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Law and Practice

Contributed by Cuatrecasas

Contents

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1. Market Trends and Developments

1.1 The State of the Restructuring Market

According to information published by the Directorate-General for Justice Policy, by comparing the first quarters of the years 2007 with 2018, we can identify a sharp increase in the number of new cases of bankruptcy, insolvency and corporate recovery from 2007 to 2012. However, from 2013 onwards, this tendency is reversed, with a decrease in the number of new cases. In fact, in 2018, the number of pending cases at the end of the first quarter shows a decrease of about 6.6% when compared with the first quarter of 2017.

As far as the duration of completed cases in the first quarter of each year is concerned, and considering the time elapsed between their entry and the final decision, ie the declaration of insolvency or similar, there is a clear and profound decrease between 2007 and 2018. Indeed, the average duration of cases dropped from ten months in 2007 to two months in 2018. This decrease is a direct consequence of the procedural amendments introduced by Decree Law no. 53/2004, of 18 March, which approved the Insolvency and Corporate Recovery Code (CIRE).

Regarding the volume of cases of the special process of revitalisation, in the first quarter of 2018 there were 108 new cases (about 69.6% less than in the first quarter of 2013), 120 cases were completed (approximately 33.3% less than in the first quarter of 2013). At the end of the first quarter of 2018, 278 of these cases were pending. Finally, the average duration of special process of revitalisation, between January and March of 2018, was seven months and 16 days.

The Portuguese financial and economic crisis that started around the first decade of the 21st century led to a sharp growth in the number of insolvency proceedings. However, the Portuguese economy is slowly recovering from that crisis.

In fact, according to the National Statistical Institute of Portugal, the Portuguese economy registered a growth of 2.7% in 2017. The explanation lies in the improvement in the international demand for both goods and services, ie exports exceeded imports. Domestic demand also played a role, especially due to the increase in private consumption and investment.

All these factors together resulted in the decrease in the number of insolvencies. In fact, in March 2018, more than 4,000 new companies were created in Portugal, which represents an increase.

1.2 Changes to the Restructuring and Insolvency Market

One of the priorities of the programme of the 21st Constitutional Government is to reduce the high level of corporate borrowing and to improve conditions for investment, which is why the capitalisation of companies is one of the pillars of the National Reform Programme.

In August 2016, the Government approved, through Resolution of the Council of Ministers No 42/2016, the *Capitalizar* Programme, comprising five strategic areas, as a programme to support the capitalisation of companies, the revival of investment and the relaunching of the economy, with the aim of developing more balanced financial structures, reducing the liabilities of economically viable companies and improving access to financing for micro, small and medium-sized enterprises.

In 16 March 2017, the Council of Ministers approved a series of legislative measures concerning the strategic area of "Corporate Restructuring" under the *Capitalizar* Programme, and these were put forward for public discussion up to 14 April 2017. These measures were approved and entered into effect on 1 July 2017.

In particular, among the several measures approved by the Council of Ministers under the *Capitalizar* Programme was the creation of the Extrajudicial Business Recovery System (RERE) – which will replace SIREVE, which is an alternative procedure to the ones regulated by CIRE. RERE is a system that enables debtors that are in a difficult economic situation or facing imminent insolvency to start negotiations with creditors in order to reach a voluntary agreement of unrestricted and generally confidential content, with a view to their recovery. These measures also include changes to the special process of revitalisation and the insolvency procedure.

2. Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

2.1 Overview of the Laws and Statutory Regimes

The laws that apply to financial restructurings, reorganisations, liquidations and insolvencies of business entities include:

- Insolvency and Corporate Recovery Code (Decree Law No 53/2004, of March 18th, as amended by Decree Law No 26/2015, of February 6th, and by Decree Law No 79/2017, of June 30th – CIRE);
- Decree Law No 178/2012, of August 3rd, establishing SIREVE – Non-Judicial Business Recovery System;
- Regulation (EC) No 1346/2000 of May 29th, on insolvency proceedings; and
- Resolution of the Council of Ministers No 43/2011 of October 25th – Principles for the Non-Judicial Recovery of Debtors.

2.2 Types of Voluntary and Involuntary Financial Restructuring, Reorganisation, Insolvency and Receivership

Types of voluntary and involuntary proceedings include:

- SIREVE – Non-Judicial Business Recovery System – this is a voluntary proceeding;
- PER – Special Process of Revitalisation – this is a voluntary proceeding, although it requires the compliance of at least one creditor; and
- Insolvency Proceeding – this may be a voluntary or involuntary proceeding, depending on the party that requests the declaration of insolvency.

2.3 Obligation to Commence Formal Insolvency Proceedings

The debtor him or herself can request a declaration of insolvency and, most of the time, he or she ought to do it. In fact, the debtor has 30 days to request said declaration counting from the moment he or she acknowledges – or should have acknowledged – his or her insolvency situation, as described in **2.6 Requirement for Insolvency to Commence Proceedings**. If the debtor is not an individual, the social body responsible for the legal person's management or, otherwise, any of its managers, may request a declaration of insolvency.

A company that finds itself in a situation of insolvency is obliged to ask the court for the judicial declaration of this condition within 30 days after knowledge of the situation of insolvency. The company may ask for continuation of its administration in its own hands, if it promises to present a recovery plan within a fixed-term period that provides for the recovery of the company and the continuation of its business. Only in the course of insolvency proceedings shall it be determined by the creditors what the future of the insolvent company will be: whether it will be liquidated or whether it has the economic viability to submit to an insolvency plan providing for its recovery.

2.4 Liabilities, Penalties or Other Implications for Failing to Commence Proceedings

Regarding the consequences arising from the fact that a company does not commence mandatory insolvency proceedings, the main one is the presumption of gross negligence when it comes to qualifying the insolvency as one of faulty conduct (Article 186, Nos 3 and 4 of CIRE).

2.5 Ability of Creditors to Commence Insolvency Proceedings

The declaration of insolvency may also be requested by whoever is legally responsible for the debtor's debts, by any creditor, regardless of the nature of the credit, or by the public

prosecutor, on behalf of entities whose interests are legally entrusted to it (for example, the tax and social security authorities). The circumstances under which the parties mentioned may initiate insolvency proceedings are listed in the several paragraphs of Article 20 of CIRE.

2.6 Requirement for Insolvency to Commence Proceedings

Insolvency proceedings can only be initiated if the debtor is in a situation where it is impossible for him or her to comply with the obligations that have become due (Article 3, No 1 of CIRE). The insolvency state can be evidenced, for example, by the size and age of the debt. When the debtor is a legal entity, the criterion by which to establish a situation of insolvency is the fact that the liabilities clearly exceed the assets (Article 3, No 2 of CIRE).

2.7 Specific Statutory Restructuring and Insolvency Regimes

Credit institutions are submitted to a special legal system, aiming at both the protection of the interests of depositors, investors and other creditors and the preservation of the normal functioning conditions of the monetary, financial and foreign exchange market. This special regime is set out in the General Legal System for Credit Institutions and Financial Companies – Decree Law No 298/92, of December 31st.

Public legal persons and public business entities are not subject to insolvency proceedings (see Article 2, No 2, of the Portuguese Insolvency and Corporate Recovery Code). This exclusion also includes insurance companies, financial corporations, investment firms and collective investment undertakings, as these institutions have special regimes.

