The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Portugal: Restructuring & Insolvency

This country-specific Q&A provides an overview of the legal framework and key issues surrounding restructuring and insolvency in Portugal.

This Q&A is part of the global guide to Restructuring & Insolvency.

For a full list of jurisdictional Q&As visit http://www.inhouselawyer.co.uk/practice-areas/restructuring-insolvency/

Country Author: SRS Advogados

The Legal 500

Natália Garcia Alves, Partner

natalia.alves@srslegal.pt

Vasco Correia da Silva, Managing Associate

vasco.silva@srslegal.pt

1. **What forms of security can be granted over immovable and movable property? What formalities are required and what is the impact if such formalities are not complied with?**

The most frequent security established in relation to loans is a mortgage over immoveable property. This type of security entitles the creditor to be paid with priority over unsecured creditors from the value of the property concerned. A mortgage over immoveable property can only be validly constituted by notarial deed and is subject to registration, otherwise producing no effects.

The main type of security taken over moveable property is a pledge. A pledge entitles the creditor to be paid, with priority over unsecured creditors, against the value of certain existing movable assets or rights (including shares, patents or trademarks). It is advisable to establish a pledge in writing, although this is not a requirement. A pledge over moveable things is only validly granted with the delivery of the asset. It is also possible to grant a mortgage over certain moveable assets which have a legal regime similar to that of immoveable property, namely regarding registry requirements (e.g.: vehicles, ships, aircrafts).

2. What practical issues do secured creditors face in enforcing their security (e.g. timing issues, requirement for court involvement)?

As a general principal, creditors have to file enforcement proceedings in court to enforce their securities. The exception is this regard is the enforcement of financial collateral arrangements, which can be enforced by the creditor directly once there is a breach by the debtor. As a matter of rule, enforcement proceedings in Portugal are expedite, particularly when there is already a security granted. If a mortgage is enforced and there are no incidents, the proceedings may take only 6 months from beginning to end.

3. What is the test for insolvency? Is there any obligation on directors or officers of the debtor to open insolvency procedures upon the debtor becoming distressed or insolvent? Are there any consequences for failure to do so?

A debtor is deemed to be insolvent when its liabilities significantly exceed its assets or when it is unable to perform its obligations as they fall due.

The directors of a company must file for insolvency within 30 days of the date when they become aware of the insolvency or the date on which they should have been aware of it. When the debtor is the owner of a company, Portuguese law presumes that awareness of the insolvency occurs three months after the general failure to meet certain debts, such as taxes or social security contributions, debts arising from an employment contract or from the breach or termination of such contract, rentals for any type of hire, including financial leases.

If the directors fail to fulfil their obligation to file for insolvency proceeding, they can be considered culpable for having created or contributed for the situation of insolvency and, consequently, the Court may impose sanctions upon them, namely sentence them to indemnify creditors up to the amount of their unpaid credits – see question 13.

4. What insolvency procedures are available in the jurisdiction? Does management continue to operate the business and/or is the debtor subject to supervision? What roles do the court and other stakeholders play? How long does the process usually take to complete?

Once a company is in a situation of insolvency, Portuguese Law determines that insolvency procedures must be filed – either by the company itself (through its directors) or by any creditor. The insolvency proceedings can be aimed at enabling payment to the insolvent's creditors through the execution of an insolvency plan and/or at the liquidation and judicial sale of the insolvent's assets. If the intention is the restructuring of the company, the debtor must submit an insolvency plan, which is subject to approval by the creditors. If a debtor files for insolvency proceedings and does not submit an insolvency plan, the creditors can decide to close down the company and proceed to liquidation of its assets.

After the insolvency is declared, as a rule the directors remain in office although with limited powers. The debtor's activity is supervised by a creditors' general meeting, a creditor's committee, a court-appointed insolvency administrator and by the court itself, which will have the last say. Directors are obliged to cooperate with these entities.

