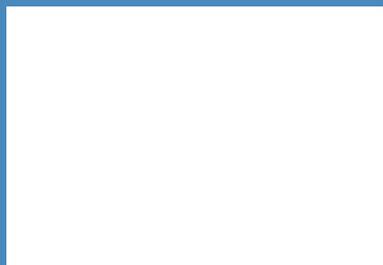


# Debt Restructuring: an alternative to insolvency proceedings

*Debt Restructuring: an alternative to insolvency proceedings* is the essential reference guide for financial institutions, legal professionals and investors. Covering 20 major jurisdictions worldwide, it provides a clear overview of the law and regulation governing debt restructuring in each one, and is structured to allow easy comparisons between jurisdictions.

- Offers a well-organised starting point for international reference
- Covers the law in 20 major jurisdictions
- Includes contributions from leading local practitioners who are experts in the field
- Uses a reader-friendly Q&A format that enables quick and easy cross-jurisdictional comparisons
- Addresses the key questions of multinational organisations
- Provides straightforward, practical commentary on each jurisdiction and the respective legal systems



FIRST  
EDITION  
2015

Debt Restructuring  
an alternative to insolvency proceedings

General Editors: Ole Borch & Lars Lindencrone Petersen, Bech-Bruun  
& Alessandro Varrenti, CBA Studio Legale e Tributario  
Founding Editor: Jacques Henrot, De Pardieu Brocas Maffei

THE EUROPEAN LAWYER  
REFERENCE

# Debt Restructuring

## an alternative to insolvency proceedings

**Jurisdictional comparisons**

**First edition 2015**

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# Foreword

**Alessandro Varrenti, CBA Studio Legale e Tributario  
Lars Lindencrone Petersen & Ole Borch, Bech-Bruun**

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The financial crisis that started quite dramatically with the bankruptcy of Lehman Brothers in 2008 has been historic. Several other financial crises have been confined to a certain area and have been quite short lived, but the one that started in 2008 has affected all parts of the world to varying degrees and is not fully over more than eight years later. It has not only stress-tested undertakings and banks; it has also tested countries and the entire way of perceiving the financial structure.

At the outset of the financial crisis, quick fixes were desperately needed. During this phase, countries had to ensure that their banking sectors did not collapse. At the same time, undertakings in crisis had to be handled, and in this process an adjustment of the set of rules available to such situations has taken place. These sets of rules could be said to have many similarities, but if you look at the finer details quite a few differences become apparent. As an experienced specialist in the law of your own country, you have not been able to rely on your experience and judgement to figure out how a specific situation would be handled in another country.

With this in mind, Thomson Reuters asked one of the grand old men of the world of insolvency, Jacques Henrot of De Pardieu Brocas Maffei, to lead a project in which Jacques and we – Alessandro Varrenti of CBA Studio Legale e Tributario (Milan), and Lars Lindencrone Petersen and Ole Borch of Bech-Bruun (Copenhagen) – were to work together to prepare an easily accessible yet detailed presentation of the sets of rules applicable to restructuring and distressed undertakings in a number of countries.

Jacques undertook the task and was a driving force during the start-up phase, and this in spite of the fact that Jacques was quite seriously ill. Sadly, Jacques passed away in the summer of 2014 and thus before the book was ready for publication. We are dedicating this book to Jacques in honour of his huge effort with the book and a number of similar projects in the past.

We hope that the readers of the book will share our enthusiasm about the finished project and that the book may contribute to understanding and decision-making in cross-border situations where there is a need to understand at least the fundamental principles of the rules of other countries.

We would like to extend our thanks to all the contributors for their efforts on the project. The dialogues we have had with the contributors from the various countries in the course of the project have confirmed the great expertise involved as well as the high level of enthusiasm for the project. We would also like to take this opportunity to express our respect – which is perhaps done too rarely – for the legislators of the

many countries. Restructuring legislation is quite difficult to draft as it requires decisions according to which some parties are to relinquish rights to the advantage of other parties for the sake of the bigger picture. It is the quality of such legislation which determines the possibilities of obtaining successful restructuring – and this applies to both in-court and out-of-court restructuring. Out-of-court restructuring will typically reflect the possibilities of the in-court options, as the rights holders will hardly be willing to contribute to an out-of-court solution providing them with a poorer result than an in-court process. At the same time, in-court restructuring is presumably still the very last thing you want. Professor Lawrence P King was quoted as saying that the American rules on restructuring, Chapter 11, may well be effective, but for him they are the equivalent of using a hammer to put out the fire in your hair. We believe that this book will demonstrate that it is not quite that bad, either in the US or in other countries.

*1 November 2014*

## Jacques Henrot

1952–2014

As mentioned in the foreword, this book has been dedicated to our partner, Jacques Henrot. No better tribute could be paid to Jacques, who, until the very end of his long fight to overcome his terminal illness, remained strongly committed to ensuring the publication of what he considered to be a significant contribution to the merging into a single instrument an analysis and description of the complexities of a wide variety of policy and legal issues in the work-out and restructuring areas across many countries.

Our partner and friend Jacques passed away late this summer. Above all, Jacques was a very talented lawyer, dedicated to the long tradition of the practice of law rooted in the old cultural values of a general practitioner and combining those values with a remarkable understanding of the diversity of legal cultures and conceptual diversities between the continental legal tradition and the common law approach. Often those skills turned out to be material in bridging the gap between the different cultures prevailing in those different environments, paving the way to consensual approaches to resolving difficulties in complex matters.

He combined unequalled expertise in the property area with a unique practice in the insolvency sector and a strong understanding of the needs of the financial services industry. Moral integrity and compliance with the highest ethical standards were among his key attributes.

Jacques had a great sense of human relationships, and was most sensitive to the needs and aspirations of our younger professionals. He was a great team builder, dedicated to training his assistants and colleagues towards excellence and achievement of the highest standards in the practice of law.

In the pursuit of that goal, he has paved the way to the emergence of a younger generation to develop a practice based on those values.

Before leaving us, Jacques has passed the torch on to that new generation sharing those values to continue to develop a practice rooted in the high standards he advocated.