3. Out-of-court Restructurings and Consensual Workouts

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

As a way to foster the resource to non-judicial corporate recovery systems, as well as a way to encourage consensual solutions, Portugal took on a set of measures regarding debtors' non-judicial recovery. Among these measures, Portugal defined several principles in accordance with best international practices (cf Resolution of the Council of Ministers No 43/2011 of October 25th). The principles acquired legislative value due to the express remission made by Law No 16/2012, of April 20th, which introduced PER, and by Decree Law No 178/2012, of August 3rd, which established SIREVE. In PER, there is a modality of proceeding (Article 17.º-F of the Portuguese Insolvency Code) that is aimed at the judicial ratification of a prejudicial agreement between the debtor and a significant percentage of its recognised creditors.

Since 3 March 2018, the Portuguese legal system has included another non-judicial restructuring solution called "Regime Extrajudicial de Recuperação de Empresas" (RERE), which allows a debtor that finds itself in a difficult economic situation or in a state of imminent insolvency to promote negotiations with its creditors towards the achievement of a restructuring agreement – voluntary, with free content and, in principle, confidential. Additionally, this RERE also allows the debtor to draft a Negotiation Protocol in order to achieve a favourable environment for negotiations.

The preference for either judicial or non-judicial proceedings depends on several factors, mainly on the nature of the credit and on the sustainability of the company. For example, on the one hand, if you are a common creditor and the company could viably recover, then a non-judicial proceeding is preferable as, by virtue of the approved recovery plan, you might actually receive part of your credit. On the other hand, if you are a common creditor and a judicial insolvency proceeding commences, then the probability of receiving is reduced. In contrast, if your credit is guaranteed by a mortgage, you are probably going to be able to see your credit satisfied.

However, there is one factor that plays in favour of non-judicial proceedings: the speediness of the process when compared to judicial proceedings.

Banks and investment funds do not tend to give financial support to companies in a difficult economic situation or facing imminent insolvency. However, if the company has some particularly appealing features, such as modern and state of the art machinery, then the investment funds and banks might be interested in giving financial support and, in these situations, it is necessary to have a thorough audit process and assessment of the economic and commercial sustainability.

If the company at stake is in a difficult economic situation or in a situation of imminent insolvency, but not yet in a situation of insolvency as described in **2.6 Requirement for Insolvency to Commence Proceedings**, then it has two different solutions. The company can either present to the court a non-judicial settlement (Article 17 – I of CIRE) or it can request the beginning of a negotiation process in order to reach a recovery plan (Article 17 – C, No 3 paragraph (a) of CIRE). In the first case, the debtor will already have reached an agreement with creditors (which may be banking entities or investment funds wishing to invest in the company) that represent a significant majority, which is then presented to the court in order to obtain judicial approval/ratification. In the second scenario, at least one of the debtor's creditors has agreed to negotiate a recovery plan.

In contrast, if said company is already in an insolvency situation, since it has become impossible to comply with the

obligations that have become due, the creditors will only intervene if an insolvency plan is approved.

3.2 Typical Consensual Restructuring and Workout Processes

In the midst of the negotiations, the debtor must provide all and any pertinent information to both the creditors and the provisory judicial administrator. Said information must be updated and complete at all times. Only then can the negotiations be transparent and equitable. Both the debtor and its managers are civilly liable for any damages caused to the creditors due to the lack or inaccuracy of this information. Additionally, all the parties involved in the negotiation must comply with the Principles for the Non-Judicial Recovery of Debtors as mentioned in **2.1 Overview of the Laws and Statutory Regimes**. As far as bureaucratic obligations are concerned, as soon as the request to begin the negotiations reaches the court, the debtor shall send a registered letter to all the creditors that did not subscribe to said request, in order to invite them to take part in the negotiations. Later, if and when creditors approve a recovery plan, the debtor shall send it to the court. Usually, the recovery plan establishes a standstill period after which the debtor must begin the payments to the creditors as stated in that plan.

As regards the special process of revitalisation, there is no committee of creditors. As stated above, all the creditors are invited to participate in the negotiation process, if they are interested and willing to do so. Besides the creditors, there is a provisory judicial administrator, appointed by the court as soon as the debtor requests the beginning of the negotiations. This administrator plays a very important role in the negotiations, as he or she is responsible for conducting the negotiations and overseeing the course and regularity of the proceedings.

Provisory judicial administrators and insolvency administrators are remunerated. The debtor company's assets assure the payment to these administrators, in accordance with Ministerial Order No 51/2005, of January 20th. The remuneration may be due according to the percentage of claims recognised that were satisfied, which constitutes a sort of "success fee".

3.3 Injection of New Money

Following Law No 16/2012 of April 20th, CIRE added a prior ranking privilege attributed to all the creditors that, in the course of the special process of revitalisation, pay for the debtor's business activity, providing it with the financial resources needed. This creditors' privilege is satisfied before the workers' privileged claims and is maintained even if, at the end of the special process of revitalisation, the insolvency of the debtor is declared within two years. Typically, new money is injected by credit facility institutions or by competing companies that wish to take over the business.

3.4 Duties of Creditors to Each Other, or of the Company or Third Parties

The negotiations between the debtor and its creditors are governed by the terms agreed between all agents or, in the absence of agreement, by the rules defined by the provisory judicial administrator appointed and the experts each agent considers fit. The agent that requested the expertise, unless otherwise stated in the recovery plan that might be approved, bears the costs of the experts.

In addition to the above, please see **3.2 Typical Consensual Restructuring and Workout Processes**.

3.5 Consensual, Agreed Out-of-court Financial Restructuring or Workout

The recovery plan may be unanimously approved. In this scenario, all the creditors must sign said plan and send it immediately to the court so the judge can ratify it.

If unanimity is not reached the plan is considered approved in two situations. Firstly, if, having been voted upon by creditors whose claims represent at least a third of all the credits entitled to vote, as stated in the credits list, it collects the affirmative vote of more than two thirds of the votes cast and if more than half of the votes cast correspond to non-subordinated claims. The second scenario is if the plan collects the affirmative vote of creditors whose claims represent more than half of all the credits entitled to vote and more than half of those votes correspond to non-subordinated claims. The voting is performed in writing, and sent to the provisory judicial administrator who opens the votes side by side with the debtor.

In the Portuguese legal system, the court cannot introduce changes on its own initiative into the recovery plans (either insolvency or recovery plans) negotiated by the creditors. If the court ratifies the plan then this decision binds all creditors, even if they did not take part in the negotiations.

4. Secured Creditor Rights and Remedies

4.1 Type of Liens/Security Taken by Secured Creditors

Equity shares, movable property, intangible property, intellectual property and the debtor's accounts may be pledged. As far as the debtor's real estate is concerned, it may be subject to mortgages. However, it is worth noting that actions undertaken during an enforcement procedure are not maintained in insolvency proceedings.

4.2 Rights and Remedies for Secured Creditors

The creditors' right to vote is intrinsically dependent on the value of the credit as recognised by the provisory judicial administrator, by the insolvency administrator or by the court.

by this we mean, each euro corresponds to one vote and, as such, the higher the credit, the higher is its weight in the voting procedure. Additionally, the major benefit given to secured creditors, ie those creditors whose claims are guaranteed in some way, is their priority in the graduation of the claims. Thus, in a liquidation scenario where the object that guarantees the claim is sold, the creditor has priority over the proceeds of said sale. In fact, in an insolvency procedure, guarantees are only executed if the creditors decide upon the liquidation of the debtor company's assets, as opposed to an insolvency plan.

