Trends and Developments

Contributed by:
Nuno Líbano Monteiro, Joaquim Shearman de Macedo, Manuela Tavares Morais and Rita Folhadela
PLMJ see p.36

Changes to the Insolvency and Corporate Recovery Code

Law 9/2022 was published in the Portuguese official gazette on 11 January 2022 and entered into force on 11 April 2022. This law establishes measures to support and speed up corporate restructuring processes and payment agreements. It is the result of the incorporation into Portuguese law of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 (the "Directive (EU) 2019/1023"). Furthermore, it amends the Insolvency and Corporate Recovery Code (CIRE), the Companies Code (CSC), the Commercial Registration Code, and other related legislation.

Of the various amendments introduced by Law 9/2022, the most noteworthy are those introduced in relation to the Special Revitalisation Process (*Processo Especial de Revitalização* – PER) and the insolvency process. This is due to the practical impact they have not only on companies undergoing a restructuring process, but also on their creditors and potential investors. The purpose of these changes is to streamline recovery and insolvency processes.

Amendments to the PER (Special Revitalisation Process) legislation

The Special Revitalisation Process Evaluation Report dated 8 July 2020 states that, from 2012 until the end of 2019, the PER has enabled "the recovery of numerous companies that would otherwise not have had at their disposal a mechanism capable of enabling their recovery, better serving the interests of the debtor and the respective creditors, also safeguarding countless jobs. In effect, the number of companies with approved recovery plans which have not resorted to special revitalisation processes or insolvency proceedings is 55.5%. This demonstrates the extent to which the economy has embraced the PER.

Another not insignificant factor that shows the good performance of the Special Revitalisation Process is the fact that more than 40% of the cases in which companies resorted to this process managed to obtain an agreement in order to continue their activity. This figure shows that the PER has served its purpose of safeguarding jobs and the economic fabric."

Based on these data and in view of the need to incorporate Directive (EU) 2019/1023 into national law, by Law 9/2022, the Parliament introduced changes to the existing rules to ensure compliance of the PER with the Directive. It also made specific corrections to clarify substantive or procedural issues.

The main changes are as follows.

One aim is to ensure, on a case-by-case basis, the most equitable treatment of creditors on whom the effective restructuring of companies will depend. This is to be achieved by making it compulsory for companies other than micro, small and medium-sized enterprises to present, with their PER application, a proposal for the ranking of creditors affected by the recovery plan. This proposal must divide the creditors

Contributed by:
Nuno Líbano Monteiro, Joaquim Shearman de Macedo, Manuela Tavares Morais and Rita Folhadela,
PLMJ

into distinct categories, according to the nature of their credits (ie, secured, privileged, common and subordinated creditors) and also reflect the whole range of creditors of the company according to the existence of sufficient common interests, namely:

- employees, regardless of the type of contract;
- shareholders;
- banks that have financed the company;
- suppliers of goods and service providers; and
- public creditors.

Any remuneration of the provisional judicial administrator and any expenses they have incurred that are not paid constitute claims on the insolvency, if the company is declared insolvent following the non-approval of a recovery plan.

The law makes it clear that the preliminary order issued in a PER will prevent any enforcement action being brought against the company to recover debts for a maximum period of four months (*standstill effect*). This order can also cause the suspension of enforcement actions that have already been brought against the company for the same purpose. Enforcement actions to recover amounts owed to employees are excluded from the above rules.

It is provided that the judge can extend the standstill effects for one month if one of the following situations occurs: (i) significant progress has been made in the negotiations on the restructuring plan; (ii) the extension is essential to ensure the recovery of the company's activity; or (iii) the continuation of the suspension of the enforcement measures does not unfairly prejudice the rights or interests of the affected parties. However, the judge may order the termination of the suspension if it no longer serves the purpose of supporting the negotiations on the recovery plan or at the request of the company or the provisional judicial administrator.

The concept of "essential executory contracts" is extended to include not only essential public services but all contracts of continuous performance necessary for the company to pursue its day-to-day activity. It includes any contracts for the supply of goods or services whose suspension would lead to the paralysis of the company's activity. This ensures that, during the period of suspension of the enforcement measures, creditors cannot refuse to perform, terminate, bring forward the maturity or unilaterally alter essential executory contracts to the detriment of the company, in respect of debts constituted prior to the suspension, where the sole ground is non-payment of such debts. The price of goods or services essential to the company's activity provided during the suspension period that are not paid are now considered a debt of the insolvent estate if the company is declared insolvent within two years of the end of the suspension period.

