

INSOL EUROPE SURVEY

Survey of Certain Regulation For Insolvency Officeholders

– Portugal –

1. INTRODUCTION

The Portuguese legal framework for insolvency office holders (IOHs) is set out in five different legal acts:

- The Portuguese Insolvency Code (IC) – *Código da Insolvência e da Recuperação de Empresas* – enacted by Decree-Law no. 53/2004 and subsequently amended by Decree-Laws no. 282/2007, 116/2008, 185/2009 and 26/2015 and by Laws no. 16/2012 and 66-B/2012;
- The Judicial Administrator Statute – *Estatuto do Administrador Judicial* – enacted by Law no. 22/2013;
- The Legal Regime of Insolvency Administrator Partnerships – *Regime Jurídico das Sociedades de Administradores da Insolvência* – enacted by Decree-Law no. 54/2004;
- Ordinance no. 51/2005 that sets forth the rules on the remuneration of IOHs;
- Law no. 77/2013 that creates the Commission for the Supervision of Court Auxiliaries (CSCA) – *Comissão para o Acompanhamento dos Auxiliares de Justiça*.

The IC, enacted in 2004, was greatly inspired by the German *Insolvenzordnung* and the Spanish *Ley Concursal* and is a modern law in line with the national legislation of European countries and the law of the European Union.

The IC revoked the Insolvency and Corporate Recovery Code of 1993 – *Código da Falência e dos Processos Especiais de Recuperação de Empresas* – and unified proceedings which

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were previously carried out separately as insolvency proceedings and corporate recovery proceedings. The IC currently comprises only one main (insolvency) procedure which may lead to the liquidation of the debtor's estate or to the recovery of the insolvent company (e.g. by its financial restructuring or implementation of controlled management). The insolvency procedure is applicable to both legal and natural persons, although there are special provisions only applicable to natural persons.

In the judgement opening insolvency proceedings, the court, amongst other rulings, appoints an IOH from an official list and schedules a day for the first creditor's meeting. In such meeting the creditors will decide whether liquidation should begin immediately or whether an insolvency plan (*plano de insolvência*) should be prepared or approved.

The insolvency plan may rule on the settlement of the creditors' claims, the liquidation of the insolvent estate and its distribution among the creditors, as well as the status of the debtor's liabilities after the termination of the insolvency proceedings. Hence, the insolvency plan may, in fact, constitute either a plan for the liquidation of the insolvency estate or a plan for the recovery of the debtor. In the absence of a plan the insolvency estate is liquidated according to the rules set forth in the IC by default.

In 2012 Law no. 16/2012 amended the IC and introduced a special procedure for the restructuring of debtors in financial difficulties or on a near-insolvency situation, inspired by English schemes of arrangement: the special revitalisation procedure – *Processo Especial de Revitalização*. This procedure applies to companies which are not yet insolvent, but which are affected by the lack of available financing means or liquidity constraints, to the point of being on the verge of breach of their obligations, or for which insolvency is imminent. The procedure's goal is to reach an agreement between the debtor and its creditors and to approve a recovery plan. The recovery plan, if subsequently approved by the court, is imposed upon dissenting creditors. The IOH orientates and supervises the negotiations but the debtor and creditors are free to define the negotiation procedure. The special revitalisation procedure is essentially an out-of-court procedure and the court only intervenes to a very limited extent.

In 2012 a new procedure was also introduced: the Corporate Recovery System by Extrajudicial Means – *Sistema de Recuperação de Empresas por Via Extrajudicial*. This is a procedure that is organised and supervised by a public entity that mediates an agreement between the debtor and its creditors. No IOH is appointed in this procedure.

2. TYPES OF INSOLVENCY OFFICE HOLDER

2.1 Insolvency proceedings

In insolvency proceedings an IOH is appointed to administrate the insolvency estate and to liquidate the estate if no insolvency plan is approved. The IOH also has several secondary roles, such as: preparing an inventory; giving an opinion on the financial situation of the debtor and prospects of an insolvency plan; preparing a list of claims; challenging claims lodged against the insolvency estate; providing information to the court and to creditors; drafting the insolvency plan; representing the debtor in pending lawsuits; deciding to keep or to terminate contracts (*cherry-picking*); giving an opinion on whether the insolvency is culpable; giving opinion on the insolvency plan; and implementing or monitoring the insolvency plan (if provided for in the plan).