For those accomplishments he will be forever remembered.

*Antoine Maffei*

*De Pardieu Brocas Maffei*

# Portugal

## Gómez-Acebo & Pombo (Portugal)

Mafalda Barreto & Carlos Soares

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### 1. WHAT COURT MONITORED RESTRUCTURING PRE-INSOLVENCY PROCEEDINGS OR SCHEMES HAVE BEEN DEvised BY THE LAW OF YOUR COUNTRY TO LIMIT VALUE DESTRUCTION FOR FAILING BUSINESS ENTITIES?

The Portuguese Insolvency Act provides court-monitored restructuring pre-insolvency proceedings, named Special Revitalisation Process (*Processo Especial de Revitalização*, PER), which was introduced by Act No. 16/2012, dated 20 April.

Failing business entities may also engage in an out-of-court pre-insolvency procedure, called SIREVE (*Sistema de Recuperação de Empresas por Via Extrajudicial*).

#### 1.1 What is the objective of the proceedings?

The PER is a pre-insolvency in-court procedure whereby a financially distressed (or imminently insolvent) debtor (that is not in an actual state of insolvency and that has not yet been held insolvent) with realistic prospects for revitalisation may, under the supervision of a court-appointed administrator (the Provisional Judicial Administrator), establish negotiations intended to devise a restructuring plan for a maximum period of three months to avoid the opening of insolvency proceedings and its effects.

#### 1.2 Do all kinds of businesses entities qualify?

The PER can be applied to all kind of business entities, with the exception of:

- public entities;
- insurance companies;
- credit institutions;
- financial companies;
- investment firms; and
- collective investment undertakings.

#### Is there a threshold related to indebtedness, turnover or asset value?

No threshold is defined by law or applied by the courts.

#### Is a court agent necessarily appointed to assist the company? If so, how is it chosen?

During the PER, the debtor is assisted by the Provisional Judicial Administrator appointed by the judge. The debtor is entitled to suggest to the judge one name among the public list of judicial administrators.

### **1.3 What are the necessary approvals?**

Only the board of directors' approval is required to initiate the process.

The power to initiate the process lies exclusively with the debtor together with at least one of its creditors.

### **1.4 What is the procedure?**

#### **Must a petition be filed? Must it be *ex parte*?**

The PER begins with a petition filed by the debtor together with at least one of its creditors before the commercial court with jurisdiction over the location of the company's registered office.

#### **Are there any other procedural documents? Must supporting documentation be filed with the application?**

The debtor shall attach to its petition the following documents:

- a list of its creditors and the amount of each claim;
- annual accounts for the prior three financial years;
- a brief summary of the current status of the company and of its chances of recovery;
- a list of its assets;
- a list of its employees; and
- a written and signed statement in which the debtor declares that it complies with all the conditions required for its recovery.

#### **Are creditors invited to participate? If so, how are they notified? What influence do they have, if any?**

All the creditors are invited to file their claims and take part in the negotiations of the restructuring agreement. Creditors are notified both directly by the debtor, by means of a registered letter, and through a publication on the official website ([www.portalcitius.pt](http://www.portalcitius.pt)).

Creditors who filed their claims and those who were listed by the debtor will be allowed to vote on the restructuring agreement.

#### **Publicity/confidentiality? Access to petition + documents? How? When?**

The restructuring process is entirely public.

Any lawyer may have access to the proceedings' file, which includes the petition and all supporting documents. Lawyers may consult the proceedings' file before the court at any time after the announcement of the appointment of the Provisional Judicial Administrator by the court.

The main events of the PER are published on the official website, which is publicly accessible online.

### **1.5 Is there recourse against the opening judgment?**

In the event that the judge rejects the opening of the proceedings, the debtor is entitled to appeal against that decision to the second instance (appellate) court (*Tribunal da Relação*). The grounds of the appeal shall be compliance with the legal requirements to apply for the PER.

The decision of the appeal would take approximately one to three months.

Conversely, the decision to open the PER is not appealable.

## **1.6 What are the substantive tests/definitions?**

### **If being still solvent is the test, what constitutes insolvency? Is there a pure cash-flow test? Is there a mix?**

Under Portuguese law, restructuring may only be filed if the company is in a difficult economical situation or imminent distress but not yet insolvent. Under the Portuguese Insolvency Act, a company is in distress/state of insolvency whenever it is unable to meet its obligations (cash-flow criteria) or whenever its assets are insufficient to satisfy its liabilities (balance sheet or assets criteria).

## **1.7 What is the role of a court-appointed agent?**

According to the law, the Provisional Judicial Administrator has the following main role and powers:

- receiving the claims and preparing a provisional list of all the creditors and the amount of their claims;
- supervising the negotiations of the restructuring agreement between the debtor and the creditors;
- authorising the debtor to perform acts of a certain relevance or with impact on the management of the company;
- presenting to the creditors the restructuring plan prepared by the debtor;
- receiving and counting the creditors' votes on the restructuring plan; and
- submitting the restructuring plan to the court's approval (homologation).

## **1.8 What protection is there from creditors?**

### **What protection is there from creditors? Stay?**

After the judge has accepted the opening of the PER, all legal actions aimed at collecting debts filed against the debtor are suspended, as well as any pending insolvency proceedings. Moreover, throughout the duration of the PER for insolvency, no applications or new collecting debts actions can be filed against the debtor.

In order to ensure the restructuring of the companies, the restructuring agreement approved by the court binds all creditors, notably those creditors that did not make claims in the proceedings, those who did not take part in the negotiations and those who voted against the plan.

Furthermore, submission to PER proceedings will avoid management liability for failing to file for insolvency (as described in more detail in sections 2.2 and 3.1 below).

### **Are there avoidance or other powers?**

Contrary to what the law provides for insolvency proceedings (as will be better described below), the Provisional Judicial Administrator does not have any avoidance powers within the PER.

### **Is proof of claims necessary? If the proof is challenged, who rules on the challenge? Timing?**

Any document that proves the existence of the claim, such as agreements, invoices or credit notes, shall be attached by the creditors to the claims.

