

All you need to know about becoming an Insolvency Practitioner in Portugal

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1. Introduction

The core features of the professional career as Insolvency Practitioner (IP)¹ in Portugal are laid down in the IP's Statute (Law 22/2013, of 26 February 2013)², which contains provisions on accessing the profession, professional duties, remuneration, monitoring and supervision of IPs, *etc.*

Some other aspects, such as the appointment of IPs, their functions, their removal from office and liability, are accommodated in the Insolvency Act³.

2. Access to and maintenance in the profession

2.1. Requirements and restrictions

Pursuant to Article 3 of the IP's Statute, a person may be an IP only if he/she meets the following requirements:

- 1) has an appropriate degree and appropriate professional experience;
- 2) attends professional training;
- 3) passes the exam designed to assess the knowledge acquired during the traineeship period;
- 4) is not in a situation of incompatibility for the exercise of the IP's functions; and
- 5) is a person of "good reputation" and suitable for exercising the IP's functions.

Regarding the notion of "appropriate degree", it is generally accepted that in order to become an IP the most suited degrees are in Law, Economics, Management or Accounting.

Given the diversity of IPs' functions it is advisable – and is indeed frequent – that, when he has one degree in the mentioned areas, he provides for permanent counselling in the remaining areas of knowledge.

Regarding the concept of "incompatibility", the IP have to meet the same requirements as Court judges and, among other restrictions, are not allowed to perform any duties or to be

¹ Administrador judicial.

² Estatuto do Administrador Judicial.

³ Código da Insolvência e da Recuperação de Empresas.

shareholders in companies that pursue activities similar to those of the company they are entrusted.

Regarding the concept of “good reputation” and “suitability”, there are two important requirements IPs must meet: they must not have been convicted for any economic crimes, including theft, robbery, bribery, fraud, misappropriation of funds, extortion and breach of trust, and must not have been declared insolvent by the Court in the last 15 years.

2.2. Continuous professional development

IPs must attend the continuing training actions designed by the IPs control body.

The control body is expected to sign protocols with universities and other institutions of the kind in order to help these training actions to take place.

As far as law is concerned, there are no specific areas an IP can specialize in or may be given expert status.

3. Finding a position as an IP

After the IP passes the exam designed to assess the knowledge acquired during the traineeship period, his name is included in an official list.

There is an official list for every judicial district but the IP is allowed to inscribe his name in more than one list.

Each list must contain the names of the available IPs and other identification details, such as professional address, phone and email contacts.

Since IPs are able to create companies and act on behalf of them, the list must also refer to this fact whenever applicable.

4. Appointment

The IP is generally appointed by the Court but may also be appointed by the creditors, in a creditors' meeting.

The appointment by the Court is made through the means of computer tools so as to ensure the randomness of the choice and an equal distribution in terms of the number of IPs appointed in the judicial proceedings concerned.

When appointing the IP to act in certain proceedings, the Court may take into account the proposals of names forwarded by the debtor and the creditors' committee, whenever there is one.

In some cases, after the IP has been appointed by the Court, the creditors may replace him by another IP of their choice, regardless of the fact that his name is not on the official list.

The recourse to an IP whose name is not on the official list may only occur when the company's size, the company's activity or the complexity of the proceedings justify such a recourse.

The IP is expected to exercise his functions with absolute independence and impartiality and may not, in any case, jeopardise the aims of the proceedings acting for personal benefit or for the benefit of his personal relations.

5. Remuneration

5.1. Core principles

Pursuant to Article 22 of the IP's Statute, the IP is entitled to being remunerated, as well as reimbursed of any costs he incurs in the exercise of his functions.

Whenever the IP is appointed by the judge his remuneration is calculated according to the values set down in a ministerial order. In addition, there is a variable remuneration depending on how successful he was in his efforts to achieve the company's rescue or to carry out the liquidation and whose value is calculated according to the values set down in the ministerial order ("rescue outcome" and "liquidation outcome").

When the IP is appointed by the creditors the amount of the remuneration is assigned on the same deliberation in which he was appointed.

5.2. How to calculate remuneration

As previously said, the variable remuneration is calculated according to the rescue outcome (in rescue proceedings) or to the liquidation outcome (in liquidation proceedings).

The rescue outcome is a value determined on the basis of the amount of claims included in the rescue plan.

The liquidation outcome is the value of the insolvency estate, after the deduction of the debts of the insolvency estate (with the exception of the IP's remuneration), and the amounts due on account of the lawsuits pending at the date of insolvency order. The value thus obtained may be increased depending on the degree of satisfaction of claims.

There is also room for remuneration on a task to task basis.

Whenever the IP's activity involves managing the company, an additional remuneration is assigned by the Court calculated according to the turnover of the undertaking, the company's previous remuneration policy, the number of employees and the complexity of the IP's functions.

