



A.M. PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE & ASSOCIADOS
Sociedade de Advogados

**BANKRUPTCY AND A FRESH START:
STIGMA ON FAILURE AND LEGAL
CONSEQUENCES OF BANKRUPTCY**

- PORTUGAL -

FEBRUARY 2002



A. M. PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE & ASSOCIADOS
Sociedade de Advogados

TITLE 1. INTRODUCTION

Historic analysis of Portuguese Law on Company Recovery and Bankruptcy.

The Commercial Code by Ferreira Borges and, later, by Veiga Beirão (1888) contained a book “Das Falências” (Bankruptcies). The provisions contained therein were subsequently revoked by the Bankruptcies Code (1889), which was later incorporated in the 1905 Code of Commercial Procedure, as a special procedure. In 1935 a new Bankruptcies Code was approved which was incorporated in the 1939 Code of Civil Procedure. Later on, the matter was inserted in the 1961 Code of Civil Procedure: Only through this statute did bankruptcy evolve from its merely liquidating dimension, with the existence of means for bankruptcy prevention being considered - composition and creditors agreement – so as to avoid the debtor's bankruptcy and to rescue the company. Yet, these measures never worked properly nor were they regarded as means for company recovery.

The legal requisites of the feasibility agreement were regulated by Decree-Law no. 124/77 of 1 April, which was incremented and reformulated by subsequent legislation. This legislation came to allow private companies in distress to sign feasibility agreements with credit institutions in order to allow their financial rehabilitation, through the granting of benefits with the latter's participation. The Government too could participate in the agreement. During the term of the agreement no bankruptcy declaration was admitted, but after Decree-Law no. 112/83 came into force the credit institutions participating in the agreement became entitled to apply for bankruptcy of the company.

Decree-Law 353-E/77 of 29 August allowed in certain cases a recognition of interest in keeping in operation companies not considered to be viable.

Most recently, Decree-Law no. 353-H/77 of 29 August allowed “public or private companies, apparently running at a loss and likely to face a problematic or slow recovery”, to be declared in a difficult economic situation. This statute provided that “patterns be imposed on the company as deemed appropriate for surmounting the situation” and, otherwise subject to these measures lapsing, the companies should submit a proposed feasibility agreement.

Through Decree-Law 125/79 of 10 May, a public limited company was created with a share capital fully subscribed by public credit institutions, which was named “Parempresa – Sociedade Parabancária para a Recuperação de Empresas, S.A.R.L”. “The object of this company consists in recovering private companies in financial difficulties, but economically viable”. The role of this company included an intervention in the areas of auditing, advice, arrangement of interests and control, and went beyond



A. M. PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE & ASSOCIADOS
Sociedade de Advogados

the State intervention in the domain of company recovery. Later on, an enactment allowed subscription of capital in Parempresa by the State.

With Decree-Law no. 177/86 of 2 July there appeared the new spirit of bankruptcy law and legislation on companies in a difficult financial state but economically viable. A jurisdiction-based procedure was introduced for recovery of companies, with companies as its central object. A fundamental role is assigned to the creditors and to the entrepreneur for diagnosis of the company's state at an economic and financial level as well as where the company's fate is concerned.

The recovery and bankruptcy procedures have been harmonised, with priority being assigned to the former. Bankruptcy should only be decreed in cases where recovery of the company is impossible. Controlled management was added as a means of recovery.

Decree-Law 10/90 of 3 January was aimed to improve on the ruling regime: it widened the harmonisation between the recovery and the bankruptcy procedures.

General framing of the current legislation applicable:

Companies.

In 1993 Decree-Law no. 132/93 of 23 April brought into force the "Código dos Processos Especiais de Recuperação da Empresa e de Falência (CPEREF)" (Code of Special Procedures for Company Recovery and Bankruptcy). Decree-Law no. 315/98 of 20 October introduced some modifications. It is the first statute that, putting in perspective alternatively the recoverability and the unfeasibility of insolvent companies, draws up jointly the regime for their recovery and for their bankruptcy, depending on the cases. It establishes a threshold phase that is common to the two procedures and determines several passage bridges from one to the other. This statute is thus applicable to any company in a difficult economic situation, or insolvent, which can either be put through a rescue operation or one or more recovery measures, or declared bankrupt. An insolvent company should only be decreed bankrupt when the company is not viable economically or if its financial recovery is considered impossible in the prevailing circumstances.

The recovery and bankruptcy regimes are not applicable to public corporations, insurance companies, credit institutions, finance companies, investment companies providing services that imply the holding of third parties' funds or securities, and joint investment organisms, and they do not affect special legislation on public companies.

As far as public companies are concerned, Decree-Law no. 260/76 of 8 April is applicable, which establishes that the forms to wind up public companies are only those provided for in this Decree-Law, without the rules on dissolution and liquidation of companies or the institutes of Bankruptcy and Insolvency being applicable. Therefore, the regime is that of inapplicability of the institute of Bankruptcy and Recovery.



