



# ICLG

The International Comparative Legal Guide to:

## **Corporate Recovery & Insolvency 2014**

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A practical cross-border insight into corporate recovery and insolvency work

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# Portugal



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## 1 Issues Arising When a Company is in Financial Difficulties

### 1.1 How does a creditor take security over assets in Portugal?

Whenever the assets being secured correspond to real estate property or moveable assets subject to registration (e.g., motor vehicles or boats), the debtor may grant a mortgage in favour of the creditor. The creation, validity, perfection, priority, enforceability and admissibility in evidence of a mortgage shall require that the relevant mortgage is executed by a public deed before a public notary, will or private document duly authenticated by either a public notary or a lawyer, in any case being subject to registration with the relevant public registry. In case of moveable assets, the creditor and the debtor may enter into a pledge agreement over the secured moveable assets, such as, amongst others, shares, equipment, receivables, bank accounts, etc. This being a possessory security, a pledge shall only be deemed perfected as long as the pledged object has been duly delivered or transferred or the pledge has been registered, as the case may be.

### 1.2 In what circumstances might transactions entered into whilst the company is in financial difficulties be vulnerable to attack?

According to the Portuguese Insolvency Code approved by Decree-Law no. 53/2004, of 18 March, as amended, there are several types of transactions which can be challenged by the insolvency administrator once insolvency proceedings have been started.

All the acts that may be qualified as detrimental to the insolvent's estate, such as the acts that diminish, frustrate, hinder, endanger or withhold the satisfaction of the insolvency creditors, performed within two years prior to the beginning of the insolvency proceedings, may be subject to claw-back. In these cases, the termination of said transactions is only possible if the counterparty acted with wrongful intent (i.e., knowledge, at the date the act was performed (i) that the debtor was in an insolvent situation, (ii) of the prejudicial nature of said act to the debtor's situation and that the insolvency situation was imminent, or (iii) that the insolvency proceeding had already been initiated).

There is a rebuttable presumption of wrongful intent if the transaction takes place within the two years prior to the commencement of the insolvency proceedings and it involves any parties related to the insolvent.

However, the following acts, among others, may be subject to claw-back regardless of any other requirements: (i) gratuitous acts performed within two years prior to the commencement of the insolvency proceedings; (ii) granting of *in rem* security to preexisting credits or to other credits that replace them within the six-month period prior to the commencement of the insolvency proceedings; (iii) granting of personal guarantees or of credit mandates within the six-month period prior to the commencement of the insolvency proceedings, which relate to transactions without any real benefit to the debtor; and (iv) reimbursement of shareholders' loans made during the year before the beginning of the insolvency proceeding.

Should the insolvency administrator decide not to exercise the claw-back, any creditor may resort to an *Actio Pauliana*.

### 1.3 What are the liabilities of directors (in particular civil, criminal or disqualification) for continuing to trade whilst a company is in financial difficulties in Portugal?

Under Portuguese insolvency law, there are grounds on which managers or directors (including shadow or *de facto* directors) can face penalties for breaching their legal duties.

When the insolvency situation is deemed to be caused by the directors' actions, the court may: (i) declare their incapacity to manage any third party's estate for a given period; (ii) prevent the persons held liable from performing commercial activities for a given period, including as a member of the board of directors of any company; (iii) order that these persons may not be considered as creditors of the insolvent company or of the insolvent's estate and require them to return to the insolvent's estate any amount already received; and (iv) sentence the directors to indemnify creditors up to the amount of their unpaid credits.

Under more extreme circumstances, the directors may be subject to criminal penalties if they have, in any way, defrauded creditors and/or fraudulently contributed to the insolvency of the company.

## 2 Formal Procedures

### 2.1 What are the main types of formal procedures available for companies in financial difficulties in Portugal?

Insolvency law provides a single main insolvency proceeding named "*processo de insolvência*". The main goal of this procedure is to obtain payment for the insolvent's creditors through the implementation of an insolvency plan or, should that prove unfeasible, through the liquidation of the insolvent's estate and the distribution of the subsequent proceeds amongst the creditors.

Reference should be made to the special legal framework recently enacted in order to induce the revitalisation of distressed companies (“PER – Programa Especial de Revitalização”) and to the extra-judicial administrative procedures led by the IAPMEI in view of restructuring the debtor’s debts (section 7).

