

Restructuring & Insolvency

Contributing editors

Catherine Balmond and Katharina Crinson



2018

GETTING THE
DEAL THROUGH

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Restructuring & Insolvency 2018

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Portugal

Vasco Correia da Silva and Pedro Pinto Melo

SRS Advogados

General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

Insolvency proceedings in Portugal are mainly regulated by the Portuguese Insolvency and Recovery Code (the CIRE) and the Regulation (EU) 2015/848 of the European Parliament and the Council on Insolvency Proceedings (the EU Regulation).

2 Excluded entities and excluded assets

What entities are excluded from customary insolvency or reorganisation proceedings and what legislation applies to them? What assets are excluded or exempt from claims of creditors?

The following entities are excluded from insolvency proceedings: public entities and public enterprises, insurance companies, credit institutions, financial companies, investment firms providing services involving the holding of funds or securities of third parties and collective investment undertakings, in so far as the submission to insolvency proceedings is incompatible with the special schemes provided for such entities.

There is special legislation applicable to credit institutions as detailed in question 4.

Assets that cannot be seized are excluded from insolvency proceedings, namely: inalienable rights and items, assets in the public domain, objects whose apprehension would offend morals or that have an irrelevant economic value, religious objects, and, unless indicated by the insolvent him or herself, instruments that are indispensable to its activity (unless seized as part of a commercial establishment) and a part of a salary that is an indispensable means of subsistence (for natural persons).

3 Public enterprises

What procedures are followed in the insolvency of a government-owned enterprise? What remedies do creditors of insolvent public enterprises have?

Public enterprises are excluded from the scope of application of the CIRE and cannot be subject to insolvency proceedings. However, this exception does not apply to municipal companies as they are considered private legal persons according to Law No. 50/2012 and, so far, one municipal company has been declared insolvent. Creditors of public enterprises can make use of normal enforcement proceedings to obtain payment.

4 Protection for large financial institutions

Has your country enacted legislation to deal with the financial difficulties of institutions that are considered 'too big to fail'?

In addition to the EU legislation adopted in relation to the Single Supervisory Mechanism and the Single Resolution Mechanism for banks, namely, Regulation (EU) 806/2014 (the Single Resolution Mechanism Regulation) and Regulation (EU) 1024/2013 (the Single

Supervisory Mechanism Regulation), the settlement system for Portuguese credit institutions is governed by the provisions of Decree-Law No. 199/2006.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

The commerce court within the territory of which the debtor's head office or centre of main interest is situated is the court with jurisdiction to open insolvency proceedings. Decisions by this court of first instance can be appealed to the corresponding court of appeal if the insolvency proceeding has a value of over €5,000. Awards of the court of appeal can only be appealed to the Supreme Court if there is a contradiction between different awards of the courts of appeal or between those and an award of the Supreme Court.

As a rule, these appeals will not suspend the execution of the appealed decision, unless the appellant posts a security, with an amount determined by the court.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

The voluntary liquidation of a company can be obtained through the initiation of insolvency proceedings, given that the requirements for a declaration of insolvency are met (see question 16). Under the CIRE, insolvency proceedings can be aimed at enabling payment to the insolvent's creditors through the implementation of an insolvency plan or at the liquidation and judicial sale of the insolvent's assets. If a debtor initiates insolvency proceedings and does not propose to present an insolvency plan, the creditors can decide to close down the company and proceed to liquidation of its assets.

In this case, the proceeding is initiated with the filing of a written petition by the debtor requesting that the court declare its insolvency, which it must do immediately. In its decision, the court will nominate an insolvency administrator, deadline for the creditors to file their claims and schedule a creditors' general meeting. As a rule, the pending enforcement proceedings filed against the debtor or other proceedings affecting the debtor's assets are suspended and the debtor's assets at the date of declaration of insolvency are seized, as well as any assets and rights obtained by the debtor while the insolvency proceeding is pending. In the creditors' general meeting, the insolvent must request that the proceeding goes to the liquidation phase, with the sale of the assets.

7 Voluntary reorganisations

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

Once a company is declared insolvent, the insolvency proceedings can be used to restructure the company. In this case, the debtor can initiate the proceeding and make a request to present an insolvency plan

for approval. This must be done in the first creditors' general meeting and is subject to approval by the creditors, who also take into consideration when deciding the report of the company's financial situation and assets produced by the court-appointed administrator. Note that the initiation of an insolvency proceeding produces a standstill effect on pending enforcement proceedings and operates the transfer of the administration of the company to the court-appointed insolvency administrator, as described in question 6.