A. M. PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE & ASSOCIADOS
Sociedade de Advogados

As far as credit institutions or finance companies are concerned, they are governed by Decree-Law no. 298/92 of 21 December, which expressly rejects the application of the means of Recovery to Finance Institutions.

Finally, insurance companies are governed by Decree-Law no. 102/94 of 20 April, which contains no reference as to whether or not the Bankruptcy and Recovery regimes should apply. It only considers the mechanisms of intervention of the supervising entity to avoid bankruptcy.

Debtors (other than company proprietors):

The applicable legislation is CPEREF only, but, differently to the company, only the bankruptcy regime is applicable, not the recovery regime. Thus, an insolvent debtor other than the owner of a company, or an entrepreneur whose company is not in activity at the moment the procedure is requested, may be adjudged bankrupt, but may not benefit from the recovery procedure. He can avoid the bankruptcy declaration through presentation of a private composition approved by the court. Therefore, with the necessary modifications, the provisions on bankruptcy are applicable to an insolvent debtor other than a company proprietor.

TITLE 2. DEFINITIONS AND TERMINOLOGY

"Empresa" hereinafter "Company".

Includes any and all organisation of means of production designed to carry on any agricultural, commercial or industrial activity or to supply services.

"Insolvência" hereinafter "Insolvency".

A company is considered to be insolvent if it is unable to meet its obligations in time because its assets available are insufficient to cover its current liabilities.

"Situação Económica Difícil" hereinafter "Difficult economic situation".

A company is considered to be in a difficult economic situation if, without being considered insolvent, it shows indications of economic and financial difficulties, in particular by failing to meet its obligations.

"Falência" hereinafter "Bankruptcy".

Procedure applicable to an insolvent individual or a company in a difficult economic situation or in a state of insolvency, provided in this case that the company is economically unfeasible or financially unrecoverable.



A.M. PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE & ASSOCIADOS
Sociedade de Advogados

"Recuperação" hereinafter "Recovery".

Procedure applicable only to companies insolvent or in a difficult economic situation, but economically viable and financially recoverable. The recovery measures applicable are composition, entrepreneurial reconstruction, financial restructuring and controlled management.

TITLE 3. WARNING LIGHTS AND PREVENTION OF INSOLVENCY

Experience has shown that, in a significant number of cases, a consensus can be reached between the different parties interested in the recovery of companies in distress, thanks to the mediating intervention of a public entity.

Thus, in 1998 Decree-Law no. 316/98 of 20 October came to provide and regulate that type of intervention, attributing it to the "Instituto de Apoio às Pequenas e Médias Empresas e ao Investimento" (IAPMEI).

This mechanism consists in: creating a conciliation procedure, simple and flexible, where the role of conducting out-of-court steps is intentionally reserved to IAPMEI, always within respect of the participants' wishes, no sanctioning or enforcement powers being attributed to this institution. A co-ordination between the conciliation procedure and the pending judicial proceedings for recovery of the company is regulated by the said statute.

It is expected that with this out-of-court procedure for conciliation, the companies in economic difficulties and those directly affected by those difficulties have at their disposal a statute more suitable to the demands of their business life.

Any company and any creditor in a position to apply for a court-based recovery, may file for a conciliation procedure with IAPMEI.

The purpose of the conciliation procedure is to obtain an agreement between the company and all or some creditors in order to make possible the recovery of a company in insolvency or in a difficult economic situation. The partners of the company may intervene in this procedure, and so do the creditors and other parties concerned as well. The content of the agreement is freely established by the parties, and may correspond to some of the recovery measures contemplated in the CPEREF. In the event judicial proceedings were started for company recovery, the agreement can serve as basis for proposals to be presented in the meeting of creditors.

TITLE 4. LEGAL POSSIBILITIES TO CONTINUE ECONOMIC ACTIVITIES



Chapter 4.1. [possibility 1]

§1. Comprehensive description of the regime as well as its underlying philosophy

1.1. Description

1.2. Critical analysis

It was through Decree-Law no. 177/86 that the new spirit of bankruptcy law was finally emancipated among us, as well as the legislation relating to companies in a difficult financial situation, but economically viable. The corporate reality was seen as the central object to a jurisdiction-based process meant for recovery of a viable productive structure, with reversible financial difficulties. Attention was given, without inhibitions, to the interests of creditors, of the company owner, of the employees, of the suppliers, of consumers, of the company, of the State, which reciprocally intersect in the company. The recovery procedure was dealt with subsequently through Decree-Law no. 10/90, of 5 January and lastly through the CPEREF.