4.3 The Typical Timelines for Enforcing a Secured Claim and Lien/Security

The average time for an insolvency proceeding to reach the stage of liquidation will vary depending on the number of assets and rights of the insolvent estate and the number of creditors.

4.4 Special Procedures or Impediments That Apply to Foreign Secured Creditors

In the Portuguese legal system, there are no special procedures or impediments that apply to foreign secured creditors, as they are treated equally regardless of their nationality.

5. Unsecured Creditor Rights, Remedies and Priorities

5.1 Differing Rights and Priorities Among Classes of Secured and Unsecured Creditors

In the absence of facts that determine the application of special rules, the creditors are equally positioned before the debtor (par conditio creditorumprinciple). However, the law may establish deviations from and exceptions to this principle, by establishing legitimate causes of preference. In an insolvency proceeding, the creditors' claims are satisfied in accordance with their priority. The credits may be: guaranteed, if they have any real guarantees over the insolvent's assets; privileged, if they have any special or general prior ranking over the insolvent's assets (for example, the State's credits and the employees' credits); and common ("unsecured"), if they do not have any guarantee. All the creditors are taken into account and they compete for the formation of the majorities required. As stated in **4.2 Rights and Remedies for Secured Creditors**, the creditors' right to vote depends on the amounts of their claims. This means, as far as common creditors are concerned, that if they gather the necessary majority, they will have the power to lead the course of the proceeding.

Once the assets with real guarantees are sold, the proceeds are immediately distributed to the guaranteed creditors. When the proceeds are not sufficient to pay the whole debt then the remaining value is inserted among the common credits. This means that the guaranteed creditors do not have a special position; they only have preference regarding the proceeds of the sale of the secured asset. The payment of the privileged creditors is made at the expense of the assets that are not encumbered with a real guarantee. Thereafter, it proceeds to the payment of the common creditors and, finally, of the subordinated creditors.

5.2 Typical Timeline for Enforcing an Unsecured Claim

As stated in the information published by the Directorate-General for Justice Policy, the time elapsed between the beginning of the insolvency procedure and the declaration of insolvency was, in the second quarter of 2016, two months. From then until the end of the process, it takes about 37 months. However, this is merely an estimate, as there are proceedings that due to their complexity and size do not comply with these timelines.

5.3 Bespoke Rights or Remedies for Landlords

Concerning landlords, there are two scenarios: one where the insolvent is the lessee, and one where the insolvent is the lessor.

In the first case, a declaration of insolvency does not suspend the lease. However, the insolvency administrator can always terminate it with 60 days' notice, if in accordance with the law or with the contract a shorter notice is not enough.

Nevertheless, when the leased property is intended for housing of the insolvent, the insolvency administrator can only declare that the right to payment of the rents due after 60 days of such declaration shall not be exercisable in the insolvency proceedings. In this scenario, the property owner has the right to require, as credit on the insolvency, compensation for the damages suffered in the event of eviction for lack of payment of some of those rents, up to an amount corresponding to one quarter.

The property-owner cannot require the termination of the agreement after the declaration of insolvency of the lessee on either of the following grounds: (i) non-payment of rents or leases relating to the period prior to the date of declaration of insolvency; or (ii) deterioration of the financial situation of the lessee.

If the property leased has not yet been delivered to the lessee at the time of his declaration of insolvency, both the insolvency administrator and the lessor may terminate the contract. It is lawful for either of them to specify to the other a reasonable period for this purpose, after which the right of withdrawal is terminated.

In the second case, the declaration of insolvency does not suspend the lease agreement and its termination by either party is only possible at the end of the deadline, without prejudice to the cases of obligatory renewal.

The alienation of the leased property in the process of insolvency does not deprive the lessee of the rights that are recognised by the civil law in such circumstances.

5.4 Special Procedures or Impediments or Protections That Apply to Foreign Creditors

Please see **4.4 Special Procedures or Impediments That Apply to Foreign Secured Creditors**.

5.5 Priority Over Secured Creditor Claims

The credits arising from an employment contract, or its violation or termination, benefit from a general prior-ranking privilege. Said credits also benefit from a special prior-ranking privilege over the employer's immovable property where the employee works. Thereby, if that property is sold, the proceeds revert firstly in favour of the employees.

As regards new money please see **3.3 Injection of New Money**.

6. Statutory Restructurings, Rehabilitations and Reorganisations

6.1 The Statutory Process for Reaching and Effectuating a Financial Restructuring/ Reorganisation

For details about consent for a statutory procedure please see **3.5 Consensual, Agreed Out-of-court Financial Restructuring or Workout**.

Only the debtor may initiate the special process of revitalisation, as it is a voluntary proceeding.

The prioritisation of the credits is not open to negotiation, as it is settled in accordance with the credits' qualification. The only aspects able to be discussed during the negotiations are the nature of the credits (whether guaranteed or not), the amount and the due date.

As already stated above (**3.1 Consensual and Other Out-of-court Workouts and Restructurings**), the company at issue must be in a difficult economic situation or in a situation of merely imminent insolvency, but it cannot be in a situation of insolvency.

In order to initiate a special revitalisation proceeding the debtor needs a written declaration, duly signed by it and by at least one of its non-subordinated creditors that represents at least 10% of the identified creditors (non-subordinated), through which it expresses its intention to begin negotiations with its creditors so that they can achieve a recovery plan. Please note that if the company was obliged to undertake an auditing process, then the declaration also has to be signed by the accountant or the statutory auditor stating that the company is not insolvent. Additionally, the debtor ought to have another written declaration stating that it meets the necessary conditions for its recovery. Finally, the debtor must surrender to the court all the documents listed in Article 24 of CIRE and a proposal for the recovery plan accompanied by, at least, a description of the assets, financial situation and redemption possibilities available to the company.

The primary purpose of the special process of revitalisation is to achieve an agreement between the debtor and its creditors.

The declarations and documents mentioned above must be presented to the court, and, as soon as they are delivered, the court appoints a provisory judicial administrator. However, the negotiations over the recovery plan take place with the exclusive participation of the debtor, the creditors who expressed an intent to negotiate and the provisory judicial administrator. Thus, the court does not participate.

Besides intervening at the beginning of the process as described, the court decides the creditors' oppositions to the provisory credits list as presented by the provisory judicial administrator. Finally, the court decides on the approval or not of the plan and on the closure of the proceeding. Therefore, the court only intervenes sporadically and it is not a main party in the process.

When the deadline for oppositions to the provisory credits list ends, which should occur around four to five weeks after the electronic publication of the appointment of a provisory judicial administrator, the participants have two months to conclude the negotiations. If the provisory judicial administrator and the debtor agree to do so in writing, this deadline may be extended by one month, but only once.