Similar to the pre-existing rule on insolvency, the new law provides for the nullity of any contractual clauses which provide a resolutive condition of the transaction if: (i) an application to open a PER is filed, (ii) the PER is opened, (iii) the application for an extension of the suspension of enforcement measures or the granting of such a suspension is filed. The same applies if such a clause gives the other party a right to compensation, termination or rescission of the contract.

Additional protection is granted to "financing acts" of the company, with the following provisions.

Contributed by:
Nuno Líbano Monteiro, Joaquim Shearman de Macedo, Manuela Tavares Morais and Rita Folhadela,
PLMJ

- During the course of the PER or in the execution of the recovery plan, creditors may finance the company's activity to provide it with capital for its revitalisation. If they do so, they enjoy a credit over the insolvent estate up to an amount corresponding to 25% of the company's non-subordinated liabilities at the date of the declaration of insolvency. If the insolvency is declared within two years of the date of the final and unappealable decision approving the recovery plan, the credits made available above this amount will enjoy a general preferential credit privilege that ranks ahead of the general credit privilege granted to the employees.
- Claims arising out of financing made available to the company by creditors, shareholders and any other persons in a special relationship with the company in implementing the revitalisation plan will qualify as general privilege claims ranking above the general credit privilege granted to employees.
- Credits arising from financing made available to the company in the course of the PER or in implementing the recovery plan may not be subject to actio pauliana, that is, actions by creditors to have certain transactions by their debtors declared void as prejudicial to their interests.
- The new financing and the interim financing cannot be declared void, voidable or unenforceable.
- Anyone granting new financing and mezzanine financing may not incur, by virtue of that financing, civil, administrative or criminal liability on the grounds that the financing is detrimental to the creditors as a whole, except in cases expressly provided for by law.

The content of the recovery plan is now set out in greater detail. Among other aspects, the plan must contain: (i) the designation individually and broken down by class – and, if applicable, broken down by the categories into which they have been grouped for the approval of the recovery plan – of the parties affected by the content of the plan and their claims or interests covered by the recovery plan; (ii) the same details as in (i) regarding the parties that are not affected by the recovery plan, together with a description of the reasons why the proposed plan does not affect them; (iii) the arrangements for informing and consulting the representatives of the employees, the position of the employees within the company and, where appropriate, the general consequences as regards employment, in particular dismissals, temporary reduction of normal working hours or suspension of employment contracts; (iv) any new financing provided for under the recovery plan and the reasons why such new financing is necessary to implement the plan; and (v) a statement of reasons containing a description of the causes and extent of the company's difficulties and explaining why there is a reasonable prospect that the recovery plan will prevent the insolvency of the company and ensure its viability, including the preconditions necessary for the plan's success.

The rules are defined for the formation of the majorities required to approve the recovery plan, in the case of ranking of creditors by categories.

The law requires the provisional judicial administrator to present, together with the result of the creditors' vote, a reasoned opinion on whether the revitalisation plan has reasonable prospects of avoiding the insolvency of the company or ensuring its viability.

There are new requirements for the judge to ratify the revitalisation plan or refuse its ratification. The judge must also assess whether: (i) in the case of ranking of creditors in sepa-

Contributed by:
Nuno Líbano Monteiro, Joaquim Shearman de Macedo, Manuela Tavares Morais and Rita Folhadela,
PLMJ

rate categories, creditors in the same category are treated equally and proportionately to their claims and whether the dissenting voting categories of creditors affected receive treatment at least as favourable as that of any other category of the same rank, and more favourable than that of any category of a lower rank; (ii) any class of creditors under the recovery plan receives or retains more than the amount corresponding to the totality of its claims; (iii) any new financing necessary to implement the restructuring plan unfairly prejudices the interests of creditors; (iv) the recovery plan has reasonable prospects of preventing the insolvency of the company or ensuring its viability.

The law allows the judge to order an expert valuation of the company if any creditor asks the court not to ratify the plan on the grounds of the no creditor worse off principle vis-à-vis a liquidation scenario.

To overcome issues of unconstitutionality, the law was amended to ensure that in the event of non-approval of the reorganisation plan, a potential declaration of insolvency must always be preceded by the hearing of the company. If the company opposes the insolvency adjudication, the judge will determine the closure and termination of the PER.