A judicial procedure was thus structured tending to hold seriously responsible the creditors and the entrepreneur in diagnosing the economic and financial state of the company, in choosing the way the company should follow, as well as in the very process of financial regeneration, if necessary to put the company through such a process. Harmonisation lines were drawn between the recovery procedure and the bankruptcy procedure, so that the former could be configured as a juridical mechanism previous to and with priority over the bankruptcy procedure.

Bankruptcy should only be decreed in those cases where recovery of the entrepreneurial organisation appears as totally impossible with the recourses and sacrifices required from the creditors.

A reference should be made here to the terms in which the said connection between recovery and bankruptcy is obtained. Let us recall in this regard the approximation of the assumptions respecting to the recovery and to the bankruptcy procedures (which nowadays tend to be different only as regards the economic viability of the company, which is required in order to resort to the former), the nonexistence of the debtor's obligation to file for bankruptcy when a recovery procedure is pending, the fact that this procedure suspends pending execution proceedings, bankruptcy and insolvency proceedings.

§2. Classification of the procedure among branches of law.

2.1. Description

2.2. Critical analysis

Resolutions for approval of any measure for company recovery must be approved in a meeting of creditors, by creditors with voting rights, whether common or preferential, representing at least two thirds of the value of all the approved credits, and not be



A. M. PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE & ASSOCIADOS
Sociedade de Advogados

opposed by creditors representing 51% or more of the credits directly covered by the measure.

The resolution of the assembly on the approved means of recovery is subject to judicial homologation, which depends only on observance of the applicable legal rules.

The current legislation contemplates four important types of measures for company recovery:

A) Composition.

Composition is the means for recovery of a company in a situation of insolvency or in a difficult economic situation, which consists in a simple reduction or modification of the whole or part of its debts. The modification may be limited to a simple moratorium. This is the simplest measure and the one that introduces the least modifications in the company's life.

B) Entrepreneurial reconstitution.

The entrepreneurial reconstitution is a means for recovery of an insolvent company or a company in a difficult economic situation, which consists in setting up one or more companies for exploiting one or more establishments of the debtor company, provided the creditors, or some of them, or third parties, are ready to undertake or boost up the respective activities. The setting up of the new company determines the extinction of the legal entity holding the company that is the object of the agreement, whenever this covers all its assets or withdrawal of the sole entrepreneur referred in the agreement.

C) Financial restructuring.

Financial restructuring is a means for recovery of an insolvent company or a company in a difficult economic situation, which consists in the adoption by the creditors of one or more measures aimed to modify the state of the company's liabilities or to alter its share capital, in such terms as to ensure by itself a superiority of the assets over the liabilities and the existence of a positive working capital.

As measures for financial restructuring bearing on the liabilities of the company we have the reduction in value of the credits, transfer of property to the creditors, modification of due dates or interest rates on debts, surrender of company's property in lieu of payment and conditioning reimbursement of claims to the debtor's means available. Increasing or reducing the share capital of the company are financial restructuring measures bearing on the company's equity structure.

D) Controlled management.

Controlled management is the means for recovery of an insolvent company or of a company in a difficult economic situation based on a global action plan, concerted



A. M. PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE & ASSOCIADOS
Sociedade de Advogados

between creditors and executed through a new board of directors, with a proper means of supervision.

The plan must define the general lines of the future management of the company, planning its execution on strictly defined bases of a technical, administrative, economic and financial character.

The means for execution of the plan are based on initiatives relating to the future management of the company such as the lease of property, the sale, barter or assignment of assets items, the termination of bilateral contracts of the debtor company, the launching of new undertakings, the conveyance of establishments or temporary transfer of company's businesses, the obtaining of credit through the granting of privilege, the rendering of establishments juridically autonomous through transfer to companies controlled by the company and the shutting down of establishment or cessation of certain activities.

§3. Criteria to benefit for the regime (the origin of the criteria (legal, case-law, practice) must be specified)

3.1. Description

3.2. Critical analysis

According to the law, any company in a difficult economic situation or in insolvency may be put through one or more recovery measures. These measures (composition, entrepreneurial restructuring, financial reconstruction and controlled management) are not applicable to debtors other than companies: they are solely applicable to companies. However, in order to be able to benefit from one or more of those measures, and besides being in a difficult economic situation or in insolvency, companies should as a rule be economically viable and financially recoverable.

The law adopts a notion of ample company, so as to tendentiously submit to recovery measures any and all company, regardless of the respective legal nature and organic model. The fact is that the existence of a company is not conceivable otherwise than involving an organisation of means of production or designed to carry an agricultural, commercial or industrial activity, or to supply services.

But the comprehensive character of the company notion has another consequence which is to subject to the recovery procedure and to the corresponding measures entities which traditionally did not fit in the concept of company. It is the case of craftsmen and free professionals who, where acting through the organisation of means of production, are regarded as potential addressees of recovery measures.