## 2.2 What are the tests for insolvency in Portugal?

The general rule is that a debtor should be deemed to be insolvent when it is unable to perform its general obligations as they fall due. A company may also be considered insolvent when its liabilities significantly exceed its assets (over-indebted balance sheet).

## 2.3 On what grounds can the company be placed into each procedure?

Insolvency procedures may be filed by the debtor, any of its creditors (regardless of the nature of the credit), any person who is responsible for the debtor’s liabilities or by the Public Prosecutor.

The directors of a company have the legal duty to file for insolvency within thirty days from the date on which they become aware of, or should have become aware of, the situation of insolvency. Failure to comply with this duty may result in penalties (please refer to question 1.3).

The insolvency proceedings may be commenced, *inter alia*, in the following cases: (i) dissipation of the debtor’s assets; (ii) debtor’s failure to pay, within a six-month period prior to the filing for involuntary insolvency, its tax liabilities, social security obligations, wages, or any rent, lease or instalment relating to the purchase or loan obtained in order to acquire the company’s premises; (iii) if the debtor is a company and its liabilities clearly exceed the company’s assets, in reference to the last approved balance sheet; or (iv) when there is a delay of at least nine months in approving the company’s annual financial statements.

## 2.4 Please describe briefly how the company is placed into each procedure.

To initiate an insolvency proceeding, a written petition must be filed before the relevant court of law (typically a court of commerce).

If the petition is filed by the debtor, it must *inter alia*: (i) state whether the insolvency situation is present or merely imminent; (ii) submit the identification of the company’s directors; (iii) submit a list of all known creditors, the details of each claim and all pending lawsuits brought up against the debtor; (iv) submit a comprehensive explanation of the company’s activities over the last three years, as well as a list of the debtor’s establishments; (v) identify all the shareholders and those who may be liable for the company’s debts; (vi) submit a list of all the company’s assets, whatever their nature; (vii) submit the accounting documents; and (viii) submit a list of all the debtor’s employees.

Petitions submitted by creditors or the Public Prosecutor must include a detailed claim and any information available related to the assets and liabilities of the debtor, as well as evidence of any of the circumstances noted in question 2.2.

## 2.5 What notifications, meetings and publications are required after the company has been placed into each procedure?

After the declaration of insolvency, the insolvent company and its five major creditors are notified of the court’s ruling. The remaining creditors are notified by means of public advertisements,

posted on a specific internet website and on the insolvent’s registered office.

As a general rule, the creditors are later on convened to meet in a general creditors’ meeting in order to decide on key issues related with the insolvency proceedings (for instance, if the creditors wish the insolvency administrator to prepare and submit an insolvency plan or if they choose to immediately liquidate the insolvent’s estate).

## 2.6 Are “pre-packaged” sales possible?

Portuguese law does not provide a specific legal basis for this. The parties may carry out acts under the “freedom to contract” in order to achieve the restructuring of the debtor, but these acts would, in case of commencement of an insolvency proceeding, be subject to claw-back. Please refer to question 1.2 above. However, the special revitalisation procedure provides for a fast-track procedure, which allows for the debtor and creditors who meet the required majorities (please refer to question 7.3 below) to present to the court a recovery plan which may include the sale of certain assets of the debtor.

## 3 Creditors

### 3.1 Are unsecured creditors free to enforce their rights in each procedure?

Unsecured creditors are entitled to enforce their rights but are required to submit a claim in the insolvency proceedings within the specific term set out by the court in the insolvency declaration.

As a general rule, once this term has elapsed, creditors may still claim their credits by way of a specific lawsuit brought against the insolvent’s estate, the remaining creditors and the debtor. Amongst other legal requirements, this lawsuit must be filed within six months after the insolvency declaration.

Claims submitted by unsecured creditors, whose rights have been acknowledged by the court, will be paid on a *pro rata* basis, depending on the value of the insolvent’s assets, and according to the ranking of credits decided by the court.

### 3.2 Can secured creditors enforce their security in each procedure?

Secured creditors are entitled to enforce their *in rem* rights within the insolvency proceedings, but are required to submit a formal claim (the procedure outlined in question 3.1 also applies). Creditors with security over real estate owned by the insolvent are paid in first place with the proceeds arising from the liquidation of such assets. In the event those proceeds are not sufficient to liquidate the entirety of the debt, the outstanding amount will be treated as an unsecured claim. Secured creditors may, alternatively, submit a credit bid to acquire ownership over the secured property.