Further, Portuguese Law provides for a Special Revitalisation Proceeding (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 filing with the court a written statement signed by the company and at least 10 per cent of its non-subordinated creditors, announcing they have begun negotiations in order to approve a recovery plan. Following this 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 would approve. During this period, the creditors are not entitled to request the court to declare the insolvency of the company.

8 Successful reorganisations

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

Portuguese law establishes four classes of credits: secured, preferential, subordinated and non-secured. Secured credits are those with security over seized assets up to the value of such assets. Preferential credits are those with 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 paid in full. 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. In any event, the credits related to the insolvency proceeding take precedence over all credits, followed by fiscal credits and credits owned by social security.

A reorganisation plan in insolvency proceedings is approved at the creditors general meeting and the necessary quorum for approval is of 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 meeting. In a PER, a plan can be approved by this same majority or by a favourable vote of the creditors representing more than half of the total amount of credits, provided that at least half of the votes issued are not subordinated.

It is still disputable in case law whether a reorganisation plan can release non-debtor parties from liability, with some courts stating that this is only possible if the plan is approved by a unanimous vote.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

A debtor can be placed into involuntary liquidation through the initiation of insolvency proceedings by its creditors. The debtor's insolvency can also be requested by any creditor, which must allege and prove the source, nature and amount of its credit and disclose any known facts related to the debtor's assets and liabilities. The debtor can file its opposition within 10 days, which must include a list of the debtor's five major creditors. The debtor has the burden of proving its solvency. If the debtor opposes the petition or cannot be located, the court shall schedule a hearing. After the hearing, the court gives its decision on the insolvency of the debtor.

Following a judgment declaring the insolvency of a debtor, the proceeding can go to liquidation or proceed to the approval of a recuperation plan, according with the decisions of the creditors' general meeting, as described in question 6.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

The creditors wishing to commence a reorganisation of a debtor can file for the declaration of insolvency of the debtor and, at the first creditors general meeting, request the insolvency administrator to prepare a recuperation plan. A recuperation plan can also be prepared and presented by one-fifth of the non-subordinated creditors. See questions 7 and 9.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

The CIRE provides for a special proceeding to homologate extrajudicial agreements, which allows a company in a difficult financial situation or that is in imminent risk of insolvency to submit a pre-arranged plan signed by the debtor and creditors of more than 50 per cent of the credits of the company (provided that more than 50 per cent of them are non-subordinated creditors).

12 Unsuccessful reorganisations

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

The reorganisation of the debtor is defeated if the recuperation or insolvency plan is not approved by the creditors. In this case, the insolvency proceedings go to liquidation and the assets seized are sold to pay the creditors of the insolvent, according with the order priority referred to in question 8. In the PER, the non-approval of a plan has one of two consequences: either the proceeding is closed and all effects terminated, and the company proceeds with its business, or the insolvency of the company is declared, if its financial situation so requires. An opinion by the judicial administrator will be taken into account in this regard.

In case a plan is approved but the debtor fails to perform it, the pardons and grace periods conferred in the plan are rendered void and all credits become due. In insolvency proceedings, this likely implies going to liquidation. In the PER, this might justify a declaration of insolvency of the debtor, if all other criteria are fulfilled.

13 Corporate procedures

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

The Code of Commercial Companies provides for a procedure for the dissolution of corporations, that can be initiated by deliberations of its shareholders. Once the dissolution is executed, the liquidation of the company assets is initiated and should be concluded in no more than two years. The members of the board of directors will act as liquidators, unless decided otherwise. If the company has no debts, the shareholders may divide its assets between themselves; if there are debts, the assets of the company should be used to pay its creditors.

Unlike insolvency proceedings, these are extra-judicial procedures that the shareholders can use to extinguish their company and they suppose a situation in which they can still pay its creditors.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

The court will, inter alia, order the closing of the insolvency proceedings in the following cases:

- after the final allotment of assets;
- after the decision homologating the insolvency plan becomes res judicata (unless if otherwise provided therein);
- upon request of the insolvent, when the insolvency situation ceases or all creditors consent to closing the procedure; or

- when the administrator concludes that the insolvent's estate is insufficient to pay the court costs and the remaining debts of the insolvent's estate.

