiring the debtor's 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's 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.

### Failure to Initiate Mandatory Insolvency Proceedings

If the request to initiate insolvency proceedings 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's Department or any person liable for the debt in the events foreseen in Article 20 of the CIRE. These events evidence the debtor's 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's Department

The Public Prosecutor's Department may initiate proceedings while representing 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 a 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

A debtor in a situation of insolvency, or imminent insolvency, is required to initiate the insolvency proceedings (voluntary or involuntary). By contrast, a PER may only be initiated where the debtor is not insolvent.

## 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 ECB 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 power 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 on the supervision authority (*Autoridade 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 liquidation proceedings.

### Asset Management

Decree-Law No 27/2023, of 28 April 2023, approved a new regime for asset management (eg, UCITS and AIF), containing certain specificities in connection with the liquidation or insolvency of undertakings for collective investment and of the respective managers. For instance, the regulatory authority (*Comissão do Mercado de Valores Mobiliários* or CMVM) has the power to withdraw the authorisation and to intervene in the judicial liquidation proceeding.

### Crypto-assets

Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, is also concerned with the protection of the holder of crypto-assets in the event of the insolvency of the issuer and establishes rules concerning:

- the duty of the issuers of asset-referenced tokens (ARTs) and electronic money tokens (EMTs) to draw up and maintain recovery and redemption plans, the latter serving as an operational plan to support the orderly redemption of the tokens, which is to be implemented upon a decision by the competent authority that the issuer is unable, or likely to be unable, to fulfil its obligations, including in the case of insolvency; and
- the duty by the issuers of ARTs and some issuers of EMTs to maintain a reserve of assets, which are legally segregated from the issuers' estate, in the interests of the holders of the tokens, so that creditors of the issuers have no recourse to the reserve of assets, in particular in the event of insolvency.

## 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 since they:

- maintain secrecy regarding the debtor's 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 the creditors and debtors 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.

### 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 "de-judicialised" 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 to both pure informal consensual restructuring and the PER, especially considering that the RERE does not allow for the cram-down of the creditors who do not engage in the negotiations. For this reason, the RERE is not discussed here.

## 3.2 Consensual Restructuring and Workout Processes

The time and proceedings depend on the debtor's 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 set up by specialised entities.

### Debtor's Undertakings

Besides the usual undertakings present in finance agreements (eg, negative pledge clauses, limitation on indebtedness), the creditors naturally require greater control over the debtor's activity in a restructuring scenario. Therefore, the agreement usually imposes on the debtor more stringent information obligations and consent requirements applicable to changes in the articles of association, members of the corporate bodies, and the capital structure. Moreover, a controller is frequently appointed by the creditors to monitor the execution of the agreement.

### 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 the 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.

## 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 (the PER) 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.

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

- certain solutions adopted do not require such a 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 bank loans and, given that banks are repeat 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 Pledges

Creditors can take security over real estate and movable property subject to public registration (cars, boats and aeroplanes) through mortgages, created through public deeds, 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 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 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. However, 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 to be 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 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.

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

In the context of the PER, if certain requirements are met, creditors can be classified into different categories according to the nature of their claims (secured, privileged, common or subordinated) and may be identified according to the existence of sufficient common interests.

### 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.

Additionally, essential common services cannot be withheld from the debtor during the PER (water, electricity, electronic communications, etc) and/or any other services without which the company cannot carry out its business. The cost of these services will be qualified as credits over the insolvency estate if the debtor is declared insolvent within two years 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 requires 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 Proceedings

Aside from this and prior 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 their rights (eg, freezing the debtor's 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, but may rank below creditors benefiting from security in rem.

### New Money in the Context of a PER

Creditors who finance the activity of the company within the PER or within the execution of the recovery plan (interim financing), have a credit over the insolvent estate up to an amount corresponding to 25% of the unsubordinated debt, if the company becomes insolvent in the two years following the res judicata of the ratification of said recovery plan.

For the part exceeding the 25% referred to above, credits resulting from financing benefit from general movable credit privilege, graduated before the general movable credit privilege granted to employees. This privilege now extends to credits resulting from interim financing granted by creditors, partners, shareholders and any other persons specifically related to the company.

It is forbidden to challenge financing acts, as well as to declare them null and void or unenforceable. Civil, administrative or criminal liability on the grounds that the financing is detrimental to all the creditors is excluded, except in cases expressly set out in the law.

# 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 and the RERE are the statutory restructuring proceedings under Portuguese law. Given the reduced importance of the RERE, the focus of this section will be the PER.

## 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), expressing their willingness to engage in negotiations, which include the following:

- a declaration by the company of its ability to recover;
- a declaration by a certified accountant attesting that the company is not insolvent;
- ancillary documents required in insolvency proceedings; and
- a proposal for a recovery plan, with a description of the company's situation in terms of assets, financing and revenue cash flows.