The creditors have a 20-day period after the announcement of the appointment of the Provisional Judicial Administrator to file their claims.

After receiving and analysing the claims and the respective proof, the Provisional Judicial Administrator prepares and files with the court, within a five-day period, a list of the creditors recognised and the amount of their respective claims. Such list can be challenged before the court by any creditor and by the debtor within a five-business-day period after its publication on the official website.

The law sets forth a five-business-day period for the judge to decide on challenges submitted. However, considering that courts are currently flooded with judicial claims, one should not expect this deadline to be observed by the judge. In any event, the negotiations of the agreement are not suspended by the challenging of the list of claims.

### **1.9 What is the usual duration of the restructuring process?**

The PER takes approximately four to six months. The negotiations of the restructuring plan between the debtor and the creditors shall have a maximum duration of two months, starting from the publication of the list of claims, which is extendable by prior written agreement between the Provisional Judicial Administrator and the debtor for an additional month.

Even though the time periods of the proceedings are established by law, the statutory time limits are frequently not met by the judge.

### **1.10 Who prepares the restructuring agreement and what are the available tools?**

The debtor is the party responsible for preparing the restructuring agreement. The Portuguese Insolvency Act does not limit the contents of such agreement; however, restructuring agreements usually incorporate the following measures:

- waiver of interest and/or of part of the principal;
- extension of the maturity of the claims (no statutory limit for the extension);
- liquidation of some of the debtor's assets;
- conversion of the claims into equity; and
- share capital increase by the shareholders and/or the creditors.

The agreement may also contain alternative solutions for creditors to opt for; for example, creditors may choose between a haircut and a debt-equity swap.

**If term-out?**

If at the end of the statutory time limit for the negotiations an agreement is not reached, the PER is extinguished and, in case the debtor is insolvent, the provisional judicial administrator shall request the court to open insolvency proceedings.

**Is a majority needed? That provided in the finance documents? What if unanimity is the rule?**

For the restructuring agreement to be approved, a quorum of at least one-third of all claims (with voting rights) and a twofold majority of the votes is required, comprising:

- more than two-thirds of the total votes cast; and
- more than half of the votes cast by unsubordinated creditors.

The criteria for approval are established by law.

**In the case of assets disposal, can the creditors choose the broker/investment bank?**

Yes. If the restructuring plan provides for the disposal of assets, the terms and conditions of such disposal may be set out in the plan.

**1.11 Are subordination agreements necessarily given full effect?**

The subordination agreements do not necessarily take full effect, considering that the restructuring agreement may affect agreements entered into prior to the PER (ie determining their amendment).

**Is it possible to discriminate between categories of creditors? Is an early bird fee/preferential treatment possible?**

The different categories of creditors are set out in the law (see section below) and apply both to PER and to general insolvency proceedings. However, Portuguese law allows discrimination within the same category of creditors, provided that such discrimination has objective grounds.

Those creditors that, during the PER, have financed the debtor's activity by providing fresh money for its revitalisation shall be granted a general privilege over the movable assets of the insolvent's asset pool, ranking senior to the general privilege over the movable assets granted to employees.

Contrary to the insolvency proceedings, the PER does not recognise early bird fees.

**1.12 How is exit managed?**

The restructuring agreement is approved by the creditors, but a subsequent court sanction is mandatory.

The court shall not sanction the restructuring agreement if any procedural provision has been breached or the agreement contains unlawful provisions. Moreover, any creditor may ask the court to refuse to sanction the restructuring agreement based on the following grounds:

- if the creditor's position would be better ensured if no restructuring agreement had been approved; or

- if, under the terms of the agreement, any creditor is granted a more favourable position than the nominal value of its claim.

Nevertheless, there are few cases of non-approval by the court.

### **1.13 Who are the necessary parties?**

The parties in these proceedings are the debtor, its creditors and the Judicial Provisional Administrator that will assist the debtor throughout the proceedings.

### **Is recourse possible? If so, who has standing?**

In general, the judicial decisions may be appealed to the second instance court (*Tribunal da Relação*) and, in limited cases, to the Supreme Court of Justice (*Supremo Tribunal*).

The appeal of the court decision on the restructuring agreement is possible in the following cases:

- if the court sanctions the restructuring agreement, the creditors that voted against such agreement are entitled to lodge an appeal; and
- if the court has refused to sanction the restructuring agreement, both the debtor and the creditors that voted in favour of the agreement are entitled to lodge an appeal.

In any of the above described scenarios, the appeal should be lodged within 15 days from the court's decision.

## **2. POST-INSOLVENCY PROCEEDINGS**

### **2.1 What is the objective of the proceedings?**

A company is in a state of insolvency whenever it is unable to meet its obligations (cash-flow criteria) or whenever its assets are insufficient to satisfy its liabilities (balance sheet or assets criteria).

The objective of the insolvency proceedings is to ensure that the debtor's creditors are satisfied either (i) through the sharing of the proceeds resulting from the liquidation of the debtor's assets or (ii) through an insolvency plan to be approved by the creditors and that may include the debtor's restructuring. The debtor's restructuring is therefore seen as merely instrumental to the satisfaction of the creditors' interests.

### **2.2 Do all kinds of business entities qualify?**

Any company in a state of insolvency is under the obligation to file for insolvency proceedings before the court within a 30-day period following the date it becomes aware (or should be aware) of its insolvency status. The director's lack of compliance with such provision significantly increases the possibility of being held personally liable.

The insolvency proceedings apply to all kinds of business entities and to individuals, with the exception of:

- public entities;
- insurance companies;
- credit institutions;
- financial companies;

- investment firms; and
- collective investment undertakings;

### **Is there a threshold related to indebtedness, turnover or asset value?**

No threshold is defined by law or applied by courts.

### **Are involuntary proceedings a possibility? Is action available to all creditors? Under what conditions?**

Third parties may also file for the debtor's insolvency. In this case, the debtor is granted a 10-day period to object to such insolvency petition.