The IOH is designated “insolvency administrator” (*administrador da insolvência*).

Upon the judgment opening insolvency proceedings, the debtor is immediately deprived of the powers of administration and disposal of its estate. However, in certain circumstances, the court may allow the debtor to manage the insolvency estate. In these cases, the IOH will supervise the management by the debtor.

If there is a justified fear that acts of bad management will be perpetrated before the judgment opening insolvency proceedings is rendered, the court may grant interim measures of relief. One of the measures that the court may grant is to appoint an IOH to administrate or to

supervise the management by the debtor until a decision on the insolvency is rendered. This IOH is designated “provisional judicial administrator” (*administrador judicial provisório*).

2.2 Special revitalization procedure

In the special revitalisation procedure, the court also appoints an IOH. The IOH supervises the management of the debtor, prepares a list of claims, participates in the negotiations of a recovery plan, orientates and supervises the negotiations. The IOH is designated “provisional judicial administrator” (*administrador judicial provisório*).

The *insolvency administrator* and the *provisional judicial administrator* are different names that reflect different functions of an IOH in insolvency proceedings and in special revitalization procedures. However, and notwithstanding the different roles undertaken, the IOH appointed is, in any case, a judicial administrator subject to the Judicial Administrator Statute. There is only one licence and one common official list for judicial administrators.

3. SIZE OF THE PROFESSION

As at 27 January 2015 there were 354 licensed IOHs, of whom 351 had their licence in force and 3 had their licence suspended. All the IOHs with their licence in force are entitled to accept appointments.

There is no legal limit to the size of the profession. However, to obtain a licence it is mandatory to have previously carried out an internship organized by the CSCA, which sets a public tender for internships with a maximum number of vacancies, whenever it deems necessary and according to the needs of the profession. Hence, the size of the profession is indirectly regulated by the CSCA.

4. PRACTISING NORMS

IOHs usually work as sole practitioners or in a partnership with another IOH. The majority of IOHs have only one or two assistants. Only a few have more than ten assistants.

5. QUALIFICATION TRAINING AND ENTRY INTO THE PROFESSION

A licence is necessary for an IOH to be included in the official list and only IOH from the official list may be appointed by the court in the judgement opening insolvency proceedings. This is without prejudice of the fact that, in situations duly justified by the size of the debtor company, by the specificity of the field of activity of the debtor or by the complexity of the proceedings, creditors may – after the initial appointment of a IOH – substitute the IOH by another not included in the official list.

The qualifications required for an IOH to obtain licence and hence be included in the official list are the following:

- An academic degree and professional experience adequate to the profession; although there is no list of accepted degrees, Law, Economics, Management, Accounting and Finance degrees are the most common;
- Training period (internship);
- Approval in the final exam organized by the CSCA.

The training period has a theoretical part and a practical part. The theoretical part consists of two-month course and the practical part consists of working under the supervision of an IOH for four months.

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The final exam is taken on the following subjects: commercial law and insolvency law; civil procedural law and labour law; accounting and tax; economics and management; ethics and deontology; and judicial administrators' practice.

6. PROFESSIONAL BODIES

The profession of IOH is regulated and supervised by the Commission for the Supervision of Court Auxiliaries. The CSCA is an independent public entity which has the powers to enact regulations on the profession and exercise disciplinary authority over the IOHs.

Although it has no legal powers, there is a civil association of IOHs: the APAJ – Associação Portuguesa de Administradores da Insolvência.

7. CONTINUING PROFESSIONAL EDUCATION

The IOHs have to attend training courses and seminars for continuing professional education as defined by the CSCA. However, the CSCA has still not enacted the regulation regarding continuing professional education of CSCA, although this was an objective of the CSCA in its action plan for the year 2015.

8. BODY CORPORATE OR INDIVIDUAL

IOHs are individuals. They may be appointed singly or jointly, although it is very rare for more than one IOH to be appointed. The IOH may only delegate certain acts to other IOHs included in the official list. IOHs may hire staff to assist them.

9. SANCTION FOR ACTING AS AN IOH WITHOUT PROPER AUTHORISATION

Taking into consideration that IOHs are appointed from an official list, and that only licensed IOHs are included in the list, it is difficult for a situation to arise where an IOH is acting without licence.