Moreover, changes were also made regarding the PER itself. Most of them were for clarification purposes and they include the following.

- There is no possibility of appeal against the order appointing the provisional judicial administrator.
- Any application to join special revitalisation processes filed by commercial companies with which the company is in a control or group relationship, under the CSC, can only be made before the start of the negotiation period in the proceedings to which the others are to be joined.
- Credit claims must indicate: (i) their origin, maturity date, amount of principal and interest; (ii) the conditions to which they are subject, both suspensive and resolutive; (iii) their common, subordinated, privileged or guaranteed nature and, in the latter case, the assets or rights which are the object of the guarantee and their registration identification data, if applicable; (iv) the existence of any personal guarantees, with identification of the guarantors; and (v) the applicable default interest rate.
- The ranking of the related credits, in particular, due to the absence of sufficient common interests, is also grounds for challenging the provisional list of credits. The judge must then decide on the conformity of the formation of the categories of credits and can order their modification if they do not reflect all the company's creditors or the existence of sufficient common interests between them.
- Companies that have filed for insolvency during the period of suspension of enforcement measures are exempt from the obligation to file for insolvency.

Although it is still too soon to have a clear picture, the changes introduced are expected to have a positive impact and, in some cases, they may be absolutely decisive for the success of the PER.

The legislative changes regarding insolvency proceedings

When it comes to insolvency proceedings, there is a simple stated intention of aiming "essentially, to provide the occasional clarification of procedural or substantive issues where there is imprecision in the law, or dissension in legal

Contributed by:
Nuno Líbano Monteiro, Joaquim Shearman de Macedo, Manuela Tavares Morais and Rita Folhadela,
PLMJ

doctrine or case law". However, some of the amendments introduced will have an enormous material impact. The most important of them are as follows.

The insolvent is required to submit, with the initial insolvency petition, a document identifying any companies with which it is in a control or group relationship under the CSC or which are considered associated companies, and, if applicable, identifying the proceedings in which their insolvency has been requested or declared.

It is established that compensation claims arising from the termination of employment contracts by the insolvency administrator after the debtor's declaration of insolvency are considered claims over the insolvency (*créditos sobre a insolvência*).

The law clarified the provision that the claims held by persons in a special relationship with the debtor are subordinated, provided the special relationship already existed at the time of their constitution (and not acquisition), and by those to whom they were transferred in the two years prior to the start of the insolvency proceedings.

There is clarification of the exhaustive nature of the concept of a person in a special relationship with the debtor as a natural or legal person.

A preferential creditor or secured creditor who appoints a natural person to administer the debtor is excluded from the concept of "de facto administrator", provided that such person alone does not have special powers to dispose of the debtor's assets.

Claims whose recognition or ranking requires the production of evidence are provisionally recognised and ranked by the court, for the maximum amount that could result from the recognition of the claims.

At the meeting to consider the report, if the creditors decide not to oppose it and the decision declaring the insolvency has become final and not subject to appeal, within 10 days of that meeting, the insolvency administrator must present a liquidation plan for the sale of the assets. This plan must include deadlines and a list of the specific steps to be implemented. Failure to present the liquidation plan will constitute grounds for dismissal of the administrator.

The amount to be guaranteed by the secured creditor for the purposes of acquisition of assets, by itself or through a third party, has been reduced from 20% to 10% of the value of the proposal presented.

Partial distributions are mandatory whenever EUR10,000 or more is deposited in the insolvent estate and its ownership is not disputed. However, for this to happen, the judgment declaring the insolvency must have become final and unappealable and the liquidation of the assets must have started. Furthermore, the deadline for challenging the list of creditors must have expired with no challenges being filed, or any challenge filed must already have been decided. Until these conditions have been met, the amounts to be distributed must remain on deposit, taking into account the maximum amount that could result from their recognition if the decision is not definitive. The insolvency proceedings must also not be at a stage where the final distribution can be decided.