Any creditor holding an overdue claim is able to instigate insolvency proceedings, irrespective of the amount of the claim or the percentage such amount represents in the overall amount of assets/liabilities of the debtor. However, the court shall only open insolvency proceedings if the debtor is in a state of insolvency (see section 2.1 above). The only exception to this rule is the claim resulting from shareholders' loans (*suprimentos*), which do not entitle the respective creditor (shareholder) to instigate insolvency proceedings.

### **2.3 What are the necessary approvals?**

Only the board of directors' approval is required.

Apart from the debtor, acting through its directors, only the creditors and the entities which are liable under the law for the debtor's liabilities (and, in certain cases, the Public Prosecutor's Office – *Ministério Público*) are entitled to instigate insolvency proceedings.

### **2.4 Is it valid and binding to agree that such proceedings be a default/termination event?**

The Portuguese Insolvency Act prevents the parties from setting forth the termination of a contract based on an event of insolvency of either party. Provisions of this nature will, as a general rule, be considered null and void.

### **2.5 What is the procedure?**

The filing for insolvency shall be presented to the commercial court with jurisdiction over the location of the debtor's registered office or its centre of main interests through a petition in which the debtor or the creditor, depending on the party that has filed the same, describes the relevant facts (notably the debtor's state of insolvency and the creditor's claim) for the opening of insolvency proceedings.

Such request shall contain the identification of the debtor's directors and its five major creditors (other than the creditor that has filed the petition for insolvency proceedings, if applicable), and shall have attached a copy of the debtor's commercial certificate. If the petition is filed by the debtor, it may also include an insolvency plan. Regarding the remaining supporting documentation, see the next section.

If the court deems the petition for insolvency proceedings complete, it will decide on its admissibility. If, on the contrary, the court considers that

the application is in any way incomplete, it will grant the applicant a period no longer than five days to cure the same.

If the insolvency proceedings have been instigated by the debtor and the court considers that there is clear evidence of a state of insolvency situation, the judge will issue a court order opening insolvency proceedings.

On the other hand, if the proceedings are filed by a creditor, the court will admit the petition provided it meets all the procedural requirements. The debtor will then be notified to accept the opening of insolvency proceedings or to file its objection within a 10-day period. Nevertheless, the court shall dismiss the petition if the debtor is subject to a PER.

If the debtor files its objection to the opening of insolvency proceedings, the judge shall schedule a court hearing to be held within the five following days. At the hearing, the judge will hear witnesses and review any other evidence admitted in order to rule on the insolvency. Burden of proof of solvency lies with the debtor.

The state of insolvency is effective from the date on which the court order opening insolvency proceedings is made. From such moment on, the proceedings, as well as notice and formalities of the same, will be made public by different means.

In addition, once the insolvency proceedings have been opened, the court will have to appoint an insolvency administrator (the Insolvency Administrator), who will manage the insolvent's asset pool and liquidate it in the event that the creditors do not decide against the liquidation.

The Insolvency Administrator shall be selected by the court from amongst those individuals publicly listed to perform such duties. The party that filed for the insolvency proceedings (either the debtor or a creditor) may suggest to the judge the name of an Insolvency Administrator.

## **2.6 Please provide information about voluntary filings**

### **Are creditors invited to participate to the initial hearing? If so, how are they notified?**

Creditors are not invited to participate in the initial hearing, irrespective of who had the procedural initiative.

### **Supporting documentation to be filed**

The debtor shall attach to its request for insolvency filed before the court the following documents:

- a list of its creditors and the amount of their claims;
- a list of all pending judicial proceedings filed against it;
- a brief summary of its business activity for the prior three years, containing a reference to its establishments, offices or other business premises, if any;
- a brief summary of the current status of the company;
- a list of the company's directors, shareholders and anyone that can be held liable for the insolvency;
- a list of its assets;
- annual accounts for the prior three financial years;

- management reports and audit reports; and
- a list of its employees.

### **Main restructuring principles/are proposals to be term sheeted at entry?**

In practice, the majority of insolvency proceedings result in a liquidation of the debtor's assets. In particular, after the entering into force of the law which has introduced the PER, few of the insolvencies end up in restructuring.

In the context of insolvency proceedings, the debtor's restructuring is achieved through an insolvency plan, which the creditors (see below for required majority) are called to vote on and approve.

The debtor may attach an insolvency plan to its petition for insolvency proceedings filed before the court. In any case, such plan can be filed at a later stage.

Apart from the debtor, the insolvency plan may also be submitted by:

- the insolvency administrator;
- anyone that can be held liable for the insolvency; or
- a creditor (or a group thereof) representing at least one-fifth of the unsubordinated claims.

The Portuguese Insolvency Act does not limit the contents of an insolvency plan. As a result, such plan may include a variety of measures, such as:

- write-offs;
- maturity extensions;
- payment deferrals; and
- debt-for-equity swaps.

Even though the contents of the insolvency plan are not specifically regulated, it must abide by the principle of equality of creditors without prejudice to different treatments based on objective criteria.

Unless the insolvency plan expressly states otherwise, the following shall mandatorily apply:

- the rights arising out of security *in rem* and privileges are not affected by the insolvency plan;
- the subordinated claims are fully written off; and
- the debtor's compliance with the insolvency plan shall release the debtor and its legal representatives from all of the debtor's remaining debt.

For the insolvency plan to be approved, a quorum of at least one-third of all claims with voting rights and a twofold majority of the votes is required, comprising:

- more than two-thirds of the total votes cast; and
- more than half of the votes cast by unsubordinated creditors.

The following shall not have voting rights:

- creditors whose claims are not modified by the insolvency plan; and
- subordinated creditors of a certain ranking if the insolvency plan provides for full waiver of the claims of the subordinated creditors

ranked below and does not attribute any economic value to the debtor and its shareholders (eg if the company does not continue as a going concern and the insolvency plan includes a reduction of the shareholders' shares to zero).

**If yes, is an expert opinion or report on the feasibility of the contemplated plan needed?**

In either of the cases referred to above, an expert opinion or report on the feasibility of the envisaged plan is not required.