After the electronic publication of the appointment of the provisory judicial administrator, all the creditors have 20 days to present a claim for their credits. The claims should be addressed to the provisory judicial administrator, who, in five days, drafts a provisory credits list. The creditors' claims must be accompanied by all the supporting documents and must state the credits' provenance, due date, amount, interest, quality (common, privileged, guaranteed, subordinated) and eventual subordination to a suspensive or resolution clause (conditional credit). If the credits are guaranteed, the claim must also contain: (i) the assets or rights covered by the guarantee and their registry identification data; and (ii) in the case of a personal guarantee, the identification of guarantors and the interest rate applicable.

If a recovery plan is approved and ratified, it binds all the creditors, including those who did not take part in the negotiations and those who voted against it.

All the proceeding, as well as the recovery plan, is public. The key commercial and economic terms are not required to be publicly disclosed.

In order to challenge the outcome of a special procedure of revitalisation a party with legitimacy and interest may appeal. The eventual appeal must obey the rules established in the Portuguese Civil Procedure Code, ie the general rules that apply to appeals. However, there are aspects to which it is important to refer: there is only one degree of appeal, namely to the Court of Appeal, and therefore not to the Supreme Court; and the sittings are continuous, even during vacation periods, considering that this is a process of urgent nature.

The success of the appeal strongly depends on the arguments invoked and, as such, on the concrete circumstances of the case.

As far as the majorities for approval of the plan are concerned, please see **3.5 Consensual, Agreed Out-of-court Financial Restructuring or Workout**.

The special process of revitalisation may end in one of two ways: the negotiations lead to the approval of a plan, or they do not.

In the first scenario, if a plan is approved, it shall be sent to the judge who will approve or reject it, in accordance with the observation of legal provisions of an imperative nature. Regarding the value distribution, this can only be assessed on a case-by-case basis.

In the second scenario, the provisory judicial administrator shall declare if, at that moment, the debtor is insolvent. In that case, the special process of revitalisation will become a process of insolvency. Otherwise, if the debtor is not yet insolvent, then the special process of revitalisation is terminated, as are all its effects. In this case, the debtor will not be able to recommence another special process of revitalisation for two years.

6.2 Position of the Company During Procedures

The initiation of the special process of revitalisation, with the publication in the official site of the appointment of a provisory judicial administrator, suspends all outstanding actions brought against the debtor for the recovery of debts and prevents the introduction of new actions during the pendency of the period of the PER.

In the course of the special process of revitalisation, the company may and must continue with its business. However, in order to practise any acts of extraordinary administration, the company must obtain the prior consent of the provisory judicial administrator.

Besides the guidance and inspection of the negotiations, the judicial administrator also plays a part in the verification of the claims and in the administration of the debtor's assets. After the appointment of the provisory judicial administrator by the court, the debtor is no longer allowed to take actions of especial significance without the prior consent of the administrator. To qualify an action as one of especial significance, one should consider the risks involved and their impact on the subsequent course of the proceeding, the prospects of satisfaction of the creditors and the susceptibility of the company's recovery. For example, this might include the sale of the company or the sale of its parts, the sale of assets necessary to the continuation of the company's activities, the acquisition of immovable property or the celebration of contracts to be performed permanently or recurrently.

As regards new moneys please see **3.3 Injection of New Money** and, as regards the possibility of investment, see **3.1 Consensual and Other Out-of-court Workouts and Restructurings**.

6.3 The Roles of Creditors During Procedures

The creditors are classified in accordance with the nature of their claims, on the same terms as in the insolvency procedure (see **3.2 Typical Consensual Restructuring and Workout Processes**).

As previously stated, in a special process of revitalisation, there is no committee of creditors.

Both the creditors and the provisory judicial administrator may require from the debtor all the information they consider necessary and pertinent in order to reach an agreement and the approval of a plan.

6.4 Modification of Claims

On this matter, there must be a harmonisation of two principles: on the one hand, the contractual freedom and the parties' autonomous will; on the other hand, the creditors of the same category must be equally positioned before the debtor, meaning that the creditors whose claims have the same nature are treated identically, preventing some from being favoured to the detriment of others.

6.5 Trading of Claims

Although the law does not give a direct answer to whether claims may be traded, the list of credits is of the utmost importance not only because it has such impact on the relative weight of the vote of each creditor but also because the payment plan set out in the recovery plan will respect, in principle, such list as drawn up by the judicial administrator. Therefore, it is only reasonable that all changes, subjective or objective, to the initially claimed credits be communicated to the provisory judicial administrator, so said list can be updated at all times.

6.6 Using a Restructuring Procedure to Reorganise a Corporate Group

In the Portuguese legal system, the special process of revitalisation is not often utilised to reorganise a corporate group, but since June 2017, it is now possible to join the special process of revitalisation of companies that have a dominium or group relation between themselves.

6.7 Restrictions on the Company's Use of or Sale of Its Assets During a Formal Restructuring Process

Please see **6.2 Position of the Company During Procedures**.

6.8 Asset Disposition and Related Procedures

Both the debtor and the provisory judicial administrator, along with creditors who expressed the wish to take part in the negotiations, conduct the negotiations.

6.9 Release of Secured Creditor Liens and Security Arrangements

As a consequence of the widespread prevalence of the principle of contractual freedom, creditors may agree on what they see fit, as long as this does not violate any procedural or substantive imperative norms.

6.10 Availability of Priority New Money

Please see **3.1 Consensual and Other Out-of-court Workouts and Restructurings** and **3.3 Injection of New Money**.

6.11 Statutory Process for Determining the Value of Claims

As mentioned above, the main purpose of the special process of revitalisation is the completion of an agreement between the debtor and its creditors. As such, the process cannot have, as its sole purpose, the intention to make a claim to the relationship held on the company nor to carry out a survey of creditors who may have an economic interest in the company.

6.12 Restructuring or Reorganisation Plan or Agreement Among Creditors

A recovery plan is not subject to an overall fairness or any similar equitable test. As previously stated, after the plan's approval the court will have to decide whether to ratify it or not, in accordance with the observation of legal provisions of an imperative nature.

6.13 The Ability to Reject or Disclaim Contracts

As previously stated (**6.2 Position of the Company During Procedures**), the debtor is only prevented from taking especially important actions. As such, the debtor may reject or disclaim contracts but he or she will need the provisory judicial administrator's consent if such act constitutes an especially significant one. If a creditor's claim has already been recognised and, in the meantime, due, for example, to the withdrawal of the agreement that sustained said credit, the claim becomes extinct, such event shall be communicated to the provisory judicial administrator, as the credits list must be updated.

6.14 The Release of Non-debtor Parties

In the special process of revitalisation, the measures stated in the recovery plan do not affect the existence and the amount of the creditors' claims against third-party guarantors, who remain liable for the fulfilment of the secured obligation as they were before. In an insolvency proceeding, the exact same situation occurs (cf Article 217, No 4 of CIRE).

6.15 Creditors' Rights of Set-off, Off-set or Netting

The regulations applied to the special process of revitalisation do not provide for the right of compensation as a way of extinguishing obligations. Despite said provisions existing in insolvency proceedings, its application to PER is doubtful. There is, however, some case law which admits the subsidiary application of the insolvency regime. Following the declaration of insolvency, the holders of credits over the insolvency may compensate said credits with debts to the insolvency estate if at least one of the following requirements is fulfilled: (a) the verification of the legal assumptions of the compensation must be prior to the date of declaration of insolvency; (b) the claim on insolvency must fulfil, before the counterclaim on the mass, the requirements laid down in Article 847 of the Portuguese Civil Code. However, the compensation is not permissible: (a) if the debt to the mass has been constituted after the date of declaration of insolvency, in particular as a result of the resolution of acts for the benefit of the insolvent estate; (b) if the insolvency creditor has acquired his or her claim from another, after the date of declaration of insolvency; (c) with debts of the insolvent for which the mass is not responsible; and (d) between the debts to the mass and the subordinate claims on the insolvency.