A PER will be concluded with the decision homologating the recuperation plan, in case such plan is approved, or with the declaration by the administrator that the negotiations ended without it have been possible to agree on the plan with the creditors. In this case, the administrator must also give its opinion on whether the company is in a situation of insolvency.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

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

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

The director of a company must file for insolvency within 30 days of the date when it becomes aware of the insolvency or the date on which it 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.

Directors and officers

17 Directors' liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

Under Portuguese insolvency law, directors can face civil and criminal penalties for breaching their legal duties. When the insolvency is deemed to be caused by directors' actions, the judge may:

- declare their incapacity to manage third party's estate for a certain period;
- prevent the persons held liable from performing commercial activities for a certain period, including as a member of the board of directors of any company;
- order that these persons may not be considered as creditors and require them to return the insolvent's estate any amount already received; and
- sentence the directors to indemnify creditors up to the amount of their unpaid credits.

Directors may be subject to criminal penalties if they have defrauded creditors or contributed fraudulently to the insolvency of the company. Directors can also be held personally liable for a company's tax or social security debt.

18 Directors' liabilities – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

See question 17.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

No.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

After the insolvency is declared, as a general rule the directors remain in office although with limited powers. They can resign after submitting the annual financial statements of the company. Directors are obliged to cooperate with the insolvency administrator, the court, the creditors' general meeting and the creditors' committee. In some specific cases directors may continue to exercise active management functions under the administrator's supervision. Directors and officers can claim their credits in the insolvency proceeding.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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

Pending enforcement proceedings filed by the creditors against the debtor or other proceedings affecting the debtor's assets are suspended during insolvency and PER proceedings, unless they were also filed against others debtors (aside from the debtor that was declared insolvent). In this event, the proceedings shall continue but only against the other non-insolvent debtors.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? Is any special treatment given to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities?

In the PER the debtor continues to carry on its business during the reorganisation. In insolvency proceedings, the insolvent will only continue to operate if it proposes to present a restructuring plan and the creditors at the creditors' general meeting agree. Nevertheless, unless it is requested otherwise in the petition for insolvency, administration of the company will be transferred to the court-appointed administrator. Creditors who supply the debtor after the insolvency is declared are considered creditors of the insolvency state, which means that they will rank higher in the list of credits and will be paid before the creditors of the insolvent.

The debtor's activity during insolvency and PER proceedings is supervised by the creditors' general meeting, the creditors' committee, the court-appointed administrator and by the court, which will have the last say.

23 Post-filing credit

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

In the PER, 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 recognised creditors, being ranked as preferential credits.

24 Sale of assets

In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets?

The court-appointed administrator will be in charge of the sale of the insolvent's assets and, preferably, he or she should conduct an electronic auction, on a special platform. However, he or she 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. The assets are sold free of all claims and liabilities.

A creditor holding a security over an asset will be consulted in deciding the method and the price of sale and he or she can propose to acquire the asset him or herself.

In any case, 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, and the administrator should attempt to do that as of his or her appointment.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

Not applicable.

26 Rejection and disclaimer of contracts

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

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.

Further, contracts that are prejudicial to the debtor's assets can be terminated by the administrator – see question 46.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

No. Agreements granting IP rights are treated as any other agreements in insolvency proceedings.

28 Personal data

Where personal information or customer data collected by a company in liquidation or reorganisation is valuable, are there any restrictions in your country on the use of that information or its transfer to a purchaser?

There are restrictions, such as purpose limitation and proportionality, which prevent the data from being freely shared with third parties. Those restrictions are originated in the data protection legal framework, namely Law 67/98, of 26 October 1998, with amendments that are implemented in Portugal Directive 95/46/EC. The General Data Protection Regulation, applicable as of May 2018, also includes identical restrictions.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Arbitration is never used in liquidation or reorganisation proceedings in Portugal. All arbitrations clauses that can affect the value of the insolvency estate are suspended during insolvency proceedings. If an arbitral proceeding is pending, the insolvent will be replaced by the insolvency state and the other party in the dispute will have to present a credit claim in the insolvency.