**How is the opening judgment rendered public?**

The insolvency proceedings are made public by different means from the date on which the court order opening the insolvency is made. In fact, the order can be consulted on the official website ([www.portalcitius.pt](http://www.portalcitius.pt)), before the court where the proceedings are pending and also in the Register of Companies (available online at [www.portaldaempresa.pt](http://www.portaldaempresa.pt)).

**When and how are creditors deemed aware of the proceedings?**

The creditors are deemed aware of the proceedings through the publication of the court order opening the insolvency proceedings on the official website ([www.portalcitius.pt](http://www.portalcitius.pt)). Additionally, the court shall send a notification letter to the debtor's five major creditors.

**2.7 How are creditors' representatives chosen?**

As referred to above, once the insolvency proceedings are held opened, the court will appoint an Insolvency Administrator, who will manage the insolvency pool under the supervision of the creditors' committee.

After being appointed, the Insolvency Administrator shall perform his duties using reasonable care, skill and diligence, and is under the obligation to act as a loyal representative of the insolvent in the best interests of its creditors.

In any case, the Insolvency Administrator can be replaced by the creditors' decision. The court can only refuse such replacement on the following grounds:

- the Insolvency Administrator appointed by the creditors has no ability or experience to perform his duties;
- the remuneration awarded by the creditors to the appointed Insolvency Administrator is clearly excessive; or
- if the creditors appoint an Insolvency Administrator whose name is not part of the public list of individuals available to perform such duties and such choice is not justified considering the size of the company, its area of activity or the complexity of the proceedings.

Under the terms of the Portuguese Insolvency Act, the Insolvency Administrator has the following role and powers:

- management of the insolvent's asset pool, including the decision to maintain or terminate ongoing contracts;
- to prepare a report to be presented to the creditors regarding:

- the company's activity during the prior three years and its current situation;
- the company's accounts and financial information; and
- the viability of the company and the convenience and consequences of approving an insolvency plan;
- to represent the debtor in all judicial claims where the debtor is a party;
- to prepare a list of the creditors' claims;
- clawback powers – the Insolvency Administrator is entitled to, at its own initiative, unwind certain agreements (either those entered into within the hardening periods or those that are detrimental to the debtor – see section 2.13 below);
- to liquidate the insolvent's asset pool; and
- to prepare an insolvency plan.

Once the insolvency proceedings are held open, the court shall appoint the members of a creditors' committee, comprising between three and five creditors representing different ranking claims, presided over by the debtor's major creditor. This committee shall cooperate with the insolvency administrator and is responsible for supervising the performance of the duties of the latter.

## **2.8 Is there recourse against the opening judgment?**

The decision of the judge to allow or refuse the opening of insolvency proceedings is subject to appeal to the second instance (appellate) court and, in very limited cases, to the Supreme Court of Justice.

The creditor that has filed the petition for insolvency proceedings is entitled to appeal against the order deciding not to open the debtor's insolvency proceedings. The debtor, the entities which are liable under law for the debtor's liabilities, any creditor and any shareholder of the debtor may appeal against the decision opening insolvency proceedings. If the debtor itself has requested its own insolvency proceedings, it may appeal against the decision that rejects the petition.

In the appeal against the court order, the creditor or the debtor, as appropriate, shall attempt to prove the existence or not of a certain claim or that the debtor is or is not in a state of insolvency.

The appeal must be filed within a 15-day period after the court order has been notified to the parties. The decision on the appeal will take approximately one to three months.

## **2.9 What are the roles and powers of committees?**

Apart from the creditors' committee referred to above, the Portuguese Insolvency Act also provides for the existence of a creditors' general meeting, with the following roles and powers:

- to ask the insolvency administrator for all information deemed relevant;
- to revoke the decisions of the creditors' committee;
- to replace the creditors' committee;
- to request the replacement of the Insolvency Administrator;
- to analyse the report prepared by the Insolvency Administrator;

- to approve and amend the insolvency plan;
- to decide on the maintenance or closing-down of the establishments, offices and other debtor's business premises;
- to authorise the execution of the most relevant decisions regarding the company's activity during the course of the insolvency proceedings in those cases where a creditors' committee has not been appointed; and
- to decide on the management of the asset pool by the debtor itself.

As a general rule, the majority required in the creditors' general meeting is a simple majority of the votes of the unsubordinated creditors present or represented (irrespective of the ranking of the claims).

However, for the insolvency plan to be approved, a group of creditors representing one-third of all claims with voting rights must vote and a twofold majority of the votes is required, comprising:

- more than two-thirds of the total votes cast; and
- more than half of the votes cast by unsubordinated creditors.

Each creditor holds a number of votes in proportion to the amount of its claim.

Interest accruing on claims after the opening of the insolvency will be subordinated. The exception to this rule is interest on secured claims up to the amount of the proceeds resulting from the sale of the encumbered asset – such interest is also secured. Although there is no specific provision, interest accruing after the opening of insolvency proceedings are not usually taken into account in determining the number of votes.

Shareholders' loans (*suprimentos*) are deemed subordinated claims. Subordinated creditors are not allowed to vote at the creditors' general meeting except in respect of the approval of an insolvency plan (with the limitations referred to above).

## **2.10 What are the consequences of opening judgments for creditors?**

### **Stay?**

The opening of insolvency proceedings has several effects on pending and future proceedings, as follows:

- all pending enforcement proceedings filed against the debtor are stayed;
- any new enforcement proceedings filed against the debtor will be rejected by the court; and
- several pending judicial proceedings can be attached to the insolvency proceedings, namely:
  - judicial proceedings filed against the debtor or against a third party that may have a direct impact on the value of the insolvent's asset pool;
  - judicial proceedings of a financial nature filed by the debtor; and
  - insolvency proceedings of any of the debtor's subsidiaries or affiliates.

See also section 2.19 below.

**Forbidden payments?**

In general, creditors shall only be paid with the liquidation of the insolvent's asset pool, with the following exceptions:

- payments to counterparties in ongoing agreements which the Insolvency Administrator decided to continue performing; and
- debts resulting from the management of the insolvent's asset pool.

Creditors benefiting from security *in rem* are paid with the proceeds of the sale of the encumbered assets as they are sold.