6.16 Failure to Observe the Terms of an Agreed Restructuring Plan

In the case of failure to comply with the approved recovery plan, the regime established for failure to comply with the insolvency plan is applicable as stated in Article 218 of CIRE. This article establishes that unless expressly stated otherwise by the insolvency plan, the moratorium or forgiveness provided for in the plan expires: (a) regarding credit for which the debtor is held to be in delay, if his or her performance, plus default interest, is not fulfilled within 15 days after written notice by the creditor; (b) for all claims if, before ending the plan, the debtor is declared insolvent in a new process.

6.17 Receive or Retain Any Ownership or Other Property

In the Portuguese legal system, the receipt or retention of any ownership or other property by the exiting equity owners is not provided for.

7. Statutory Insolvency and Liquidation Proceedings

7.1 Types of Statutory Voluntary and Involuntary Insolvency and Liquidation Proceedings

The insolvency process is a universal execution process whose purpose is to satisfy the creditors' claims. There are two possibilities. One is the liquidation of the insolvent through the sale of its assets organised and promoted by the insolvency administrator. The creditors' claims are, pro rata and proportionally, satisfied with the proceeds from the sale.

The other possibility is that, if the debtor is economically viable, an insolvency plan might be approved. This plan, in most cases, will work as a recovery plan, providing for the maintenance of the debtor's business and creating a kind of "oxygen cylinder", by granting grace periods and partial debt pardons that are negotiated with the creditors.

The submission to the insolvency proceeding or the request for a declaration of insolvency commences with a written petition. If the debtor is the applicant, the debtor shall indicate whether the insolvency situation is current or merely imminent. Nevertheless, the petition must contain the identification of the administrators of the debtor, both of fact and law, and its five biggest creditors, with the exception of the applicant itself (when the declaration of insolvency is not requested by the debtor). The petition must be accompanied by the set of documents listed in article 24 of CIRE.

Within the deadline stated in the statement that declares the insolvency (which cannot exceed 30 days) all the creditors must claim their credits, regardless of their nature. The creditors' claims must be accompanied by all the supporting documents and must state the credits' provenance, due date, amount, interest, quality (common, privileged, guaranteed, subordinated) and eventual subordination to a suspensive or resolution clause (conditional credit). If the credits are guaranteed, the claim must also contain (i) the assets or rights covered by the guarantee and their registry identification data, and (ii) in the case of a personal guarantee, the identification of guarantors and the interest rate applicable. The creditors' claims shall be addressed to the insolvency administrator. Within the 15 days that follow the end of the deadline to present the creditors' claims, the insolvency administrator must present a list of all the credits, recognised and not recognised, in alphabetical order. Each entry in the list of recognised credits must contain the identification of the claimant, the credit's nature, the capital, the interests, the personal and real guarantees, the privileges, the interest rate applicable and eventual subordination to a suspensive or resolution clause. The list of unrecognised credits must contain the fundamental grounds of each decision. The affected creditor can object to such a decision.

In the statement that declares the insolvency, the court decides whether it is necessary to hold a first creditors' meeting, entitled a report assessment assembly. In this assembly a first report with an analysis of the company prepared by the insolvency administrator will be assessed and discussed. The administrator will suggest what the destiny of the debtor should be liquidation or an insolvency plan proposal. However, the final decision is taken by creditors' assembly, which will vote on the insolvency administrator's proposals.

The insolvency process, including all its incidental, joint procedures and appeals, is a process of an urgent nature. In practice this means that the insolvency process has priority over non-urgent procedures and its sittings do not suspend during judicial vacations. As far as the timeline is concerned, and as stated in the information published by the Directorate-General for Justice Policy, the time elapsed between the beginning of the insolvency procedure and the declaration of insolvency was, in the second quarter of 2016, two months. From then until the end of the process, it takes about 37 months. However, this is merely an estimate, as there are proceedings that due to their complexity and size do not comply with these timelines (cf. **5.2 Typical Timeline for Enforcing an Unsecured Claim**).

The claims may be traded, even in the midst of an insolvency procedure. Such an operation only implies a subjective modification in the relationship of obligation, keeping untouched the contents of the transferred credit, which means that the assigned credit keeps the same nature regardless of the person of the transferee.

Following the declaration of insolvency all enforcement actions and all proceedings required by the insolvent's creditors whose subject contends with insolvency estate's assets are suspended. In addition, it is no longer possible to introduce or continue any enforcement procedure brought by creditors of the insolvent. However, if in those actions there is some other person being enforced against, the execution proceeds against that person. The above-mentioned suspension turns into termination as soon as the insolvency proceeding is extinguished, except for the purposes of exercising the right of reversion legally established.

The declaration of insolvency immediately deprives the insolvent, directly or through his or her managers, of the administration and disposal powers over the insolvency estate's assets. Said powers are transferred to the insolvency administrator. However, CIRE provides (cf Articles 223 et seq.) that the court, in the statement that decrees the insolvency, might determine that the insolvency estate's administration is ensured by the insolvent. For that to happen the insolvent must expressly require it and he or she must present an insolvency plan that provides for the continuance of the operation of the company by himself. Also, there must not be any reasons to expect delay in the proceeding or some other disadvantages

to the creditors. Finally, the person who requested the insolvency (if not the debtor) must give prior consent.

As a general rule and subject to some special cases of the law regarding particular types of agreements, in any bilateral agreement in which, until the date of the declaration of insolvency, there is not yet a total fulfilment by the insolvent or by the other party, the fulfilment is suspended until the insolvency administrator declares whether to opt to maintain or to refuse the fulfilment.

The other party can fix a reasonable term for the insolvency administrator to exercise his option; afterwards, it is deemed a refusal of fulfilment.

If the insolvency administrator refuses the obligation's fulfilment, and regardless of the right to the asset's separation, if applicable: (a) neither party shall be entitled to the refund of what has been provided; (b) the insolvency estate has the right to demand the value of the consideration already made by the debtor, to the extent that it has not been made by the other party; (c) the other party is entitled to demand, as a credit over the insolvency, the value of the non-fulfilled part of the service/supply rendered by the debtor, once the value of the corresponding consideration that has not yet been has been deducted; and (d) the right to compensation of the damage caused to the other party by the non-fulfilment: (i) only exists up to the value of any obligation imposed pursuant to (b) above; (ii) shall be deducted from the amount to which the other party is entitled pursuant to (c) above; and (iii) constitutes a credit over the insolvency.

Both parties may declare the compensation of the obligations referred to in (c) and (d) above with those referred to in (b) above, up to the limit of the respective amounts.

For more information on when creditors can exercise certain rights please see **6.15 Creditors' Rights of Set-off, Off-set or Netting**.

Both the court as the insolvency administrator analyse all the information, which is, similar to what happens in PER, public. For more please see **3.2 Typical Consensual Restructuring and Workout Processes**.