Creditor remedies

30 Creditors' enforcement

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

After the declaration of insolvency, all assets of the debtors are seized in the insolvency proceedings and creditors are prevented from filing executive or interim claims over those assets outside the bankruptcy procedure. Accordingly, all individual enforcement proceedings are suspended and the filing of any enforcement proceeding by creditors against the insolvent is halted.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

Unsecured creditors, like the secured ones, must claim their credits with the insolvency administrator in the insolvency proceeding, within the deadline established in the declaration of the debtor's insolvency set out by court. Creditors shall submit details regarding the amount, maturity, guarantees and nature of their claims. After the deadline established in the declaration of insolvency has expired, creditors can still claim their credits by filing a claim against all the creditors and the insolvency estate, which will become a declaratory proceeding appended to the insolvency proceeding.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they called? What information regarding the administration of the estate, its assets and the claims against it is available to creditors or creditors' committees? What are the liquidator's reporting obligations?

After the declaration of insolvency, the insolvent and its five major creditors are notified by letter of the court's ruling. The remaining creditors are notified by means of public announcements, posted on a specific website. As a general rule, the creditors are later on convened to meet in a creditors' general meeting, so as to decide whether they wish to attempt the company's restructuring, through the approval of a restructuring plan, or proceed to the complete liquidation of the insolvent's estate and subsequent distribution to creditors. In that meeting the court-appointed insolvency administrator will present a report that lists the debtor's assets and the list of creditors. If the creditors' general meeting decides to entrust the insolvency administrator with the preparation of a restructuring plan, a new meeting will be convened to discuss and vote on the proposed plan.

33 Creditor representation

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

A creditors' committee may be formed as a corporate body appointed by the judge and composed of a limited number of creditors. Usually, the creditor's committee is appointed in the declaration of insolvency and it may be composed of three or five members, with two alternated. The president of the creditors' committee will usually be the biggest creditor and the other members should be chosen so as to represent the different classes of creditors. At the creditors' general meeting changes to the composition of the creditors' committee might be proposed or the commission can be created, if it has not been appointed by the court. The creditors' committee has a central role in authorising the insolvency actions and in controlling the bankruptcy management carried out by the insolvency administrator.

34 Enforcement of estate's rights

If the liquidator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong? Can they be assigned to a third party?

No.

35 Claims

How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Can claims for contingent or unliquidated amounts be recognised? Are there provisions on the transfer of claims and must transfers be disclosed? How are the amounts of such claims determined?

Both in insolvency and PER proceedings the creditors' claims must be filed with the insolvency administrator or court-appointed administrator within the established deadline. In insolvency proceedings the deadline is set by the court decision and, if creditors fail to comply with it, they will have to initiate a declaratory proceeding, as described in question 31, within six months after the declaration of insolvency becoming *res judicata*. In the PER, the deadline for credit claims is of 20 days starting from the announcement of the initiation of proceedings made in a specific website. There is no statutory form for the claim, but it should nevertheless state the name and address of the creditor, the amount due, the maturity, guarantees and nature of their credits and attach supporting documentation. Any creditor whose claims have not been recognised or have been partially recognised may lodge a challenge to the list of credits recognised. Within the same time period, any creditor may challenge the recognition of other creditors' claims. The CIRE does not formally regulate the transfer of claims already admitted to bankruptcy proceedings. However, the Portuguese Civil Code admits that transfer is possible but the new creditor has to file a request with the court so that its position is recognised in the same terms as the original creditor.

Conditional claims are accepted under reservation, and the respective amount is set aside awaiting the fulfilment of the condition. Once the condition is fulfilled, the creditor must request the judge to admit its claim.

Finally, the amount of default interest verified after the declaration of insolvency might equally be claimed, but they will be considered as subordinated credits and will be paid last.

36 Set-off and netting

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

After the declaration of insolvency, creditors can only balance their debts to the insolvency estate with their credits if the right of set-off is prior to the declaration of insolvency and the credit is due and the object of the credit and that of the debit is of the same nature.

The right of set-off cannot be exercised if:

- the debt to the insolvency estate was constituted after the declaration of insolvency;
- the credit was acquired from another person after the date of the declaration of insolvency;
- the relevant debts are the responsibility of the insolvent and not of the insolvency state; and
- the credit is subordinated.