**Interests accruing during the period: paid at contractual payment dates? Deferred and paid after the plan is adopted? Capitalised? Is the rate necessarily the contract rate?**

According to the law, interest accruing after the opening of insolvency proceedings is deemed a subordinated claim (except for those claims with security *in rem*, up to the amount of the proceeds resulting from the sale of the encumbered asset). The payment of such interest will only take place after the liquidation of the debtor's assets provided that there are still any funds available or, instead, as set out in the insolvency plan.

Interest shall not be capitalised.

The rate is necessarily the contractual rate, unless the insolvency plan sets forth otherwise.

**Is the opening judgment a valid draw stop?**

The general rule under the Portuguese Insolvency Act is that agreements with reciprocal obligations pending on both parties on the date of the opening of insolvency proceedings (such as credit facilities with undrawn commitments) shall be suspended until the Insolvency Administrator decides to terminate or maintain them (see section 2.19 below).

Nevertheless, a decision of the Insolvency Administrator deciding to continue to perform a credit facility with undrawn commitments and requesting further drawdowns would be considered clearly abusive as the insolvent's asset pool could not, in principle, meet the obligations deriving therefrom – such a decision by the Insolvency Administrator would be challengeable.

**Necessity to file a proof of claim: are all creditors required to file a proof of claim?**

All creditors shall attach to their claims sufficient proof of the existence of the same, such as invoices, credit notes or any document in which the debtor recognises the amount in debt.

**Are secured creditors necessarily notified? Are there any time limits? Are non-resident creditors treated differently?**

The five major creditors, the tax authorities and the social security are notified of the opening of insolvency proceedings, generally by means of registered letter sent by the court. In case one of the major five creditors is a non-resident entity, it shall be notified by way of registered letter. The

remaining creditors are notified through a publication on the official website ([www.portalcitius.pt](http://www.portalcitius.pt)) and through a public announcement posted in the debtor's registered office, establishments, offices or business premises, if any, as well as in the court.

The known creditors residing in another member state of the European Union shall be notified as set out in EC Regulation No. 1346/2000.

The judge establishes a period of up to 30 days for the creditors to file their claims.

### **What are the consequences if a creditor is time-barred? Is the debtor discharged?**

After the time limit granted for submitting the claims has elapsed, the creditors are granted a last opportunity to make their claims, within a specific procedure named 'subsequent claim'. Claims shall be filed within the six months after the *res judicata* of the court's decision opening the insolvency proceedings.

The debtor is not automatically discharged if the creditors do not meet the time limits set forth by law to make their claims. However, these creditors cannot be paid within the insolvency proceedings.

### **Does such proceedings entail any limitation on the enforcement of contractually created security?**

After the opening judgment, no judicial or out-of-court civil enforcement against the debtor may be initiated and any action in course shall be stayed as of the date of the opening judgment. Therefore, the enforcement of security and payment to the secured creditors will be made within the insolvency proceedings.

There are no stays on enforcement during insolvency proceedings (eg prohibition to sell the assets required for the maintenance of the debtor's operation for a certain time frame).

However, it must be noted that, at the first creditors' general meeting, the creditors may either decide to liquidate the debtor's assets (and consequently sell the secured assets) or decide on the preparation of an insolvency plan to be approved on a subsequent creditors' general meeting. Such insolvency plan may include limits on the enforcement and sale of any secured assets.

### **2.11 What is the duration of the restructuring process?**

There is no statutory deadline for the restructuring process.

As mentioned above, the creditors can approve an insolvency plan which may (i) contain the measures to be carried out for the restructuring of the debtor and/or (ii) lay down specific rules for the payment of creditors' claims through the liquidation of the insolvent's asset pool.

### **2.12 How do creditors vote?**

The insolvency plan can be submitted to the creditors, *inter alia*, by the debtor, by the Insolvency Administrator or by any creditor (by itself or as a group) representing at least one-fifth of the unsubordinated claims. The

insolvency plan shall be approved at the creditors' meeting or, instead, through a written vote within a period not exceeding 10 days from the date of submission.

The court cannot determine the number of classes of claims based on case by case criteria. All claims are classified according to specific criteria set out by law, as follows:

- Secured and preferential claims (*créditos garantidos e privilegiados*): those that benefit from a security *in rem* arrangement on specific assets of the debtor (these have preference over specific assets of the debtor) and those which hold a general legal preference in respect of the assets of the debtor (eg social security contributions or employment-related claims).
- Subordinated claims:
  - claims where subordination has been agreed;
  - interest of any kind to the extent that it is unsecured;
  - claims held by related parties (ie directors or shareholders holding, directly or indirectly, a share interest in the debtor in excess of certain thresholds, companies of the same group as the debtor or having dominant influence, etc)
  - claims resulting from a clawback by the Insolvency Administrator against bad faith counterparties; and
  - shareholders' loans (*suprimentos*).
- Ordinary claims: all claims that are neither secured/preferential nor subordinated.

The shareholders are not a specific class of creditors.

### **2.13 What are the rules on clawback/voidability?**

In general terms, all prejudicial actions of the debtor carried out within two years preceding the opening of insolvency proceedings may be subject to clawback.

As an exception to the rule of evidence, transactions with related parties within the two-year period preceding the opening of insolvency proceedings only require evidence of prejudice. In this case, bad faith is presumed (rebuttable presumption).