Where the debtor qualifies as a large company, it must also file a proposal for the classification of creditors affected by the restructuring plan into distinct categories, according to the nature of their respective claims. It must also classify these creditors according to the existence of sufficient common interests in order to reflect the range of the company's creditors (eg, employees, shareholders, bank entities, suppliers of goods and services, and public creditors).

Upon receipt of this request, the court's order appointing a provisional judicial administrator ("PA") is published on the official web platform CITIUS, formally initiating the PER.

Subsequently, the creditors must lodge their credit claims to the PA, who drafts and publishes a provisional list of creditors on the CITIUS platform. This list may be challenged by the creditors before the court.

With the publication of the appointment of the PA, the standstill period (four months, extendable for one month) is initiated, as referred to below.

Once the deadline to challenge the list has passed, out-of-court negotiations between the creditors and the debtor, under the PA's supervision, can begin. These last for two months, extendable once for one month, if the legal assumptions are met.

### *Role of the court*

The court rules on the challenges to the provisional creditors' list and once this is approved by the creditors, the court renders a ruling of ratification/non-ratification of the recovery plan.

The recent amendments to the CIRE have made judicial scrutiny of the recovery plan more stringent and demanding, as follows. The court is expected to:

- confirm if the recovery plan provides for the equitable treatment of creditors and categories of creditors affected, regardless of any creditors' opposition to the plan;
- determine modification of the list where it does not reflect the universe of the company's creditors or the existence of sufficient common interests among them;
- determine if new financing to the company fairly aligns with the interests of the creditors;

- ensure the viability of the plan, providing it offers reasonable prospects of avoiding the company's insolvency; and
- order an evaluation of the company by an expert (if a creditor expresses non-approval of the plan).

### *The recovery plan – approval, ratification and potential challenges*

The plan's approval requires a vote of the company's creditors. The CIRE foresees three systems of obtaining the approval majority (in all referred systems, abstentions are not considered).

Under the first system, the plan may be approved by the favourable vote of more than two thirds of the total votes issued in each of the categories of creditors.

The second system foresees the approval of the plan which, having been voted on by creditors whose claims represent at least one third of the claims listed with voting rights, obtains the favourable vote of (i) more than two thirds of the total votes issued; and (ii) more than 50% of the votes issued corresponding to non-subordinated claims listed with voting rights.

According to the third system, the plan is approved if it cumulatively collects the favourable vote (i) of creditors whose credits represent more than 50% of the total credits with voting rights; and (ii) of more than 50% of the issued votes corresponding to non-subordinated credits with voting rights.

The ratification (or non-ratification) of the recovery plan may be challenged in accordance with the assumptions provided for in the CIRE.

Upon the ratification of the recovery plan, the debtor and all creditors (including non-voting 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 by 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 and the PA declares before the court that the company is insolvent, it may: (i) lodge an opposition, following which the judge will order the PER to be closed with all its effects extinguished; or (ii) not oppose it, in which case, insolvency is declared and proceedings are initiated (being the PER proceedings attached to the document).

Where the PER is terminated, 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 submission of a pre-negotiated extrajudicial recovery plan signed by the debtor and creditors representing the majorities foreseen in the CIRE to approve the plan, with all ancillary documents. In such cases, following the PA's appointment and the notification of non-subscriber creditors for opposition 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.

## 6.2 Position of the Company

### Effect in Claims Against the Company
The standstill period is now four months, extendable for one month. The standstill period begins with the order appointing the PA and does not allow for the inclusion of declaratory actions within the scope of this rule. The exception to the standstill period is only found in enforcement actions for the collection of labour credits, thus protecting the rights of workers.

A contractual clause which gives the request to open a PER, the request for an extension of the standstill period, or the granting thereof the value of a resolutive condition of the business, or which grants the opposing party a right to indemnity or termination of the contract, is now null and void.

### Effects on the Company's Activity and Management
The company may 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 company's viability or the creditors' rights, such as the sale of the business or relevant assets, acquisition of property, conclusion of long-term agreements, assumption of liabilities and provision of collateral). Without the PA's approval, said transactions have no effect.

### New Borrowing
The company may borrow money during recovery proceedings. Such credits benefit from a statutory right of lien as described in **5.5 Priority Claims in Restructuring and Insolvency Proceedings** under the heading "New Money in the Context of a PER".

## 6.3 Roles of Creditors
During a PER, the different categories of creditors negotiate and vote the restructuring plan.

### Classes of Creditors
As referred to in **5.1 Differing Rights and Priorities**, the waterfall of credits sets out the criteria by which creditors will, in principle, be paid. It is also important to bear in mind the different categories of creditors. Thus, it is common, within the PER, for the PA to hold meetings with the most important creditors (eg, those necessary to form the majority required to approve the plan) according to the relevant criteria.