The other presupposition for application of recovery measures is the situation of insolvency of the company, which the law characterises as the impossibility to satisfy obligations in time due to the available assets of the company being insufficient to



A. M. PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE & ASSOCIADOS
Sociedade de Advogados

satisfy its current liabilities. The law relates the impossibility to meet obligations with the lack of means and credit.

These realities are no more than the causes that normally determine the insolvency, but one of them, or both, may exist without the company being necessarily prevented from satisfying its obligations, if for example it can have access to resources which, though not involving technically proper means or credit, allow its survival anyway.

What is really essential is that the company, regardless of the reasons which, in concrete, justify it, is really placed in a position of incapacity to satisfy in time the obligations it is bound to satisfy. It must be such a lack of satisfaction that, for the amount involved, for its significance in the aggregate of liabilities, or for the very circumstances of unfulfilment, reveal an incapacity of the company to honour its commitments on the whole. It is not enough to be in default or even definitive unfulfilment of one or more obligations, in the same way as default is irrelevant when due to circumstances other than availability of means. Insolvency is linked with and revealed through financial incapacity.

A company may also be the object of a recovery procedure if, although it should not be considered insolvent, it is in a difficult economic situation, that is, if it shows economic and financial difficulties, in particular through unfulfilment of its obligations.

However, the existence of a company in a situation of insolvency is not enough for the company to be subjected to recovery measures. It is also necessary to establish its economic viability and financial recoverability.

Economic viability relates to the possibility for the company, after overcoming a specific crisis, to keep in activity, in terms of generating sufficient wealth in order to cover at least the maintenance costs, without consequently constituting a source of constant loss for the investors.

Financial recoverability relates to the possibility of immediate obtainment of the means allowing the company to surmount the rupture, whether through an alteration of liabilities (reduction or, at least, restructuring) or through amplification of assets or retaking or credits or through measures conjugated in the various domains.

A company is capable of obtaining means enabling it to overcome a specific financial rupture, without its capacity for long term survival being guaranteed, if it is incapable of generating sufficient funds to secure its own balance; and on the contrary, serious perspectives may exist for a company to survive, after overcoming the crisis, without means existing to overcome the crisis due to insurmountable financial constraints. In any of these cases, one of the requisites for application of recovery measures is missing, and so the procedure must be either turned into a bankruptcy procedure or shelved.

§4. Specification of the possible initiators of the procedure



A. M. PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE & ASSOCIADOS
Sociedade de Advogados

4.1. Description

4.2. Critical analysis

A company which is insolvent or in a difficult economic situation but which considers itself to be economically viable and believes that the current situation can be overcome, may apply to the court for an appropriate recovery measure. The initiative to apply for recovery should be taken by the respective owner, or by the board of directors, or by the general assembly of partners.

Any creditor, whatever the nature of his claim, may request the application of an appropriate recovery measure to a company he considers economically viable, provided facts exist which reveal the situation of insolvency of the debtor, such as failure to satisfy one or more obligations which, for the amount involved or for the circumstances of unfulfilment, reveals an impossibility for the debtor to timely satisfy its obligations on the whole; an escape of the company owner or of the members of its board of directors, related with the lack of solvability of the debtor and without designation of an appropriate substitute, or abandonment of the place where the company is based or exercises its main activity; a dissipation or deviation of property, creation of fake debts or any other anomalous procedure revealing the debtor's intention to put itself in a position of impossibility to satisfy its obligations in time.

The Public Prosecutor may request the adoption of an appropriate recovery measure, in representation of the interests legally entrusted to it, which it may also request when the company has been declared in a difficult economic situation but there is an economic and social interest in keeping the company in operation.

§5. Restructuring plan (if applicable, who must file it, how, where, must it be voted by creditors, is there a court intervention, etc...)

5.1. Description

5.2. Critical analysis

As far as this item is concerned, the reader is referred to §2 below, where the four applicable measures for company recovery are described.

§6. Administration of the procedure (who manages the assets of the individual or the company, the role of the different actors in the proceedings creditors, debtor, State, appointed manager, court, etc.)

6.1. Description

6.2. Critical analysis

Situation prior to a decision homologating any recovery measure.

If a justified fear exists regarding the practice of mismanagement acts, the entity who requests the application of a recovery measure must request, in the beginning of the



A. M. PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE & ASSOCIADOS
Sociedade de Advogados

proceedings, the immediate appointment of a judicial administrator to assist the debtor and without whose approval no acts can be performed for alienation or encumbrance of property or for undertaking new responsibilities, besides those indispensable for the current management of the company. It will be incumbent on the judicial administrator to guide the management of the company, diagnose the causes of the prevailing situation, assess its economic viability and study the most appropriate means of recovery for pursuing the company's objectives and for protecting the creditors' interests.

Management measures applicable to the company.