However, the following transactions from companies are subject to clawback regardless of any other circumstances:

Specific transaction	Hardening period – ie prior to the date of the beginning of the insolvency proceedings (PBIP)	Bad faith	Prejudice
Acts of the debtor without consideration, with the exception of donations in accordance with social practice	Within 2 years PBIP	Regardless	Regardless
(i) New securities in respect of pre-existing obligations or of others in lieu of pre-existing obligations (ii) Personal guarantees with no actual interest for the debtor (iii) Prepayment of liabilities in unusual terms of legal transactions and which the creditor could not claim (iv) Prepayment of liabilities falling otherwise due after the opening of insolvency proceedings	Within 6 months PBIP From 6 months to 2 years PBIP	Regardless Required	Regardless Presumed (NRB)
New security <i>in rem</i>	Within 60 days PBIP	Regardless	Regardless
	From 60 days to 2 years PBIP	Required	Presumed (NRB)
Acts of the debtor for consideration where its obligations significantly exceed those of the counterparty	Within 1 year PBIP	Regardless	Regardless
	From 1 to 2 years PBIP	Required	Presumed (NRB)
Repayment of shareholders loans	Within 1 year PBIP	Regardless	Regardless
	From 1 to 2 years PBIP	Required	Presumed (NRB)

## 2.14 What are the rules on set-off/netting?

The set-off/netting of claims by the creditors is only admissible in limited situations expressly provided for by law. In general terms, for a creditor to be entitled to set off its credit over the insolvent's asset pool, one of the requirements below must be met:

- legal set-off requirements must have been fulfilled prior to the declaration of the insolvency; or
- the creditor's claim shall be the first to have met the general set-off requirements, ie before the debtor's claim has fulfilled those legal requirements.

In any case, subordinated creditors and those which have acquired the claim after the opening of the insolvency proceedings cannot be set off.

## **2.15 How is exit managed?**

### **Simple term-out; is a majority needed?**

There is no specific deadline for the termination of insolvency proceedings. Insolvency proceedings may normally end with the liquidation of the insolvent's asset pool or, if applicable, the judicial sanction of the insolvency plan.

### **Is it possible to cram down dissenters?**

The insolvency plan approved by the referred twofold majority of the creditors and sanctioned by the court crams down dissenters.

The court shall not approve the restructuring agreement if any procedural provision has been breached or the agreement contains unlawful provisions. Moreover, any creditor may ask the court to refuse approval of a restructuring agreement based on the following grounds:

- if the creditor's position would be better ensured if no insolvency plan had been approved; or
- if, under the terms of the insolvency plan, any creditor is granted a more favourable position than the nominal value of its claim.

### **Term out + asset disposal programme: should the programme be completed before the adoption of the plan? Can it be postponed and be part of the plan? Will sanctions be imposed if not completed? Is it possible for creditors to monitor the process?**

The insolvency plan may also aim at the ordered liquidation of the insolvent's asset pool. As a result, if agreed by the required majority of creditors, it is possible to include an asset disposal programme and all its relevant features, including the conducting of the disposal programme, within an insolvency plan.

The insolvency plan may allow the insolvency administrator to monitor the compliance thereof. In such case, creditors are entitled to be updated annually by the insolvency administrator on the compliance of the insolvency plan and to ask the insolvency administrator for further information on the compliance.

### **In the case of debt conversion(s), what approvals are necessary? Is it possible to force shareholders' consent?**

As a general rule, the approval of the affected creditor is required by law for debt conversions. However, the approval shall not be required if some prerequisites set forth in the law are met that ensure the marketability of the shares.

The share capital increase of the debtor may be part of the insolvency plan and may waive existing shareholders' pre-emption rights provided that:

- the share capital is previously reduced to zero; or
- this share capital increase does not entail the devaluation of the shareholdings held by the existing shareholders.

### **Sale of the business as a going concern to an entrepreneur**

The Portuguese Insolvency Act provides for the possibility of selling the business as a going concern to an entrepreneur. The business as a going concern will be sold as a whole, unless no satisfactory proposal of purchase is presented or the liquidation or sale of separated parts of the business is more satisfactory.

### **Do creditors have the right to make their own proposal? Is credit-bidding possible?**

Any person, including any creditor, is entitled to present an offer. Credit-bidding is possible if the creditor holds a security *in rem* over the asset being sold. The creditor can credit-bid up to the amount of its claim provided that there are no higher ranked secured creditors.

### **Automatic release/survival of existing pledges and charges**

There is an automatic release of all existing pledges and charges over the assets sold within the proceedings. The secured creditors shall be paid by the proceeds of the sale.

### **2.16 Are ‘prepackaged’ plans, arrangements or agreements permissible?**

According to the Portuguese Insolvency Act, prepackaged plans, arrangements or agreements are not permissible (contrary to what is provided for in restructuring proceedings). The debtor may nonetheless file an insolvency plan proposal together with its filing for insolvency.

### **2.17 Is a public authority involved?**

The Public Prosecutor’s Office (*Ministério Público*) is the only public authority that can be involved in insolvency proceedings. The Public Prosecutor’s Office, within its general powers of representation of the state, may represent Portuguese public entities, notably public creditors, in such proceedings.

The Public Prosecutor’s Office may also be involved in the classification (characterisation) of the insolvency as at-fault and the assessment of the Insolvency Administrator accounts, and can take part in creditors’ general meetings.

The Public Prosecution Service plays mainly a supervisory role and is therefore not entitled to rule on the debtor’s eligibility to the court protection, nor must it approve/opine upon the feasibility/sustainability of the plan.

### **2.18 What is the treatment of claims arising after filing/admission?**

Such claims, namely those resulting from the management of the insolvent’s asset pool, are pre-deductible.

## **2.19 Are there ongoing contracts?**

The Portuguese Insolvency Act sets out a general principle according to which the performance of any ongoing contract (that has not yet been fulfilled by either of the parties) is suspended until the Insolvency Administrator decides that it will be performed or, instead, chooses to refuse its performance. The Insolvency Administrator is prevented from choosing the performance of an agreement whenever it is highly unlikely that the insolvent's asset pool will be able to fully comply with the obligations under the agreement.

The counterparty is entitled to grant the Insolvency Administrator a reasonable deadline to announce its option. If the Insolvency Administrator does not meet such deadline, refusal is assumed.

A decision of the Insolvency Administrator deciding to continue to perform a credit facility with undrawn commitments and requesting further draw downs would be considered clearly abusive as the insolvent's asset pool could not, in principle, comply with the obligations deriving therefrom – such a decision by the Insolvency Administrator would be challengeable.

## **2.20 Are consolidated proceedings for members of a corporate family/group possible?**

According to the law, the Insolvency Administrator may request that the judicial proceedings regarding the insolvency of members of a corporate family/group be ruled together.