In any case, if the insolvent’s estate does not have the necessary means to pay for its own debts, then the proceeds generated by the liquidation of the secured assets may be used to pay for such debts.

### 3.3 Can creditors set off sums owed by them to the company against amounts owed by the company to them in each procedure?

Creditors are allowed to set off sums owed to the insolvent company with their own credits over the latter, if both credits/debts

are mutual, enforceable, duly payable and relate to “substitute” goods (“*coisas fungíveis*”).

The law stipulates that the set off of credits/debts is admissible if the aforementioned criteria are met prior to the insolvency declaration. Alternatively, the law also accepts the set off of credits/debts if the creditor’s credit has met said criteria before the insolvent’s counter-credit.

Set off will not be permitted if: (i) the creditor’s debt towards the insolvent arose after the insolvency declaration; (ii) the creditor’s credit over the insolvent was acquired from a third party after the insolvency declaration; (iii) it is in relation to debts of the insolvent company for which the insolvent’s estate is not liable; or (iv) it envisages the cancellation of subordinated claims.

Notwithstanding the above, special rules apply to certain situations, like close-out netting provisions inserted in financial collateral arrangements.

## 4 Continuing the Business

### 4.1 Who controls the company in each procedure? In particular, please describe briefly the effect of the procedures on directors and shareholders.

Within the general insolvency procedure, the insolvent company will be controlled by the insolvency administrator, appointed by the court. As a general rule, the insolvency administrator will be responsible for managing the insolvent’s estate and will be entitled to carry out any acts and be involved in any transactions within the ordinary course of business, albeit specific acts of material relevance require the creditors’ prior consent.

After the insolvency declaration, the directors of the company remain in office, although with limited powers and without receiving any compensation for their work. They may resign after submitting the annual financial statements of the company.

Directors must cooperate with the insolvency administrator, the creditors’ general meeting, the creditors’ committee or the court.

Notwithstanding the above, in specific cases, the directors of the insolvent company may continue to exercise active management functions, although under the insolvency administrator’s supervision.

With respect to shareholders, the insolvency administrator may ask them to supply deferred capital contributions or accessory contributions due and unpaid. In principle, they will not face any liability for the insolvency of the company, unless they are considered to be *de facto* or shadow directors.

### 4.2 How does the company finance these procedures?

According to the general insolvency legal framework, (i) court fees, (ii) fees owed to the insolvency administrator, (iii) debts generated by the insolvency administrator’s decisions regarding the performance of contracts, and (iv) expenses relating to the liquidation and management of the insolvent’s estate, amongst others, are borne by the insolvent’s estate.

However, if the insolvency declaration is not awarded by the court or is later on reverted by the appeals court, the court fees will be borne by whoever commenced the insolvency proceedings.

### 4.3 What is the effect of each procedure on employees?

The declaration of insolvency does not imply the termination or suspension of the existing employment agreements. The

insolvency administrator must continue to meet the obligations *vis-à-vis* the employees arising from the existing employment agreements until the insolvent company ceases to carry out its business. However, before that, the insolvency administrator is entitled to dismiss employees whose work is no longer essential to the operation of the insolvent company.

### 4.4 What effect does the commencement of any procedure have on contracts with the company and can the company terminate contracts during each procedure?

As a general rule, all contracts with reciprocal undertakings entered into between the insolvent and a third party, which have not been completely performed by either party by the time the insolvency is declared, will be suspended until the administrator decides whether or not to perform them. However, the counterparties may set a term for the insolvency administrator’s decision. Once this term has elapsed, there is an assumption that the insolvency administrator has decided not to perform the contract.

The law sets out specific rules with regard to the potential compensations due to the insolvent company and/or to the relevant third party as a result of the insolvency administrator’s decision not to perform the contract.

Notwithstanding the above, special rules apply to certain types of contracts. Some typical examples are: (i) lease agreements (in which the insolvent party is the lessee) are not suspended, but the insolvency administrator may terminate them at any time provided that a 60-day notice is given; (ii) normally, mandates and powers of attorney are immediately terminated; and (iii) current account agreements terminate upon the declaration of insolvency and the respective bank accounts are closed.