37 Modifying creditors' rights

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

The court will only change the rank (priority) of a creditor's claim if the creditor lodges a challenge to the list of credits recognised relating to the nature of its credit and the court, after production of evidence, finds that the credit was wrongly classified.

38 Priority claims

Apart from employee-related claims, what are the major privileged and priority claims in liquidations and reorganisations? Which have priority over secured creditors?

In the insolvency procedure, claims are ranked as follows:

- claims over the insolvent's estate: ranked above any other, to be paid first, usually resulting from the insolvency administrator's activity and concerning, among others, the court fees, the insolvency administrator's fees and obligations incurred under contracts entered into by the insolvent company after the declaration of insolvency, or under contracts that the administration of the insolvent company decides to keep in force and perform;
- secured claims;
- preferential claims;
- non-secured claims (unsecured, unprivileged and unsubordinated credits); and
- subordinated claims.

See question 8.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

During these proceedings employees' contracts might terminate because the company initiates a procedure of collective redundancies, to restructure its business and reduce costs, or due to the closure of the company, in which case the contracts will expire. In these cases, employees are entitled to a compensation settled according to the rules for collective redundancies. Employees will be equally entitled to credits that become due with the termination of the employment contract (for instance, annual leave days that were not enjoyed and holiday subsidies).

40 Pension claims

What remedies exist for pension-related claims against employers in insolvency or reorganisation proceedings and what priorities attach to such claims?

Not applicable.

41 Environmental problems and liabilities

Where there are environmental problems, who is responsible for controlling the environmental problem and for remediating the damage caused? Are any of these liabilities imposed on the insolvency administrator personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

Both the company and its directors can be liable for environmental problems, given certain circumstances. For instance, directors are liable to pay fines related to environmental infractions once the company does not have enough funds (namely, in insolvency situations) and they are liable in a solidary manner for environmental damages caused by certain activities of the company.

42 Liabilities that survive insolvency or reorganisation proceedings

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

Fiscal debts and social security debts can never be subject to a pardon in a restructuring plan, so these liabilities will always survive such proceedings. Otherwise, all credits can be subject to haircuts and restructuring in insolvency and reorganisation proceedings and, in case the respective plans are approved and later complied with, all liabilities are terminated.

Update and trends

Portugal was one of the EU member states that suffered the most from the world economic crisis that began in 2008.

Despite this fact, the number of insolvencies declared by Portuguese courts decreased in 2013 for the first time since 2007 and has decreased ever since, in a homologous comparison (2014: 5,327; 2015: 5,118; 2016: 4,346; 2017: 3,862). In the same period, the most affected industry was the wholesale, retail and vehicle repair industry, followed by the construction industry.

The Portuguese Insolvency and Recovery Code was amended recently by Decree-Law No. 79/2017. The legislative changes mainly affected the regulation of special revitalisation proceedings, whose requirements for access were made more demanding. This might cause a decrease in the number of proceedings initiated.

43 Distributions

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

After the judicial sale of the insolvent's assets is concluded, the insolvency administrator must, after having consulted with the creditors' committee, prepare a distribution plan and submit it to the court for approval. It is the court that must approve the plan and order a distribution. Note that, according to Portuguese law, there is a mandatory order of priority for the payment of claims, as described in question 38. Non-secured debts will generally be paid on a pro rata basis after the debts of the insolvency estate, the secured credits and the preferential credits have been satisfied and subordinated debts will be paid once the remaining debts have been satisfied in full. Within the same category, payments are made on a pro rata basis.

Security

44 Secured lending and credit (immoveables)

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

Under Portuguese law, loans are mainly secured by way of a mortgage over immoveable property, a type of security that entitles the creditor to be paid with priority over unsecured creditors. There are three types of mortgage: legal mortgage, which is provided for by law; judicial mortgage, when a judgment is rendered against a debtor on the debtor's personal property; and conventional mortgage, when parties agree to grant a mortgage, for example, as security for a loan. A mortgage on immoveable property can only be validly constituted by notarial deed.

45 Secured lending and credit (moveables)

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

The main type of security taken over moveable property is the pledge. A pledge entitles the creditor to be paid, with priority over unsecured creditors, against the value of certain existing moveable assets or rights (including shares (whether listed or unlisted), patents or trademarks). In the context of insolvency proceedings, non-possessory pledges may be enforced by the creditor only after his or her credit is admitted to the list of recognised credits as a preferential credit. It is essential that the pledge be established in writing for proof.