Acting as an IOH without proper authorisation may be considered a crime of unlawful practice of a profession (*crime de usurpação de funções*) which is punishable with imprisonment up to two years. Acting as an IOH while the licence is suspended, or after it was cancelled may be considered an administrative infringement punishable with a fine of up to €250,000.

10. BONDING AND INSURANCE

IOHs do not need to hold a bond but must have an insurance policy for civil liability.

They may be insured by any insurance company authorised in Portugal.

The *APAJ – Associação Portuguesa de Administradores Judiciais* – has negotiated a civil liability insurance policy with Hiscox for their associates.

11. APPOINTMENT OF IOHs

The court should appoint the IOH randomly from the official list. Moreover, according to the Insolvency Administrator Statute, the choice should be made through a computer programme that ensures randomness and an equal distribution of proceedings amongst the IOHs. IOHs have often criticised the system arguing that the judges do not choose randomly but rather tend to choose IOH that they already know, thus creating a vicious cycle.

Despite random appointments being the general principle, the IC provides that when the management of the insolvency estate requires special skills, the court may choose the IOH taking into consideration suggestions by the debtor or by the creditor's committee. The court may also appoint more than one IOH if the proceedings are particularly complex. In complex proceedings, when the debtor files for insolvency, and unless the court suspects that the debtor is not acting in good faith, the court will often appoint the IOH suggested by the debtor.

Creditors may freely substitute the appointed IOH. However, the creditors may only appoint an IOH which is not included in the official list in situations duly justified by the size of the debtor company, by the specificity of the field of activity of the debtor or by the complexity of the proceedings. In these cases, the court may refuse the IOH if it considers that the IOH does not have the necessary reputation and aptitude for the function.

12. REMUNERATION

The remuneration of the IOH is paid by the insolvent estate.

When the creditors appoint the IOH by substituting the one appointed by the court, they may set the remuneration.

When the creditor is appointed by the court, the remuneration is that which is set forth in the Judicial Administrator Statute and in Ordinance no. 51/2005. The IOHs are entitled to a fixed and variable remuneration. The fixed remuneration is €2,000. The variable remuneration is a percentage of the value obtained from the proceeds of the assets of the insolvency estate, deducted from the amounts necessary to pay the debts of the insolvency estate (i.e., the debts incurred with the liquidation). The percentage depends on the value, but may range from 0.1% to 7%. The variable remuneration may be adjusted according to the percentage of fulfilment of the claims and if it exceeds €50,000 the court may reduce or eliminate the excess.

The IOHs are also entitled to a specific remuneration for the drafting of the insolvency plan, which is set by the creditors. The IOH may refuse to draft the insolvency plan if he/she does not agree with the remuneration.

If the insolvency estate comprises a running commercial establishment, the IOH is also entitled to an additional remuneration for managing the establishment, which is set provisionally by the court until the creditors decide to keep the establishment open or to close it down. If the creditors decide to keep the establishment open they must set the remuneration.

13. PERSONAL LIABILITY OF THE IOHs

The IOHs are liable for damages caused to the debtor and to creditors due to the lack of compliance with their duties.

The IOHs are also liable for damages to the creditors of the insolvency estate (i.e., creditors for debts incurred with the liquidation) if the insolvency estate is not sufficient to fulfil their rights and if the damages result from an act of the IOHs, unless the lack of sufficiency of the insolvency estate was not foreseeable bearing in mind the circumstances that were known or that should have been known by the IOH.

The special liability of IOHs is limited to acts or omissions that occurred after their appointment.

14. RELEASE OF IOHs FROM LIABILITY

Civil liability of IOHs is subject to special rules on statutes of limitations. Liability is subject to limitation up to two years after the claimant was aware of its right but and any case is limited up to two years after the IOH has ceased to carry out his/her functions.

15. INDEPENDENCE

IOHs must act with absolute independence. Also, IOHs are forbidden to perform any acts that, for their benefit or in the benefit of third parties, may endanger the recovery of the debtor or, should this not be viable, its liquidation. IOHs must only pursue the interest of the creditors.

If IOHs do not act independently they may be liable for damages caused, they may be subject to disciplinary action (their licence may ultimately be cancelled) and they may be subject to fines of up to €500,000.

There are specific rules on incompatibilities and impediments in order to ensure the independence of the IOHs. For example, IOHs may not be part of the corporate bodies of companies that are in the same line of activity as those of the insolvency estate, and cannot be part of corporate bodies of companies where they have acted before as IOHs.

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