## 5 Claims

### 5.1 Broadly, how do creditors claim amounts owed to them in each procedure?

After the declaration of insolvency, creditors may submit their claims by lodging them with the insolvency administrator within the specific term set by the court for this purpose (up to 30 days). The creditors shall submit details regarding, *inter alia*, the amount, maturity, guarantees and nature of their claims.

Within the fifteen days following such term, the insolvency administrator will assess and quantify the claims against the insolvent company. The resulting list, outlining the creditors whose claims are acknowledged or not by the insolvency administrator, will be submitted to the court. This list may be challenged by the creditors within the subsequent ten days, in which case a hearing will be adjourned. If no-one challenges the list, it shall be immediately confirmed by the court.

### 5.2 What is the ranking of claims in each procedure? In particular, do any specific types of claim have preferential status?

In the insolvency procedure, claims are ranked as follows:

- (i) **claims over the insolvent’s estate:** ranked above any other, to be paid first, usually resulting from the insolvency administrator’s activity and concerning, among others, the court fees, the insolvency administrator’s fees, the costs and expenses of the insolvent estate’s management and/or liquidation, debts or claims resulting from obligations incurred under contracts entered into by the insolvent

company after the declaration of insolvency, and debts or claims resulting from obligations incurred under contracts that the administration of the insolvent company decides to keep in force and perform;

- (ii) **secured claims:** comprise secured credits (typically by a mortgage or pledge) and claims for credits with special legal privileges (for instance, certain employee and tax claims), having priority over the proceeds of the sale of the assets to which they are linked;
- (iii) **privileged claims:** protected by general legal privileges, usually granted in order to ensure tax and social security collection, having priority over common and subordinated claims;
- (iv) **common claims:** unsecured, unprivileged and unsubordinated credits, which are satisfied on a *pro rata* basis once those referred to above have been paid; and
- (v) **subordinated claims:** for instance, credits of creditors with a special relationship with the debtor (e.g., directors, shareholders) and interest due after the declaration of insolvency, to be paid after all other creditors have been satisfied in full.

**5.3 Are tax liabilities incurred during each procedure?**

Taxes due during the insolvency proceedings are ranked as claims over the insolvent’s estate.

**6 Ending the Formal Procedure**

**6.1 What happens at the end of each procedure?**

The court will, *inter alia*, order the closing of the insolvency proceedings in the following cases: (i) after the final allotment of assets; (ii) when the court ruling which affirmed the insolvency plan has the force of *res judicata* (unless if otherwise provided therein); (iii) upon request of the insolvent company, when the insolvency situation ceases or all creditors consent to closing the procedure; or (iv) when the administrator concludes that the insolvent’s estate is insufficient to pay the court costs and the remaining debts of the insolvent’s estate.

Upon the registration of the closing of the proceedings due to the final allotment of assets, the company ceases to exist. By contrast, should the insolvency proceedings follow an insolvency plan with different goals, said proceedings will be closed after the insolvency plan is affirmed by the court.

**7 Restructuring**

**7.1 Is a formal procedure available to achieve a restructuring of the company’s debts in Portugal?**

Portuguese law establishes three different procedures through which a restructuring of company debts can be achieved: (i) an insolvency procedure; (ii) a special revitalisation procedure; and (iii) a system of extrajudicial recovery of undertakings.

In the course of an insolvency procedure, the general meeting of creditors may approve an insolvency plan – a flexible instrument which may contain any measures of debt relief (v.g., cancellation or rescheduling of debts, granting of security interests to creditors).

The procedure for the approval of an insolvency plan is set out in detail in question 7.3 below.

In addition, a new pre-insolvency procedure called the “special revitalisation procedure” (“*Processo Especial de Revitalização*”) was introduced in 2012 with the purpose of establishing a formal legal framework for companies in financial distress to negotiate a recovery plan with their creditors (which comprises any measure of debt relief).

This procedure is initiated by the debtor, together with at least one of its creditors, by submitting to the court a statement of their intention to negotiate a recovery plan. Negotiations last for a maximum period of three months, during which a grace period is granted to the debtor since the creditors are not entitled to request the court to declare its insolvency and all pending legal proceedings envisaging debt collections are halted.

Every creditor is invited to participate in the negotiations of the recovery plan, which must be approved in accordance with the quorums and procedures outlined in question 7.3 below.