It is also possible that a mortgage is taken over certain moveable assets that have a legal regime similar to that of immoveable property, namely regarding registration procedures (eg, vehicles, ships, aircraft). Finally, a general lien could be taken over all moveable assets of the debtor, allowing the creditor to satisfy his or her claim with priority over other creditors, although in compliance with the order expressly set out by law.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

Once insolvency proceedings have commenced, the insolvency administrator can set aside 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 that were carried out in bad faith 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 of the knowledge of their existence. The termination has retroactive effects. The insolvent debtor or the third party who received the communication of termination can challenge the termination, filing a judicial action within three months after receiving the communication.

In the PER the termination of transaction is not provided for, so creditors must, in that case, resort to the general provisions of the civil code on termination of agreement and file a declarative action.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

The CIRE lists as subordinated credits any credits held by 'connected entities' to the insolvency company, provided that such special connection existed at the time the credit was constituted, and by those that were transmitted in the two years prior to the insolvency proceeding. The subordinated creditors must file a credit claim in the insolvency proceeding. Their credits will be ranked after all other credits in the insolvency. Further, subordinated credits do not confer voting rights, except when the creditors' general meeting votes on the insolvency plan.

Groups of companies

48 Groups of companies

In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?

A parent company that completely controls a subsidiary (because there are no other shareholders) is responsible for the liabilities of that subsidiary, as a solidary debtor, whether those liabilities were constituted prior to or after the controlling relation. This provisions only apply if the parent company is established in Portugal.

49 Combining parent and subsidiary proceedings

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

Both insolvency and PER proceedings of companies involved in the 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, assets and liabilities of the different companies are not pooled together as that would disregard their separate legal personalities.

International cases

50 Recognition of foreign judgments

Are foreign judgments or orders recognised and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments?

A judgment given in any EU member state is recognised in Portugal without any special procedure being required. For judgments of other states, a review of the judgment or orders is required. Parties should file

for this review in the court of appeal and the judgment will be recognised as long as the following requirements are met:

- there is no doubt about the authenticity of the document;
- the judgment no longer appealable;
- the foreign court was competent, there was no fraudulent evasion of the law and Portuguese courts do not have exclusive competence for the matter;
- there is no pending case on the same issues nor any judgment that has become *res judicata*;
- the defendant was summoned to present its defence in the proceedings; and
- there is no violation of public order.

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

Regulation (EU) 2015/848 applies to cross-border insolvency proceedings within the EU.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

No.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

Foreign creditors have the same rights and obligation as national creditors. They must claim their credits within the deadline established by the court (not being granted any special extension) and, following this, they can participate in insolvency and PER proceedings, both in negotiations and in deliberations.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

The company's assets located in Portugal that are placed under administration of the court-appointed insolvency administrator can only be transferred to the administrator of a foreign insolvency proceeding after the debts to Portuguese creditors have been paid.

54 COMI

What test is used in your jurisdiction to determine the COMI (centre of main interests) of a debtor company or group of companies? Is there a test for, or any experience with, determining the COMI of a corporate group of companies in your jurisdiction?

According to Regulation (EU) 2015/848, the centre 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 centre of its main interests in the absence of proof to the contrary and unless it has been moved to another member state within the three-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 centre of main interests has the same definition as in the Regulation.

55 Cross-border cooperation

Does your country's system provide for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings? Have courts in your country refused to recognise foreign proceedings or to cooperate with foreign courts and, if so, on what grounds?

Within the EU the recognition of foreign proceedings and the cooperation between courts is made according to the terms of Regulation (EU) 2015/848.

Foreign insolvency proceedings outside EU member states are recognised by Portuguese courts 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 centre of main interests and the recognition does not violate public order.

56 Cross-border insolvency protocols and joint court hearings

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

Within the EU, Regulation (EU) 2015/848 is applicable to cross-border insolvency cases. For other cross-border proceedings, when the insolvency is declared abroad, secondary proceedings in Portugal can be initiated regarding the assets of the debtor that are located in the territory and, in this case, the Portuguese court-appointed administrator will coordinate with the foreign administrator on all relevant matters.



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