If composition is the recovery measure applied, the company directors can maintain their former powers of management during the execution of the composition, or they may be conditioned in the exercise of their powers, depending on the terms of the approved measure. Composition can be subject to supervision by the creditors committee, or by only one or some of them, as resolved. It is not a matter of excluding the management powers pertaining to the entrepreneur or to the respective corporate bodies, whose duty in general, after approval of the composition, is to conduct the companies activities. What really matters is to limit the practice of certain categories of acts, clearly identified in the resolution passed by the assembly, which are regarded, at least potentially, as detrimental to the creditors and, perhaps, most often unnecessary to the company.

The reference to a conditioning in the exercise of the powers of management shows that those powers are not eliminated, only that someone else's intervention is required in the management. The entity whose job is to assist those in charge of the management in the exercise of the conditioned powers will be defined by the assembly of creditors and can be one or some of its members, or a committee, entrusted with supervising the execution of the composition.

In the case of entrepreneurial reconstitution and financial restructuring, there is no provision of legislation regarding the powers of management.

However, as to the former possibility, since new companies are set up for exploiting one or more establishments of the debtor company, obviously these new companies will take charge of the management of the debtor company's establishment and of the respective assets. The legal entity holding the debtor company can even be extinguished, which implies logically a cessation of the management powers existing therein.

As to the latter possibility, if the measure adopted bears on the liabilities, the powers of management will be maintained, but, similarly to the composition, such powers can be conditioned and supervision can be exercised. If a measure is approved which bears on the share capital, all will depend on how the share capital of the company will be structured thereafter; for example, if it is resolved to increase significantly the share capital, such increase being subscribed by new partners, those new partners will be



A. M. PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE & ASSOCIADOS
Sociedade de Advogados

entitled to designate directors and can exercise such right in a way that can allow for significant modifications being introduced in the management structure of the company.

When the controlled management measure is applied, the directors of the company are definitively removed from office. When approving the plan, the creditors must designate immediately the new board of directors on whom it will be incumbent to implement such plan. Such board may include withdrawn directors, whose permanence is considered advisable for the company management, as well as the judicial administrator himself. The new board of directors must take office as soon as possible, on which date will cease both the term of office of the elected members of the corporate bodies and the specific activity of the judicial administrator.

The term of office of the directors designated by the creditors will last for the time of duration of the controlled management. It can be admitted in the approved plan that the management of the debtor company will be entrusted to a specialised entity, through contract to be entered into with the management company for the adequate period of time. The management contract will be signed, on behalf of the debtor company, by the audit board or the person designated for that purpose by the audit board or by the creditors assembly, and the full powers of the new board of directors are transferred to the management entity.

During the period of execution of the controlled management, the operation of the general meeting and of the audit board will be suspended, as well as the exercise of the voting rights of the company shareholders. Their duties will be exercised by the creditors assembly, who will also designate the body to supervise the plan.

§7. The degree of protection of the actors implied in the procedures: public investors, creditors (secured and unsecured, preferential or not), shareholders, stakeholders,...), as well as the way to carry out this protection

7.1. Description

7.2. Critical analysis

The position of the company and of its owners.

In the initial phase of the procedure, the company has precisely the power to trigger the recovery process if, though insolvent, it is economically viable and the possibility to overcome its financial rupture, already occurred or impending, has not been definitively impaired. We are before a power-duty, the exercise of which is aimed at the satisfaction of the interests of the company, as well as at the protection of the interests of the creditors. This means that if the company, in spite of its situation of need, fails to take the initiative to apply for the procedure, it will take the consequences provided by law, in particular subjection to the bankruptcy procedure.

Therefore, in filing suit, the company can immediately suggest the adoption of the measures considered appropriate to remedy its state, and may also suggest the



A. M. PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE & ASSOCIADOS
Sociedade de Advogados

composition of the creditors committee and judicial administrator, although the court is not bound to accept those suggestions.

Where the recovery procedure was not requested by the company, the company may challenge it, provided there are motives to justify such objection.

In taking the steps necessary for a decision on the development of the action, the Court may hear the representatives of the company.

The company should be heard on the entities that may have been proposed by the creditors, as for example, the judicial administrator.

As applicant, the company can freely withdraw the petition and discontinue the proceedings.

Until homologation of the measure, the company has other powers, such as: a) power to challenge creditors' claims; b) power to participate in the creditors assembly, being therefore entitled to intervene therein, trying, in particular, to motivate the creditors for adopting a conduct considered advisable by the company. However, the company will never be able to participate in resolutions and, as a rule, the company does not have means to avoid the adoption of any measures; c) power to claim against the resolutions on approval of creditors' claims, although this right is conditioned by the fact of the company not having previously, in an express or tacit way, accepted the relevant claim d) power to appeal against the decision homologating the measure; e) power to discontinue the proceedings, although being subject to the agreement of creditors holding at least 75% of the claims.