The recovery plan affirmed by the court is binding on all creditors, even if they did not participate in the negotiations.

Finally, Decree-Law 178/2012 of 3 August, established the “system of extrajudicial recovery of undertakings”. It is an out-of-court procedure the goal of which is to promote the extrajudicial recovery of undertakings, through an agreement between an undertaking and creditors which represent at least 50 per cent of the total amount of the company’s debt, and which makes the recovery of the undertaking’s financial situation viable. Such agreement may comprise the application of any means of debt relief.

**7.2 If such a procedure is available, is a debt for equity swap possible and how are existing shareholders dealt with?**

In the course of the insolvency proceedings, it is possible for the general meeting of creditors to approve an insolvency plan providing for a share capital increase through the conversion of debt into new equity.

In principle, existing shareholders enjoy a subscription privilege, i.e., the right to buy a proportional number of new shares with preference over creditors or other third parties.

This privilege may only be excluded in two situations: (i) if the share capital increase does not have a negative impact on the value of the existing shares; or (ii) if the company’s share capital has previously been reduced to zero. However, the share capital may only be reduced to zero if it is foreseeable that, upon liquidation of all the assets, nothing would be left for distribution among shareholders.

Outside the formal insolvency procedure, a debt for equity swap generally requires the general meeting of shareholders to approve a share capital increase through contributions in kind.

**7.3 Can dissenting creditors be crammed down?**

In the course of formal insolvency proceedings, the creditors’ general meeting may resolve on the approval of an insolvency plan, which, upon approval by the court, binds all creditors, including those who have voted against it or who have not attended the meeting.

The following quorums must be met: (i) at least one-third (1/3) of the creditors with voting rights must attend (or be duly represented in) the relevant meeting; (ii) more than two-thirds (2/3) of the votes cast therein must endorse the approval of the plan; and (iii) more than half (1/2) of the votes cast must be issued by non-subordinated creditors.

Once approved by the creditors, the plan needs to be affirmed by the court before producing effects over all creditors.

A recovery plan approved in the course of a “special revitalisation procedure” will also be binding on all creditors if the abovementioned quorums are met and the plan is affirmed by the court.

In principle, a recovery plan approved within the “system of extrajudicial recovery of undertakings” is only binding on creditors who subscribed it, unless (i) it consists of a payment plan, (ii) it has been endorsed by creditors representing at least two-thirds (2/3) of the company’s debts, and (iii) it has been affirmed by the court.

**7.4 Is consent needed from other stakeholders for a restructuring?**

The consent of other stakeholders is not a prerequisite for a restructuring, although the workers’ representatives, the creditors’ committee, the insolvent company and the insolvency administrator are entitled to issue a non-binding opinion on the insolvency plan.

However, if the insolvency plan provides for the company to continue operating, it must be approved by those shareholders who are personally liable for the company’s debts.

**8 International**

**8.1 What would be the approach in Portugal to recognising a procedure started in another jurisdiction?**

The advertising and the registration of an insolvency proceeding started in another EU Member State must be authorised by a Portuguese court, upon request by the foreign insolvency liquidator.

Portugal



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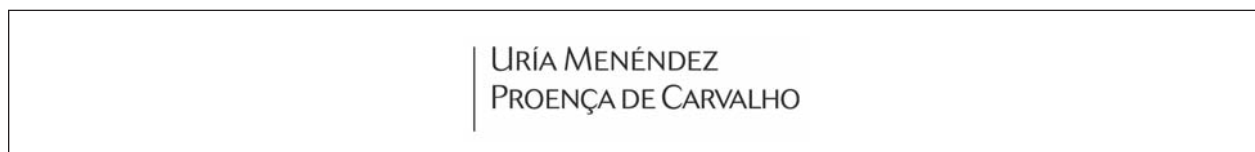
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David Sequeira Dinis is a senior associate in the Lisbon office of Uría Menéndez – Proença de Carvalho and is specialised in litigation and restructuring & insolvency matters.

He joined the firm in 2005, immediately after graduating from the Catholic University of Portugal. Since then, he has focused his work on corporate litigation and on restructuring and insolvency issues.

The 2012 *Chambers Europe* directory included David Sequeira Dinis on the Restructuring & Insolvency section where it highlighted his “*technically excellent*” skills.

Said directory again highlighted David’s role in this area of expertise in its 2013 edition.



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