5. How do creditors and other stakeholders rank on an insolvency of a debtor? Do any stakeholders enjoy particular priority (e.g. employees, pension liabilities)? Could the claims of any class of creditor be subordinated (e.g. equitable subordination)?

Portuguese law establishes four classes of credits: secured, preferential, non-secured, and subordinated. Secured credits are those with security over seized assets up to the value of such assets. Preferential credits are those that grant a right to be preferentially paid up to the value of the assets over which such preference exists. Subordinated credits are those that will be settled only after the non-secured creditors have been fully paid. The subordinated credits are listed in the CIRE and include, namely, any credits held by "connected entities" with the insolvent company, provided that such special connection existed at the time the credit was granted (eg. shareholders loans). All other credits are non-secured.

In any event, the credits related to the insolvency proceeding take precedence over all credits and generally are followed by Tax Authority credits, Social Security credits and in some cases by employees' credits.

6. Can a debtor's pre-insolvency transactions be challenged? If so, by whom, when and on what grounds? What is the effect of a successful challenge and how are the rights of third parties impacted?

Once insolvency proceedings have commenced, transactions that unfairly favour one creditor over the others or any acts that reduce, make it more difficult or impossible, jeopardise or delay payment to the creditors can be set aside by the insolvency administrator.

Two requirements must be fulfilled: the acts must have been carried out in bad faith (with the knowledge of the debtor's insolvency or of the damage that act could cause) and within the two years prior to the initiation of the insolvency proceedings.

The insolvency administrator can terminate contracts that fulfil these criteria by means of a registered letter within six months as of the knowledge of their existence. The termination has retroactive effects. The insolvent debtor or the third party which received the communication of termination can challenge it, filling a judicial action within three months after receiving the communication.

7. What form of stay or moratorium applies in insolvency proceedings against the continuation of legal proceedings or the

enforcement of creditors' claims? Does that stay or moratorium have extraterritorial effect? In what circumstances may creditors benefit from any exceptions to such stay or moratorium?

As a rule, the pending enforcement proceedings filed against the debtor or other proceedings affecting the debtor's assets are suspended with the declaration of insolvency. The only exception is the case in which there are other parties, besides the insolvent, in the enforcement proceedings, in which case enforcement may proceed only against those. The debtor's assets at the date of declaration of insolvency are seized to this proceeding, as well as any assets and rights obtained by the debtor while the insolvency proceeding is pending.

Other pending legal proceedings that affect assets of the debtor's insolvency estate may proceed, but they are annexed to the insolvency proceeding, if the insolvency administrator so requests. The effects on pending proceedings in other states are governed by the rules of that jurisdiction.

8. What restructuring and rescue procedures are available in the jurisdiction, what are the entry requirements and how is a restructuring plan approved and implemented? Does management continue to operate the business and/or is the debtor subject to supervision? What roles do the court and other stakeholders play?

When a situation of insolvency is merely eminent, Portuguese Law provides for a Special Revitalization Proceeding (Processo Especial de Revitalização - "PER"). The PER is intended to allow companies in a difficult financial situation to renegotiate their debts with all creditors and prepare a recovery plan, without being declared insolvent.

The proceeding is commenced by filling with the court a written statement signed by the company and, at least, 10% of its non-subordinated creditors, announcing they have begun negotiations in order to approve a recovery plan.

Following, the court issues a judicial order appointing an Administrator and creditors are granted a 20-day deadline to claim their credits.

The recovering company will have a period of two months (extendable for an additional period of one month) to conclude negotiations and present a recovery plan that its creditors will have to approve.

During this period, the creditors are not entitled to request the court to declare the insolvency of the company.

During PER proceedings, the company continues to carry out its business, but it will be supervised by a court-appointed administrator and by the court itself, which will have the last say.

A revitalization/reorganization plan is approved by written vote and by a required majority of: (i) two-thirds of the votes issued, provided that at least half of the votes issued are not subordinated and that one-third of the total amount of credits with voting rights issue their votes; (ii) the votes of the creditors representing more than one-half of the total amount of credits, provided that at least half of the votes issued are not subordinated.