The distribution of the value intrinsically depends on the route the insolvency procedure takes. If an insolvency plan is approved the payments shall be done according to what was set out therein. In the event of a liquidation, the creditors' claims are, pro rata and proportionally, satisfied with the proceeds from the sale.

7.2 Distressed Disposals as Part of Insolvency/ Liquidation Proceedings

With the exception of cases where the administration of the insolvency estate is assured by the insolvent, as explained above, the insolvency administrator secures the negotiation, execution and sale of the assets.

Sale implies that the assets are transferred to the purchaser free of any guarantee rights that encumbered them. However, this situation may not entail any injury to a guaranteed creditor, because the preference in the payment transfers itself to the proceeds of the sale of that asset.

7.3 Implications of Failure to Observe the Terms of an Agreed or Statutory Plan

Please see **6.16 Failure to Observe the Terms of an Agreed Restructuring Plan**.

7.4 Investment or Loan of Priority New Money

The debts that emerge from an insolvency estate's management acts – namely those that result from new money injected into the company after the declaration of insolvency – correspond to the insolvency estate's debts (cf Article 51, No 1, paragraph (c) of CIRE). As such, this new money has a priority over the insolvency debts. In fact, the credits over the insolvency are overlooked when faced with the credits emerging from the insolvency estate.

7.5 Insolvency Proceedings to Liquidate a Corporate Group on a Combined Basis

Since June 2017, the Portuguese Insolvency Code sets forth that if the debtor is a commercial company which, under the terms of the Portuguese Companies Code, is in a relationship of control or group with other companies in respect of which insolvency proceedings have been proposed, the judge, unofficially or on the basis of an indication made by the debtor or by the creditors, may nominate the same insolvency administrator for all companies and, in that case, appoint, in general terms, another insolvency administrator with functions restricted to the assessment of claims between debtors of the same group, as soon as it verifies the existence of these, in particular by indicating the primary administrator.

Additionally, among the procedural effects of a declaration of insolvency is the possibility of joining the debtor's insolvency proceeding with another insolvency proceeding of someone who legally answers for his debts. If the debtor is an individual, then the insolvency proceeding joined may be that of his or her spouse, but only if the legal system is not the separation of assets.

7.6 Organisation of Creditors

In the insolvency process a committee of creditors is appointed by the court, namely in the statement that declares the insolvency.

Three or five members and two substitutes compose the committee. As far as the presidency of the committee is concerned, that position shall fall to the biggest creditor of the

company. The selection of the remaining members must ensure the representation of the several classes of credits, with the exception of the subordinated claims. The committee co-operates with the insolvency administrator in the conduct of the proceeding and in the liquidation of assets and supervises the insolvency administrator's activity. The committee may analyse freely the debtor's accounting information and can request from the insolvency administrator all the information that it sees fit. The committee members are not remunerated, and only have the right to the reimbursement of the expenses strictly required by the performance of their functions.

7.7 Conditions Applied to the Use of or Sale of Assets

The insolvency administrator has the power of decision, and the creditors' committee oversees the process.

8. International/Cross-border Issues and Processes

8.1 Recognition or Other Relief in Connection with Foreign Restructuring or Insolvency Proceedings

On 5 June 2015 the new Regulation (EU) 2015/848 of European Parliament and Council, of 20 May 2015, regarding insolvency proceedings was published and it entered into effect on 25 June 2015.

The goal of this revision was not only to ensure greater efficiency and effectiveness of the insolvency procedures that have external effects, but also to contribute to a "second chance" culture and to an improvement of the internal market functioning and its resilience during economic crises, and also to preserve jobs, promote economic recovery and sustainable growth, and relaunch entrepreneurship in Europe, as was proposed in the Europe 2020 strategy and in the Entrepreneurship 2020 Action Plan.

This new legislative instrument, accompanied by the Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency, and the Communication (COM (2012) 742 final), favours the recovery and revitalisation of viable companies.

The revision (a) widens the scope of the application of the Regulation to procedures that promote the debtor's recovery and revitalisation; (b) strengthens the legal framework of co-operation and communication between courts, between these and the insolvency administrators, and among insolvency administrators, making it clearer and endowing it with greater legal certainty; (c) improves the co-ordination between insolvency procedures concerning the same debtor and in the case of procedures regarding companies that are part of a group (this is one of the major new elements); (d) gives primacy to the concentration of efforts in the main proceeding, making it possible for a judge to dispense with opening secondary proceedings, once it is demonstrated that the respect of the local creditors' rights is assured; and (e) increases insolvency publicity through searchable national insolvency registers throughout Member States and their respective interconnection (with the necessary data protection guarantees).

This Regulation also incorporates the most relevant jurisprudence of the European Court of Justice that has been given concerning the former Regulation (EC) No 1346/2000 of 29 May 2000.

The Regulation applies to insolvency proceedings, whether the debtor is a natural person or a legal person, a trader or an individual. Insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings holding funds or securities for third parties and collective investment undertakings are excluded from the scope of the Regulation.

The Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his or her main interests. The "centre of main interests" corresponds to the place where the debtor conducts the administration of his or her interests on a regular basis and is therefore ascertainable by third parties. The Regulation provides immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings. Automatic recognition means that the effects attributed to the proceedings by the law of the State in which the proceedings were opened extend to all other Member States. The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court's decision.

As regards foreign creditors please see **4.4 Special Procedures or Impediments That Apply to Foreign Secured Creditors**.

9. Trustees/Receivers/Statutory Officers

9.1 Types of Statutory Officers Appointed in Proceedings

In the Portuguese jurisdiction, there is only one type of officer that is appointed in the recovery or insolvency proceedings, which is designated as the "judicial administrator".

The new Law 22/2013, of February 26th, approved the statute regarding the judicial administrator. The judicial administrator is the person responsible for the supervision and guidance of the acts concerning the special process of revitalisation, as well as the management or liquidation of the bankrupt estate under the insolvency procedure, being

competent to carry out all acts attributed to him or her by this statute and by the law.

The judicial administrator is designated as "provisory judicial administrator" in a special revitalisation proceeding, as "insolvency administrator" in an insolvency proceeding, and as "fiduciary" in a natural person's insolvency proceeding.

Those who may be judicial administrators are those who cumulatively: have a degree and professional experience suitable to the activity performed; attend internships promoted for this purpose; are approved in the admission examination specifically organised to assess the knowledge acquired during the internship; are not in a situation of professional incompatibility for the activity; and are suitable for the activity of judicial administration.

The new law has provided the judicial administrators with a wider role, due to the range of functions they now have under the special procedure of revitalisation.

The insolvency administrator has to prepare the insolvent's debt payments at the expense of the amount of money existing in the insolvent estate, namely the result of the liquidation procedure; the insolvency administrator also has to provide for the conservation and fructification of the insolvent's rights and for the continuation of the company's operation, avoiding, if possible, the deterioration of the economic situation of the insolvent company.

In 2013 a committee for the monitoring of the justice auxiliaries (CAAJ) was created, which is responsible for the monitoring, supervision and discipline of the justice auxiliaries. This committee follows the work of enforcement agents and judicial administrators.

Among other things, the insolvency administrators' remuneration now has a fixed component and a variable one, depending on the outcome of the company's recovery. Furthermore, the new statute establishes the possibility to apply a sanction to misfit behaviours, rewarding correct practices within the scope of the activity.