Until homologation of the measure, the company's activities continue to be conducted by the normal bodies, unless otherwise determined by the court.

During the period of execution of the measures for company recovery, where the powers of the company are concerned, the contents of §6 are incorporated by reference herein.

The position of creditors.

The creditors have a preponderant role in the process of recovery of a company, especially in defining the fate of the insolvent company, as the resolutions for approval of any measure for recovery of the company must be approved by creditors with voting rights representing at least two thirds of the value of all the credits approved and not be opposed by creditors representing 51% or more of the claims directly covered by the measure.

There is a principle of equality of creditors, that is, the situations of creditors with equivalent positions must be treated in similar terms. Normally, differences exist according to the nature and the value of the securities they may have.



A. M. PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE & ASSOCIADOS
Sociedade de Advogados

In the cases where the creditors vote in favour of the measure or accept it, their rights against the co-obligors or third guarantors of the obligation are affected in the respective existence or amount, to an extent corresponding to the extinction or modification of the respective claims before the debtor company. In the situations where the creditors do not approve or accept the measure, their rights against all those responsible for the debt remain untouched, regardless of the source of responsibility and of the effects brought by homologation of the measure in respect of subsistence or enforceability of the claim before the company.

The position of third parties.

The State, public institutes without the nature of public companies and the social security institutions, holding privileged claims against the company, may give their agreement to the adoption of measures, if so authorised by the competent member of Government.

Any reduction in value of the employees' claims must be limited to the degree of their attachableness and depend on the employees' express agreement.

Those third parties who, by virtue of the payment effected, were subrogated in the creditor's rights, as well as the co-obligors who, through the consideration provided, were invested in the right of remedy over the debtor, acquire in the recovery procedure, to the extent they have satisfied the creditor's claim, the powers that belonged to the creditor, including the powers to vote in the meeting of creditors. In case of partial satisfaction of the creditor's claim, the powers to act in the recovery procedure are shared by the creditor and by the subrogee or holder of the right of remedy over, in the proportion of satisfaction given to that claim. The third guarantors of the obligation or their co-obligors, from whom satisfaction of the claim is demanded by the creditor, may subordinate their satisfaction of that demand to the transmission of all the property and rights received by the creditor, as consideration for the main claim.

§8. Termination of the procedure

8.1. Description

8.2. Critical analysis

Unless otherwise stipulated, composition is subject to the clause “salvo regresso de melhor fortuna” (return of better fortune excepted), which will be effective for ten years, the company being obliged, as soon as its economic situation improves, to pay prorata to the composition creditors. This clause expires with the homologation of a new composition or with the declaration of bankruptcy of the debtor; in neither case may the company apply for or be put through a new recovery procedure.

Thus, a new recovery procedure and a new composition will only be possible in the following terms: the creditors with claims arisen subsequently to the approval of the



A. M. PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE & ASSOCIADOS
Sociedade de Advogados

composition may request the opening of a new procedure for recovery of the company and, under such procedure, approve a new composition, without prejudice to the previous one. But until such time as the obligations resulting from the composition have been fully satisfied, no new procedure can be requested by the debtor or by anyone else for recovery of the company.

The law also provides for two causes of annulment of the composition: a) by request of a creditor who, by sentence passed subsequently and become *res judicata* proves the existence of a credit arisen previously to the approval of the composition which was not considered in the meeting of creditors where the claim would likely have an influence on the legal majority required for approval of the recovery measure and b) where through malice on the part of the company or a third party the acceptance of creditors was obtained in order to influence the legal majority.

In the entrepreneurial reconstitution, the setting up of a new company determines the extinction of the legal entity holding the company that is the object of the agreement whenever the agreement comprises all the assets of the company or the removal of the sole entrepreneur involved in the agreement. In any case, this is a measure of instantaneous execution. The causes of annulment of the composition are also applicable to this measure.

In financial restructuring, it is up to the judge, upon request by the judicial administrator, as soon as the full execution of the measure has been secured, but never later than 60 days after homologation of the resolution of the assembly, to declare the recovery procedure terminated, ceasing then all the effects brought by the order for the proceedings to continue. Termination of the proceedings does not affect the execution of the long-term measures already started, until the end of the maximum period established for their duration. The causes of annulment of the composition are applicable also to this measure.

Controlled management has the duration fixed in the plan, not exceeding two years, with the possibility of that period being extended for another year or more, all at once, upon request by the management of the debtor company or by the supervising committee. The controlled management period starts on the date of homologation of the resolution approving the measure and ends with the simple lapsing of the term. With the lapsing of the period fixed for its duration, controlled management ends and the company resumes its normal activity so that the creditors whose claims have not been satisfied will be able to freely exercise their rights.