A restructuring of the company can also be achieved in the insolvency proceedings – see question 4. In this case, the insolvency plan is approved at the creditors' general meeting by two-thirds of the votes, provided that at least half of the votes issued are not subordinated and that one-third of the total amount of credits with voting rights are represented at the creditors' meeting.

9. Can a debtor in restructuring proceedings obtain new financing and are any special priorities afforded to such financing (if available)?

In PER proceedings only, whose goal is the recuperation of the company, the debtor can obtain loans and the creditors that grant them are given priority in the list of recognized creditors, being ranked as preferential credits.

10. Can a restructuring proceeding release claims against non-debtor parties (e.g. guarantees granted by parent entities, claims against directors of the debtor), and, if so, in what circumstances?

No.

11. Is it common for creditor committees to be formed in restructuring proceedings and what powers or responsibilities to they have? Are they permitted to retain advisers and, if so, how are they funded?

No. Creditor committees are only common in insolvency proceedings, where their main powers are to supervise the activity of the insolvency administrator and to cooperate with him. They can retain advisers, if they so wish, which will generally be paid by the party that requested their services.

12. How are existing contracts treated in restructuring and insolvency processes? Are the parties obliged to continue to perform their obligations? Will termination, retention of title

and set-off provisions in these contracts remain enforceable? Is there any an ability for either party to disclaim the contract?

As a rule, all contracts of the debtor that are not yet fulfilled by any party are suspended until the insolvency administrator decides whether or not the insolvent will comply with them. The administrator can decide not to fulfil a contract and the other party is entitled to make a credit claim in the insolvency proceedings in the amount of the unfulfilled obligation (discount its own obligation, that it would have to perform) plus any amount due as compensation.

Furthermore, contracts that are harmful to the debtor's assets can be terminated by the administrator – see question 6.

During insolvency proceedings, the court-appointed administrator will be in charge of the sale of the insolvent's assets and, preferably, he should conduct an electronic auction, on a special platform. However, he can choose another method of sale (namely, sale through offers by letter, sale in regulated markets, direct sale, particular negotiation, auction in an auction house, etc.) as long as that choice is justified. Credit bidding is permitted. The sale of the entire business of the debtor is always the preferred solution, unless there is a specific advantage in the separate sale of the assets.

A creditor holding a security over an asset will be accessed about the method and the price of sale and he can propose to acquire the asset himself.

Assets are sold free of all claims and liabilities.

As a rule, pre-packaged sales are possible in restructuring and insolvency proceedings, but they will depend on the approval of the court-appointed administrator when concerning significant assets of the debtor.

13. What duties and liabilities should directors and officers be mindful of when managing a distressed debtor? What are the consequences of breach of duty? Is there any scope for other parties (e.g. director, partner, shareholder, lender) to incur liability for the debts of an insolvent debtor?

Under Portuguese insolvency law, directors can face civil and criminal penalties for breaching their legal duties. When managing a distressed company, directors should be mindful of the circumstance that an insolvency may be qualified as culpable if it is created or aggravated as a result of intentional fault or serious misconduct on the directors, in the three years preceding the commencement of the insolvency proceedings.

Portuguese insolvency law foresees an irrebuttable presumption of fault concerning the acts of directors that affect, in whole or in a significant part, the assets of the debtor, (such as destruction, damage, render useless, concealment or disappearance, etc.) or that harm the economic situation of the debtor and simultaneously bring benefits to the directors, when they do not comply with certain legal obligation (eg. duty to keep organized accounts). The non-fulfillment of the duty to file for the declaration of insolvency can also create a presumption of fault (although this can be set aside).

The qualification of the insolvency as culpable, having been caused or aggravated by directors actions, triggers several effects, such as: the inhibition of the directors persons to manage third-party assets, to trade, to hold office in any corporate body of a company, association, foundation, public company and cooperative; the loss of any credits over the insolvency or the insolvency estate; an obligation to compensate the creditors of the debtor which was declared insolvent in the amount of the unpaid credits (for unfunded liabilities), up to the value of their respective assets.