For each judicial subdistrict there is a list of judicial administrators, containing the name, place of business, electronic mail address and professional telephone number of those persons licensed to perform the judicial administration activity in that subdistrict.

The nomination of a judicial administrator is made by the judge through official software that ensures the randomness of the nomination and the distribution in equal number of the judicial administrators in the proceedings.

Judicial administrators may be removed by the judge at any time and replaced by another one if, once the creditors' committee, the debtor and the judicial administrator have been heard, there exists fair ground. The judicial administrator may be liable for any damages caused to the debtor and to the creditors for negligent non-compliance with the obligations and duties that he or she has to comply with.

10. Advisers and Their Roles

10.1 Types of Professional Advisers

In the various applicable restructuring and insolvency processes attorneys are very often hired as representatives of the various parties evolved in the proceeding, such as the insolvent itself and the creditors. If the insolvent is a high-level positioned company or a company that employs many employees or one that has a considerable invoicing volume, the insolvent itself or the judicial administrator may designate financial advisers or management consultants to assist with the recovery or insolvency plan drafting.

If the company is going through a special revitalisation proceeding, the hiring and payment of these professionals is done by the company itself and has no reflection on the proceeding, and most of the time the court is not even aware of their hiring.

If the company has already been declared insolvent, and the judicial administrator, with the possible pre-approval of the creditors' committee, hires some of the aforesaid professionals, these will be paid for by the insolvent estate, whether the professionals are hired to assist in the liquidation procedure or in the insolvency plan drafting.

11. Duties and Personal Liability of Directors and Officers of Financially Troubled Companies

11.1 Duties of Officers and Directors of a Financially Distressed or Insolvent Company

The managers and directors have a general duty of good management, which includes strict compliance with all their legal and contractual obligations and a duty of care, loyalty and information. In compliance with the duty of care, managers must show availability, technical competence and knowledge of the company's activity suited to its functions and employ in that regard the diligence of a meticulous and orderly manager. Concerning the duty of loyalty, managers must act in the interest of the company, taking into account the long-term interests of the shareholders and weighing in the interests of other persons relevant to the sustainability of the company, such as employees, customers and creditors. The attitude that managers and directors must comply with towards the creditors is subject to a divergence: on the one hand, we find case law stating that a meticulous and orderly diligence is required and, on the other hand, there are cases

in which the criterion is the average man. Concerning the recipient of the directors' and managers' duty there is no distinction between the different natures of the creditors' claims.

Under an insolvency scenario, there is a specific proceeding called the qualification of the insolvency, whose purpose is to ascertain whether the insolvency is culpable or fortuitous. CIRE declares that an insolvency is culpable when the situation has been created or aggravated due to intentional or serious misconduct by the debtor or its administrators, in law or in fact, in the three years prior to the beginning of the insolvency proceeding. In this case the consequences are multiple. Firstly, there is a prohibition from administering or inspecting third-party assets and from undertaking commercial activities; secondly, a prohibition on being a member of an organ of a legal person, of an association or foundation, of a public company or of a co-operative; and finally, the loss of the credits over the insolvency and the obligation to return any amount received as payment for those credits.

The court's decision that qualifies the insolvency does not ascertain the eventual civil liability of the managers or directors. The qualification of the insolvency as culpable or fortuitous is not binding towards criminal grounds or civil claims. This means that the allocation of the losses to the managers for their wrongful causation of the insolvency must be made with resource to the general principles and rules as set out in the Portuguese Commercial Companies Code.

CIRE foresees the possibility, given to the insolvency administrator, to interpose judicial actions aimed at the compensation of the damages caused to the generality of the insolvency's creditors due to the diminution of the insolvent's assets or any other judicial actions in favour of the debtor.

Besides this possibility, both the Portuguese Commercial Companies Code and the Portuguese Criminal Code provide for various types of crimes related to the performance of the administrative bodies of commercial companies. The managers or administrators are liable towards legal persons for any damages caused by their actions or omissions in violation of their legal and contractual obligations. Additionally, the managers or administrators answer to the creditors, if they fail to comply with the provisions set for the protection of the latter and if the assets are revealed to be insufficient for the satisfaction of the creditors' claims. Furthermore, there are crimes related to the lack of charging capital duty, the amortisation of shares or quotas, the unlawful distribution of assets of the company, or the breach of the duty to propose reducing the capital. All of these crimes may contend directly with the insolvency of the company, in order to provoke or contribute to the decrease in the company's assets. As far as the Criminal Code is concerned, the crime of wilful insolvency, the crime of negligent insolvency, the crime of credit frustration and the crime of favouring creditors may be referenced.

11.2 Direct Fiduciary Breach Claims

During the insolvency proceedings the creditors' rights are exercised by the insolvency administrator, namely, and as stated above, the possibility to interpose judicial actions aimed at the compensation of the damages caused to the generality of the insolvent's creditors due to the diminution of the insolvent's assets or any other judicial actions in favour of the debtor.

11.3 Chief Restructuring Officers

As stated in **9 Trustees/Receivers/Statutory Officers**, the only officer appointed in the insolvency proceeding is the insolvency administrator. In some cases of exceptional complexity, more than one insolvency administrator may be appointed.

11.4 Shadow Directorship

Civil and criminal liability, as stated above, applies to administrators, whether in fact or in law. In practice this means that both a member of the board of directors and someone who, although not a member, carries out administrative function can be liable.

11.5 Owner/Shareholder Liability

Please see **13 Intercompany Issues**.

12. Transfers/Transactions That May Be Set Aside

12.1 Grounds to Set Aside/Annul Transactions

Acts that impair the insolvent's assets carried out within the two years prior to the commencement of the insolvency proceeding may be annulled. Acts that diminish, frustrate, hinder, endanger or delay the satisfaction of creditors of the insolvency proceeding are considered detrimental to the mass. The acts listed in Article 121 of CIRE are presumed to be detrimental to the insolvent's assets, without the possibility of proof to the contrary.

12.2 Look-back Period

The look-back period is two years prior to the date of commencement of the insolvency proceeding.

12.3 Claims to Set Aside or Annul Transactions

The insolvency administrator, through a registered letter with receipt of acknowledgement, performs the annulment. The annulment must be made within the six months that follow the knowledge of the transaction, but never later than two years from the date of the declaration of insolvency. If the transaction is not yet completed, the annulment may be made without any deadline, by way of exception.

Such claims may be brought only in the insolvency proceeding.

13. Intercompany Issues

13.1 Intercompany Claims and Obligations

In the Portuguese legal system, credits held by people specially related with the debtor, such as equity owners and those who had this quality in the period of two years before the beginning of the insolvency proceeding, are qualified as subordinated claims or junior claims.

Also the credits owned by parent/subsidiary or group related to the company – at the time of the beginning of the insolvency proceeding or in the two years period before that beginning – are classified as subordinated claims.

According to Article 501 of the Portuguese Corporate Code (PCC), a totally dominant company (ie one that holds 100% of the share capital of a subordinate company) is personally and unlimitedly liable for the obligations of the subordinated company, regardless of whether such obligations having been undertaken before or subsequently to the takeover of the company. This liability is commonly considered as a strict liability (ie regardless the lawfulness of the dominant company's performance) direct, unlimited, objective (ie regardless of any fault) and joint.