### **What are the consequences with regard to pooling of assets and liabilities? Do creditors have a right to challenge such pooling?**

The pooling of assets and liabilities of two or more related debtors into a single big pool to pay creditors is not allowed.

## **2.21 What are the charges, fees and other costs?**

The insolvency proceedings are subject to the payment of court fees, namely an initial court fee, which shall be paid when the petition for insolvency proceedings is filed, and a subsequent fee due at the end of the proceedings.

The court fees regulation determines the obligation of the payment of the court fees due if the request for insolvency is withdrawn or if such request is rejected by the court, such payment to be made by the applicant.

In all other cases, it is the insolvent's asset pool that is held liable for the payment of the court fees. Furthermore, the insolvent's asset pool is also responsible for the payment of the Insolvency Administrator's fees.

## **3. LIABILITY ISSUES**

### **3.1 What is the liability of managers/directors *vis-à-vis* creditors?**

#### **Can management/directors (*de jure* or shadow) be held personally liable? Are there any prerequisites?**

In general terms, the debtor's managers/directors (*de jure* or shadow) are liable before the creditors for damages caused by its acts or omissions that

caused or aggravated the insolvency situation and/or that reduced the value of the debtor's assets, frustrating payment to the creditors.

The duties on which managers/directors' liability is grounded are deemed to have been breached in the following circumstances:

- destruction, damage, concealment of all or of a considerable part of the debtor's assets;
- disposal of the debtor's assets for the managers/directors own benefit or for the benefit of third parties;
- reduction of the debtor's profits, or cause or increase its losses, leading to detrimental agreements entered into by the debtor for the managers/directors' own benefit or for the benefit of people specially related to them;
- using the debtor's credit or its assets for purposes contrary to its interests, for the managers/directors' own benefit or for the benefit of third parties, namely in order to favour another company in which the managers/directors have an direct or indirect interest;
- mismanagement, being aware that it would lead to the debtor's insolvency;
- breach of the obligation to keep the debtor's accounts organised; or
- breach of the obligation to file the petition for insolvency proceedings within 30 days from the date it becomes aware of the debtor's state of insolvency.

### **Who has standing to sue? Can creditors force the court agent to introduce an action? How?**

Both the Insolvency Administrator and creditors are entitled to bring an action against the managers/directors.

The creditors may request the Insolvency Administrator to bring an action against the debtor's managers/directors.

In particular, the debtor's managers/directors can be held responsible through three different routes.

#### *Specific proceedings aimed at classifying the insolvency as at-fault (qualificação da insolvência)*

These specific proceedings takes place within the insolvency proceedings, and are intended to determine if the insolvency is no-fault or, instead, at-fault.

The insolvency situation shall be deemed as at-fault if the debtor's managers/directors committed any act with malicious intent or wilful misconduct that caused or aggravated the debtor's insolvency situation.

According the Portuguese Insolvency Act, managers/directors have acted with wilful misconduct in the following situations:

- when they have destroyed, damaged, rendered useless, hidden or got rid of the debtor's patrimony, either in its entirety or in a considerable part;
- when they have created or artificially aggravated liabilities or losses, or reduced profits, leading the debtor to enter into loss-making

transactions, to its own benefit or to the benefit of those with whom it has a special relationship with;

- when they have purchased goods on credit, in order to sell them or use them as payment at a price considerably lower than current prices, before the obligation is satisfied;
- when they have used the debtor's assets for their personal benefit or for the benefit of third parties;
- when they have exercised, under the corporate veil, an activity for personal gain or for third parties gain, damaging the company;
- when they used the debtor's credit or assets in a way contrary to its interests, to their own benefit or to the benefit of third parties, namely in order to favour another company in which they have a direct or indirect interest;
- when they have pursued, in their own interest or in the interest of third parties, a loss-making operation while being aware or with the obligation to be aware that such operation would most likely lead to an insolvency situation;
- when they have failed to substantially comply with the obligation to keep the company's accounts, kept altered books or a dual accounting system, or committed any irregularity in respect of the assessment of the debtor's assets and liabilities and financial position; or
- when they have repeatedly failed to comply with their duties to report and to collaborate until the date of the report drawn up by the Insolvency Administrator.

In addition, the existence of malicious intent will be presumed, in the absence of evidence to the contrary, when the managers/directors:

- have breached the duty to request the debtor's insolvency; or
- have breached the duty to prepare annual accounts, within the legal time limit, and to submit them to audit or deposit them with the Register of Companies.

Pursuant to the Portuguese Insolvency Act, the court's decision to classify the insolvency as tortious shall order the debtor's managers/directors (*de jure* or shadow), during the three years prior to the date of the opening of insolvency proceedings, to pay to the debtor's creditors the amount of its claims that they have not received within the liquidation of the debtor's assets (ie the total amount or only a part of such claims). All the managers/directors have joint and several liability.

#### *'Collective' civil action*

In case of breach of the duties above referred, during the insolvency proceedings the Insolvency Administrator is entitled to bring an action against the debtor's managers/directors on behalf of the creditors, asking for a compensation for the damages caused by the decrease of the insolvent's asset pool (either before or after the opening of insolvency proceedings). This action can be filed by the Insolvency Administrator at its own initiative or by creditors' request, being attached to the insolvency proceedings.

*Criminal judicial procedure*

If there is any evidence of a crime committed by the debtor's managers/directs, the court shall inform the Public Prosecutor's Office, so that an investigation is opened.

The criminal offences that may arise from the debtor's managers/directors are:

- fraudulent insolvency;
- concealment of assets;
- negligent insolvency; or
- granting advantages to certain creditors.

These criminal offences are punishable with imprisonment or a fine, under the terms of the Portuguese Criminal Code.

**Can creditors join in the court agent's action? Under what conditions?**

In general terms, the creditors cannot join in the action filed by the Insolvency Administrator. However, any creditor having specific losses may be entitled to file a separate claim. In this case, the creditor needs to claim and provide evidence of its specific loss.

**3.2 What is the liability of the lender?**

The Portuguese Insolvency Act has no specific provision regarding the liability of a lender or akin, nor are we aware of any case law decision where such matter is discussed.

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