If the creditors, gathered in a creditors' meeting, decide to assign the IP the task of designing a rescue plan, it is for the creditors to decide on the corresponding remuneration in the same meeting. The law does not lay down any criteria for the calculation but it allows the IP to refuse to perform the task if he thinks the remuneration assigned is not adequate.

5.3. Payment

The insolvency estate bears the costs of the IP's remuneration, except in situations provided for in Articles 39 and 232 of the Insolvency Act (i.e. when the assets of the debtor are alleged or proven to be insufficient to meet the costs of the proceedings and the remaining debts of the insolvency estate). In this case, the remuneration is paid by the body responsible for financial and patrimonial management of the Ministry of Justice.

The fixed remuneration is paid in two installments (the first on the date of the IP's appointment; the other six months after the appointment).

As to the variable remuneration its payment varies according to the kind of proceedings concerned. In the case of rescue, the remuneration is paid in two instalments of the same value (the first on the date of the approval of the rescue plan; the other one two years after the plan is enacted, and its value may be reduced if the debtor fails to fulfil his obligations). In the event of liquidation, the remuneration is paid at the end (on the date of the termination of the proceedings).

5.4. Critical appraisal

All in all, the IP's remuneration policy has given rise to some doubts and criticisms.

One of the main problems stems from the fact that the calculation relies on outdated values (dating back to 2005) and, besides, does not take into account the brand new and diversified functions performed by IPs within pre-insolvency proceedings.

But there are other questions as to the criteria provided by the law.

In what regards, for instance, the remuneration for managing the company, one may wonder: is the judge really able to estimate the turnover of the undertaking or the complexity of IP's functions?; how can the company's previous remuneration policy be a criterion when the company is currently in a critical situation (pre-insolvency or actual insolvency) or when that very policy may be the reason that led to the company's crisis in the first place?

6. Removal from office / dismissal

The Court may remove the IP from office or dismiss him at any time in a given case.

The core concept behind the Court order is the concept of “just cause”, which – it goes without saying – is an undefined legal concept.

The concept of just cause is, nonetheless, common to several branches of law, which can call be upon to helps us establish a meaning: on the one hand, the civil law notion of just cause (equivalent to “any justified reason”) and, on the other hand, the labour law notion (requires a serious breach of duties). The civil law focuses, however, on “cause” and ignores “just”.

All things considered, it is arguable that there is just cause for dismissal whenever there is a breach of duties that is so serious that the maintenance of the IP in office is completely out of the question and any claim to the contrary is unfounded.

When there is just cause, the judge has a duty (and not merely the power) to dismiss the IP. More precisely, the judge has a duty-bound power. The Court’s decision is, of course, challengeable.

7. Liability

7.1. Fundamentals

For breach of duty, and in addition to the removal from office, the IP may be subject to liability, pursuant to Article 59 of the Insolvency Act.

Some authors argue that there is analogy between the regimes of civil liability of the IPs vis-à-vis the creditors and of the company directors. Among other things, this means that the criterion enshrined in Article 59 of the Insolvency Act is, in fact, the same as the criterion provided for in Article 64 of the Companies Act and that applies to company directors. Accordingly, the IP is required to employ at all times the diligence expected of a meticulous and orderly manager. Otherwise he will be held liable for all the damages caused to creditors.

7.2. Liability insurance

Among other professional requirements, IPs are required to have their own liability insurance in order to cover the risk inherent in the performance of their duties, being the amount of the risk covered defined in a ministerial order.

8. The official body for IPs

As previously referred, there is a control body which oversees the work of IPs as well as the work of other Court officers and auxiliaries (the Commission for the monitoring of Court officers and auxiliaries⁴).

The Commission, created by Law 77/2013, of 21 November 2013, is responsible for the monitoring and supervision of IPs.

It has the power to open disciplinary proceedings against IPs on account of malpractice and breach of duties. In this event, it has the power to subject the IP to a number of sanctions, namely to impose fines. Ultimately, the IP may end up being disqualified for a certain period.

9. Learning from best practice

There are no channels specifically designed for the compilation and dissemination of best practice.

There is, nonetheless, the Portuguese Association of IPs⁵, which is a non-profit association whose purposes are to represent and defend the interests of the IPs, as well as to provide guidance regarding all the aspects of the profession, except for those legally attributed to other entities or bodies. In the pursuance of the latter, we may encounter a number of organized initiatives on promoting networking and exchange of experience and good practice at the national context.

The official page of the Portuguese Association of IPs is available at <http://www.apaj.pt/>.

⁴ Comissão para o Acompanhamento dos Auxiliares da Justiça (CAAJ).

⁵ Associação Portuguesa de Administradores Judiciais (APAJ).