As is the case with the PER, many of the amendments introduced by Law 9/2022 regarding insolvency proceedings were simply to clarify certain points. These include:

Contributed by:
Nuno Líbano Monteiro, Joaquim Shearman de Macedo, Manuela Tavares Morais and Rita Folhadela,
PLMJ

- registration of the declaration of insolvency in the land, commercial and vehicle registries in relation to the assets or rights comprising the insolvent estate;
- the possibility for the insolvency administrator to delegate, in writing, the performance of specific acts to an insolvency administrator currently registered on the official lists;
- standardisation of some points of the rules applicable to restructuring such as the content of the plan and the majority required for its approval; and
- clarification that the measures provided for in the insolvency plan affecting the debtor's liabilities do not affect the existence or the amount of the rights of insolvency creditors, specifically, those voting in favour of the plan, against co-debtors or third-party guarantors of the obligation.

In insolvency proceedings, it is also necessary to ensure compliance with the new requirements, including those relating to the preparation of the plan. These proceedings also have to be more closely monitored in order to promote greater speed, which may have an impact, in particular, on the payment of creditors.

Contributed by:
Nuno Líbano Monteiro, Joaquim Shearman de Macedo, Manuela Tavares Morais and Rita Folhadela,
PLMJ

PLMJ is a law firm based in Portugal that combines a full service with bespoke legal craftsmanship. For more than 50 years, the firm has taken an innovative and creative approach to produce tailor-made solutions to effectively defend the interests of its clients. The firm supports its clients in all areas of the law, often with multidisciplinary teams, and always acting as a business partner in the most strategic decision-making processes. With the aim of being close to its clients, the firm created PLMJ Colab, its collaborative network of law firms spread across Portugal and other countries with which it has cultural and strategic ties. PLMJ Colab makes the best use of resources and provides a concerted response to the international challenges of its clients, wherever they are. International collaboration is ensured through firms specialising in the legal systems and local cultures of Angola, China/Macao, Guinea-Bissau, Mozambique, São Tome and Príncipe and Timor-Leste. The firm would like to thank Ricardo Silva Pereira and João Tiago Morais Antunes for their contributions.

Authors

Nuno Líbano Monteiro is senior partner in the dispute resolution practice at PLMJ. He has 30 years' experience and has worked on many highly complex and economically important commercial and financial cases. Nuno also has extensive experience in the areas of professional liability of directors and service providers. In his work as a restructuring and insolvency lawyer, he has represented the main parties in the largest cross-border insolvency cases. As a representative of the Portuguese Bar Association, Nuno was involved in the drafting of the Insolvency and Corporate Recovery Code. Nuno is a member of the International Bar Association and Insol Europe, and he is Vice-President of the Circle of Litigation Lawyers. He has authored numerous legal articles and participated as a speaker and lecturer in seminars and postgraduate courses.

Joaquim Shearman de Macedo is co-head of the dispute resolution practice and co-head of the insolvency and restructuring team at PLMJ. With more than 20 years' professional experience, he has been at the forefront of the largest transnational insolvencies involving Portugal and has excelled in representing sellers and buyers in NPL transactions across the entire spectrum of portfolio types. Joaquim assists clients with a wide range of matters including debt restructuring and insolvency disputes. He advises investment funds, financial institutions and corporations. Joaquim has published several scientific articles on insolvency and restructuring matters, and he is frequently invited to speak at academic events.

Contributed by:
Nuno Líbano Monteiro, Joaquim Shearman de Macedo, Manuela Tavares Morais and Rita Folhadela,
PLMJ

Manuela Tavares Morais is a senior counsel in the dispute resolution practice at PLMJ. With over 20 years' experience, she works in various areas of civil and commercial law, with a particular focus on civil procedure and on insolvency and corporate restructuring. She has provided expert advice to both Portuguese and foreign clients in court proceedings involving different jurisdictions, in particular, in cases of insolvency and liquidation of credit institutions. Manuela also represents creditors and debtors in the negotiations in special corporate recovery proceedings.

Rita Folhadela is a senior associate in the dispute resolution practice at PLMJ. With several years of professional experience as a lawyer, she specialises in civil and commercial litigation, and insolvency and restructuring. She has handled a wide range of in-court restructuring operations, including PERs (special revitalisation processes), and out-of-court processes like the RERE (the out-of-court corporate recovery scheme). Rita advises creditors and debtors in all stages of these processes. Her main focus is on advising large corporate clients, in particular, banks and companies from a wide range of sectors.

PLMJ

Av. Fontes Pereira de Melo, 43
1050-119
Lisboa
Portugal

Tel: +351 213 197 300
Email: plmjlaw@plmj.pt
Web: www.plmj.com

PLMJ
Transformative
Legal Experts