Directors can also be held personally liable for the company's tax or social security debt.

14. Do restructuring or insolvency proceedings have the effect of releasing directors and other stakeholders from liability for previous actions and decisions?

No.

15. Will a local court recognise concurrent foreign restructuring or insolvency proceedings over a local debtor? What is the process and test for achieving such recognition? Has the UNCITRAL Model Law on Cross Border Insolvency been adopted or is it under consideration in your country?

A judgment given in any EU Member State is recognized in Portugal without any special procedure being required. Regulation (EU) 2015/848 applies to cross-border insolvency proceedings within the EU.

For judgements of non-EU states, a review of the judgement or orders is required. Generally, foreign insolvency and restructuring proceedings will be recognized as long as the foreign court that declared the insolvency based its competence on the criteria of the location of the residence or headquarters of the debtor or of its center of main interests and the recognition does not violate public order.

Note that, according to Portuguese Law, Portuguese courts have exclusive jurisdiction for the declaration of insolvency of companies which have their headquarters in Portugal, meaning that no foreign judgements (outside the EU) will be recognized in this regard.

The UNCITRAL Model Law on Cross Border Insolvency was not adopted nor is it under consideration in Portugal.

16. Can debtors incorporated elsewhere enter into restructuring or insolvency proceedings in the jurisdiction?

Yes. Debtors incorporate elsewhere but which have their center of main interests (COMI) in Portugal can initiate insolvency proceedings in our jurisdiction.

According to Regulation (EU) 2015/848, the center of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. In the case of a company or legal person, the place of the registered office shall be presumed to be the center of its main interests in the absence of proof to the contrary and unless it has been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings.

Under Portuguese law, which is applicable to cross-border situations not involving EU states, the concept of center of main interests has

the same definition as in the Regulation.

17. How are groups of companies treated on the restructuring or insolvency of one of more members of that group? Is there scope for cooperation between office holders?

Both insolvency and restructuring proceedings of companies involved in a same corporate group can be combined and the same administrator can be appointed for both. This normally depends on a request by the court-appointed administrator but can also be order ex officio by the court or be requested by the relevant debtor companies. However, different companies keep their separate legal personalities and their assets and liabilities of the different companies are never pooled together as in the proceedings.

18. Is it a debtor or creditor friendly jurisdiction?

There is a fair balance between the positions of debtors and creditors in the Portuguese jurisdiction and there is no identifiable trend to favour neither of these parties.

19. Do sociopolitical factors give additional influence to certain stakeholders in restructurings or insolvencies in the jurisdiction (e.g. pressure around employees or pensions)? What role does the state play in relation to a distressed business (e.g. availability of state support)?

The recent changes in the insolvency and restructuring legal framework in Portugal created a balanced legal regime, which is in line with insolvency legislation at an European level.

The different actors have a fair chance of sustaining their positions and creditors are generally treated equally – the equality of creditors being a core principle of the insolvency regime.

The only exception is the State, which is a privileged creditor and benefits from a special rule included in the General Tax Law granting it preference over all other credits in case of approval of an insolvency plan or a special revitalization plan. This exception rule guarantees that the credits of the State are not affected by restructuring and insolvency proceedings.

20. What are the greatest barriers to efficient and effective

restructurings and insolvencies in the jurisdiction? Are there any proposals for reform to counter any such barriers?

The legal regime of restructuring and insolvency has been amended several times in the recent years.

The main guideline of recent reform has been to anticipate the intervention in restructuring proceedings – either through negotiations with the creditors or through court with the appointment of an administrator.

The goal is to promote the recovery and solvability of debtors, both natural and legal persons, and avoid that they achieve a situation of insolvency.

Accordingly, barriers to restructuring have been gradually eliminated and new regimes have been created to promote negotiations with creditors and achieve restructuring agreements.

Given the recent changes, reforms are not anticipated at this point.