### 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 appoint one or more representatives (not necessarily lawyers) to negotiate with the debtor.

### 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 the members of corporate bodies.

Creditors may also request, from the PA or the debtor, any relevant information to assess the financial situation, the terms of the plan and

their relative position vis-à-vis other creditors, to enable an assessment of their situation should the debtor be 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 a PER.

## 6.4 Claims of Dissenting Creditors

### Cram-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 in a "creditors worse off" situation.

## 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 accordingly. 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 concerning companies in a control or group relationship may be joined. In such cases, the same PA may be appointed for all the joined proceedings.

## 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. Despite this, the recovery plan may establish limitations (eg, creditors' authorisations).

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

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 a 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 for in 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.

### 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 an 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/security. Both the agreement to accept new money and its liens are immune to annulment in the case of a subsequent insolvency declaration. These investments/loans may be secured by assets of the company, even if such assets are encumbered by pre-existing secured creditor liens/security, although the original creditor benefits from priority in the enforcement of that security. Moreover, the CIRE grants new money creditors a statutory right of lien over all the debtor's current assets, ranked above the right of lien granted to employees, which is extended to the PER.

## 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.

## 6.12 Restructuring or Reorganisation Agreement

The plan may limit/reduce/affect credits, but will 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, upon being subrogated in the original creditor's position, these co-debtors/guarantors, 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.

## 6.15 Failure to Observe the Terms of Agreements

The company fails to comply with the recovery plan if it defaults for more than 15 days as of

receiving written notice from the creditor, in which case, a moratorium or waiver provided for in the plan ceases to be effective. Thus, 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, and 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 for them to 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 or, where recovery is not possible, through the liquidation of the insolvency assets and the distribution of the proceeds among 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's 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's Department) a maximum of 30 days to claim their credits (including conditional credits) before the insolvency administrator (IA). Creditors must lodge their claims 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 render a decision concerning the existence and correct classification of the credits. Recognition and/or ranking of credits that require evidence will be provisionally decided by the court.

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.

### Trading of Claims

These credits may be traded among creditors and with third parties prior to, or even throughout, the insolvency proceedings (but this may prevent set-off against debts of the insolvency estate).

### 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, will 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 that 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 against debts of the insolvency estate if at least one of the following requirements is fulfilled:

- the legal requisites (in particular, 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 their 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 public. 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 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 insolvency estate debts (notably liquidation expenses) and only the remaining part pays the credits in accordance with the amounts and ranking determined in the list of recognised creditors and decided 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, and are currently mandatory in certain circumstances.

## 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 the secured creditor 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

Creditors' meetings are general assemblies of creditors composed of all the 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 the member state's 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 per the information available, no protocols or other arrangements have been entered into with foreign courts to co-ordinate cross-border proceedings.

However, within the EU, Regulation (EU) 2015/848 establishes some co-ordination mechanisms, namely, concerning cases where main and secondary insolvency proceedings in relation to the same debtor co-exist, which may occur when the debtor has an establishment within the territory of a member state other than the one where the insolvency proceeding was initiated. These mechanisms consist basically in duties of co-operation and information between the courts, and between the 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 will 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) will 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 (excluding Denmark) are enforceable in Portugal without any previous revision or confirmation by the national courts.

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

In any case, said rulings produce the same effects in Portugal 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 Portuguese public policy (eg, the fundamental principles, constitutional rights and individual liberties);
- 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 will 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, (2) and Article 20, (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 will 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 will be based on the place where the debtor is domiciled or 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 both 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 of assets integrated into 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 not performed on the date of the declaration of insolvency; and
- annulling acts detrimental to the insolvency estate ("claw-back actions").

### Liability

The PA and the IA report to the court and to the creditors' committee and are liable for damages caused to creditors through negligent non-compliance with their 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.

### Interaction With the Debtor's Management

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

### Who Can Serve as Judicial Administrator?

The judicial administrator is usually registered in the insolvency administrators' official list and must fulfil certain requirements.

Attorneys are prevented from serving as judicial administrators, as provided for in the statutes of the Portuguese Bar Association. However, the statutes of the Certified Accountants Association do not prevent accountants from serving as judicial administrators, 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 if 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 on the part of the directors (including de facto and shadow directors) in the three years preceding the opening of 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 for 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 of the opening of the insolvency proceeding) will be assessed to determine whether they have wilfully, or due to serious misconduct, created the insolvency or contributed to the extent of the insolvency. 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 misconduct 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/or terminated 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 and/or terminated, regardless of bad faith, except for special situations where

the law always requires 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.

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