The following cumulative conditions shall be met in order to give rise to the aforementioned liability:

(i) the entities involved (ie the totally dominant company and the subordinate company) must be private limited companies, public companies or limited partnerships with issued share capital;
(ii) a subordination agreement or a situation of total dominance must exist through the sole, exclusive ownership of the share capital of the subordinate company, whether direct or indirect (ie by way of intermediate companies owned by the dominant company); and
(iii) the dominant company must incur in default of its obligations for more than 30 days.

Thus, pursuant to Article 501 PCC, a shareholder that is a legal entity holding just 51% of a company's share capital cannot be held liable for corporate debt of the subordinated company, due to the fact that the condition of sole, exclusive ownership of the share capital (that is, the condition of total control) is not fulfilled.

All the academic solutions presented regarding the liability of companies in situations of "simple" control (ie holding 51% of the share capital of another company) require that additional conditions are met or that general principles are applied, beyond the actual existence of a control situation. This, in turn, it excludes the application of the liability regime provided for in article 501 PCC.

In the search of a specific solution to situations of de facto groups, many authors end up advocating the application of general principles, which are more prone to infringements in the case of de facto groups. However, such general principles do not have specific provisions applicable to group liability cases.

Therefore, according to the relevant doctrine and case law, the mere possession of 51% of the share capital of another company does not determine, by itself, liability for the corporate debt of the subordinate company. A company shall only be held liable for the subordinate company's corporate debt in the case of full control of the latter, infringement of the principle of trust, breach of the principle of loyalty, actual exercise of managerial functions by the dominant company, or the infringement of duties and obligations of managers, insofar as such behaviours cause damage.

13.2 Off-set, Set-off or Reduction

The credits themselves are not, by nature, reduced or set off; the credits are totally or partially recognised or not by the insolvency administrator, depending on whether the administrators recognised their existence or not, but, afterwards, the amounts fixed are classified as subordinated.

This category of subordinated claims receive an unfavourable legal treatment. In fact, for example, regardless of their origin, the subordinated claims are graduated and, therefore, paid only after all the remaining insolvent credits have been satisfied.

In principle, the subordinated claims do not entitle their respective owners to vote, except if the deliberation concerns the approval of an insolvency plan.

The ratio leg is understandable if it is borne in mind that, in the absence of express regulation contained in the insolvency plan, the subordinated claims are absolutely forgiven and, therefore, will not be paid.

14. Trading Debt and Debt Securities

14.1 Limitations on Non-banks or Foreign Institutions

Loans

In accordance with the Legal Regime of Credit Institutions and Financial Companies approved by Decree Law No 298/92, of December 31st (RGICSF), in order to undertake, on a professional basis, activity related to credit operations – including the granting of guarantees and other commit-

ments, financial leasing and factoring and loans – credit institutions and financial companies must first be registered with the Bank of Portugal (BdP).

However, EU-domiciled banks may carry out credit activities in Portugal without any local presence. In fact, the Banking Directive establishes that possibility, which arises from the freedom to provide services. In order to do so, the foreign EU bank must be registered with BdP. However, a non-EU domiciled entity is only allowed to carry out banking activities in Portugal through the setting-up of a branch or the incorporation of a subsidiary, both subject to specific authorisation procedures with the BdP.

Bonds

In contrast, the issuance and subscription of bonds is not qualified as a credit activity, and therefore it is expressly allowed by the RGICSF. In practice, this means that entities other than banking entities and financial companies may fully underwrite a bond issuance made by a Portuguese company under and within the thresholds established by Portuguese legislation.

14.2 Debt Trading Practices

There is no customary documentation for documenting secondary market trading. The LMA documentation, including LMA forms, are only used when (i) there is a significant debt trade between foreign entities and a Portuguese bank or (ii) when the deal is exclusively between foreign entities and refers to loans (either defaulting or performing) or bonds issued by a Portuguese company. LMA documentation is only utilised when foreign entities are involved and, as such, when the parties to the trade are exclusively Portuguese banking or financial entities, such documentation is not employed.

In any case, and even when LMA documentation is used, Portuguese law-governed documents (namely an assignment agreement) may be required for the perfection of the transfer, particularly in respect of mortgage loans or other loans that benefit from in rem security granted in Portugal or by Portuguese companies.

In Portugal, in order to transfer loans, a credit assignment agreement is frequently used. Novation and risk participation are very rare.

Under Portuguese law, associated benefits of guarantees provided as security are, by rule, transferred with the debt, unless there is a contractual provision stating otherwise or unless the guarantees are not inseparable from the transferor ("intuitu personae").

Nevertheless, the transfer of the guarantees may require compliance with certain formalities for its perfection, such as public deeds, notifications to the debtors, or registration with the real estate registration department or with the commercial registration department.

The trading of securities (for example bonds or others) based on insider trading, either on a regulated or non-regulated market or even over the counter, is prohibited. Trading on the basis of inside information qualifies as a criminal offence and thus no trading based on inside information is allowed and the parties cannot waive such a prohibition.

14.3 Loan Market Guidelines

As already mentioned above, LMA documentation, including the LMA Transparency Guidelines or the AIMA Secondary Loan Market Guidelines, is usually only used when (i) there is a significant debt trade between a foreign entities and a Portuguese bank or (ii) when the deal is exclusively between foreign entities and refers to loans (either defaulting or performing) or bonds issued by a Portuguese company. LMA documentation is only utilised when foreign entities are involved and, as such, when the parties to the trade are exclusively Portuguese banking or financial entities, such documentation is not employed.

14.4 Enforcement of Guidelines

The guidelines do not have legislative value; they are merely soft law. In fact, these rules are rules of conduct or best practices with recommendations or guidelines; thus compliance depends on the willingness of the market participants, and regulators do not enforce them.

14.5 Transfer Prohibition

A loan agreement (ie the credit rights arising under a loan agreement) can be assigned to a third party without the debtor's consent, in the absence of a contractual provision that states otherwise.

However, please note that the transfer of the contractual position under a loan agreement to a third party requires the consent of the debtor.

14.6 Navigating Transfer Restrictions

Despite being generally allowed under Portuguese law, synthetic structures and total rate of return swaps cannot be used with the aim of circumventing legal or contractual transfer restrictions.

15. The Importance of Valuations in the Restructuring and Insolvency Process

15.1 Role of Valuations in the Restructuring and Insolvency Market

In the Portuguese legal system, valuations play an important role in all phases, namely when establishing whether there is or not an insolvency situation and when preparing the recovery plans.

15.2 Initiating Valuation

In an insolvency proceeding, and in order to prepare the plan, a valuation can be commenced either by the debtor, by the creditors or by the insolvency administrator. In the special process of revitalisation, the debtor usually requests the valuation. However, due to the important role played by the creditors in the negotiations of the plan they are able to appoint experts, as long as they bear their own fees.

15.3 Jurisprudence Related to Valuations

There is no case law in relation to valuation.

The valuation methodology utilised is discounted cash-flow valuation, moderated by comparative methods such as: patrimonial value, price-to-book value (PBV), average price on the market of a company and others.

The only standard applicable to forward-looking valuations is common sense.

Liquidation values are not a term of comparison every time that the company's potential to generate value contributes more than its patrimonial value.

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