With cessation of the controlled management, the efficacy of suspension of actions against the debtor ceases as well, but there is no interruption of execution of the long-term measures already started until the end of the maximum period established for their duration. The cessation of controlled management, on whatever grounds, does not affect the validity of the measures adopted by the creditors assembly under the recovery procedure or the effectiveness of the acts performed by the management during the controlled management.



A.M. PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE & ASSOCIADOS
Sociedade de Advogados

Early cessation of the management can take place if requested by the management or supervising body, creditors representing at least 51% of the liabilities of the enterprise, its owner or, in the case of a company, by the shareholders owning a majority of its share capital, and the creditors assembly, after hearing the management and the supervision body, provided these are not the applicants, may resolve for cessation of the controlled management before the end of term, on grounds of a substantial and irreversible frustration of the planned objectives. Such resolution must be homologated by the judge.

Early cessation of controlled management is equivalent to an acknowledgement of failure to satisfy the obligations undertaken by the company and may be invoked as cause for acceleration of performance of the obligations not yet fallen due. The causes of annulment of the composition are also applicable to this measure.

§9. Degree of information on the development of the procedure toward creditors (e.g. access to (court) files, etc.)

9.1. Description

9.2. Critical analysis

The publicity principle respects to the very procedure and its development as well as to the measures adopted, with effects on the sphere of relations between the company and its creditors, as well as at a more general level of knowledge by those who have or may have any relationship with the company.

The law provides that, once the recovery proceedings have been filed and the preliminary order passed for the proceedings to continue, all parties involved must be effectively summoned in order to defend their interests under the proceedings. If the proceedings were started by the company, all creditors are served summons; if the proceedings were started by a creditor, all the remaining creditors and the company will be served and summoned to intervene and, if the proceedings are to be continued, they may participate in defining the fate of the company.

Publicising is also required regarding the meeting of the creditors assembly convened in the order for the proceedings to continue.

In the ambit of the hypothesis of divulgation and knowledge of the proceedings, the law requires registration of the suit as well as the order for the proceedings to follow, and of the resolutions of the creditors assembly and of the relevant judicial decisions passed.

The proceedings may be consulted in the Court by any person concerned, including obviously any and all creditors.



A. M. PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE & ASSOCIADOS
Sociedade de Advogados

§10. Costs related to the procedure, if applicable (e.g. fees trustee, judicial administrator, etc.)

10.1. Description

10.2. Critical analysis

As far as court costs are concerned, the case value in the proceedings for company recovery is equivalent to that of limited jurisdiction of the Court of Appeal plus one escudo, that is € 14.963,95. The case value is determined on basis of the assets as per the debtor's balance sheet or, in its absence, on basis of the indication made in the application or in the petition, which will be corrected when found to be different from the real value - this in the cases where this value is below €14.963,95. In a bankruptcy proceedings where bankruptcy is declared, the case value for purposes of court costs is the value of the liquidated assets.

The costs in the procedure for company recovery are borne by the debtor. The costs in the bankruptcy procedure are borne by the bankrupt's estate.

§11. Competence, knowledge and functioning of insolvency (bankruptcy) courts

11.1. Description

11.2. Critical analysis

The competent court for company recovery or bankruptcy procedures is the Commercial Court - a court of specialised competence - of the place where the debtor is based or has its domicile, and the trial judge will deal with the procedure and decide on all its phases, incidents and appendices.

Where recovery or bankruptcy procedures are pending with different courts in respect of related companies, such procedures are attached to the proceedings concerning the company that presents the highest assets value.

Whenever the debtor is based or has domicile in a foreign country and activity in Portugal, the competent court is that where the permanent representation of the debtor is located or, if no representation exists, the center of its major interests, in relation to proceedings arising from obligations undertaken in Portugal, or which should be satisfied in Portugal, liquidation being restricted to the assets existing in Portuguese territory.

§12. Publicity conditions, if applicable (e.g. newspaper, official gazette)

12.1. Description

12.2. Critical analysis

The debtor and the five major known creditors are served personally, and the remaining creditors are summoned through public notice, with the formalities determined by



A. M. PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE & ASSOCIADOS
Sociedade de Advogados

uncertainty as to the persons, and through announcements published in the Official Gazette and in a daily newspaper of extensive nation-wide circulation.

Notice as to the date, hour and place of the creditors meeting is immediately given by announcement published in the Official Gazette and in a leading newspaper of the locality as well as by public notice posted on the door of the head-office and of the main establishment of the company. The five major creditors, as well as the company and the employees committee, are also given notice of the day, hour and place set for the meeting, through circular letters sent by registered mail.

The announcement and the circular letters must contain the identification of the proceedings, the date of filing of the petition and the date of the order for the proceedings to continue, and the name and head-office of the debtor; they must also contain a warning to the creditors that they must claim their credits, so that they can intervene in the creditors assembly, indicating the deadline for submission of the creditors claims.

In the bankruptcy proceedings, the sentence decreeing bankruptcy must be published in the Official Gazette and in a leading newspaper of the relevant county as well as through public notice posted on the door of the head-office and branches of the bankrupt or on the place of its business, depending on the cases, and also at the place of the Court.

TITLE 5. LEGAL CONSEQUENCES OF BANKRUPTCY AND POSSIBILITIES FOR A FRESH START

Chapter 5.1. Bankruptcy procedure

Criteria to declare a company or an individual bankrupt.

A company in a difficult economic situation or in a situation of insolvency may be put through a recovery procedure or may be adjudged bankrupt; however, bankruptcy should only be decreed if the company is not economically viable or if its financial recovery is considered impossible in the prevailing circumstances.

Subjective assumption: The company. The debtor.

The legislator reserved recovery procedures to the debtors holding an entrepreneurial organisation, as only in those cases the application of measures for their reorganisation and financial regeneration will be justified.

An insolvent debtor other than a company owner or an entrepreneur whose company is not in activity at the date the procedure is requested, may be adjudged bankrupt but may not benefit from the recovery procedure, as the bankruptcy procedure is applicable to



A. M. PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE & ASSOCIADOS
Sociedade de Advogados

any debtor, whether or not a company owner, unlike the recovery procedure which is only applicable to companies.

The bankruptcy regime is not applicable to public corporations, insurance companies, credit institutions, finance companies, investment companies providing services which imply the holding of third parties' funds or securities, and joint investment organisms.

Insolvent debtors subject to a bankruptcy procedure can be individuals or companies whatever their form, including associations, foundations, business corporations, simple civil companies with legal personality, civil companies under a commercial form, co-operatives, groupings of undertakings, European groupings of economic interest, irrespective of their mercantile legal status.

Objective assumption: Insolvency. Difficult economic situation.

The bankruptcy procedure is applicable to debtors other than company proprietors, who are in a situation of insolvency, as well as to companies in a difficult economic situation or in situation of insolvency, provided in this case that the company is not viable economically or cannot be financially rescued.

The law defines the situation of insolvency as a situation where the company is unable to meet its obligations in time, because its available assets are insufficient to satisfy its current liabilities. As far as the difficult economic situation is concerned, the legislator considers it to be a situation where, although the company should not be considered insolvent, it shows signs of economic and financial difficulties, in particular by failing to satisfy its obligations.

The following are signs of insolvency: A) Failure to satisfy one or more obligations (rendering of thing or fact) which, for the amount or circumstances involved reveals an impossibility for the debtor to fully satisfy its obligations on the whole; B) Escape of the company proprietor or of the officers, without designation of an appropriate substitute, if caused by insolvency of the debtor, and abandonment of the place where the company is based or carries on its main business; C) Dissipation or deviation of property, the creation of fake debts or other procedure revealing the debtor's intention to put itself in a situation where satisfaction of its obligations will be impossible.

Particular assumption: Economic unfeasibility. Impossible financial rehabilitation.

The bankruptcy procedure is applied to insolvent companies that are not viable. The bankruptcy procedure is, in relation to insolvent companies, a residual means that should only be used when recovery is considered impossible. The bankruptcy procedure is also applicable to insolvent debtors other than company proprietors, but in this case the viability concept does not apply, nor does the principle that feasibility should be preferred.

Formalities of the procedure. Actors of the procedure. Competent Court.



A. M. PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE & ASSOCIADOS
Sociedade de Advogados

At the preliminary phase it is incumbent on the debtor to file for bankruptcy, but the creditors and the Department of Public Prosecution too may request that bankruptcy be adjudged. After the initial request for bankruptcy has been granted, the creditors and the debtor are notified for submitting, within 10 days, the respective opposition or creditor's claim, or for proposing any other measure.

The Judge can also adjudge bankruptcy, after some of the signs of insolvency have been recognised, if an opposition to the recovery procedure is lodged within that period by creditors representing at least 51% of the recognised credits and if it is alleged that the company is not viable. After that period, the Court shall take the necessary steps and decide on the development of the procedure: once insolvency has been proven, the Judge orders that the proceedings be pursued as requested.

The court order for continuing the proceedings should adjudge the debtor bankrupt, if this has been requested by the creditors without objection from the remaining creditors, or requested by the debtor without objection from the creditors.

In case of opposition, without causing the proceedings to change into a recovery procedure and without leading to a declaration of bankruptcy, judgement will take place.

Once bankruptcy has been declared, the preliminary phase is extinguished and the phase of winding-up starts. The judicial liquidator and the creditors committee are appointed, if a creditors committee has not been created yet or if its replacement is required; immediate apprehension of the accountancy elements and of all the debtor's assets is decreed, which are entrusted to the judicial liquidator; and a time limit is set, of up to 30 days, for submission of the creditors' claims.

The sale of all the assets listed as the bankrupt's property, effected by the judicial liquidator with the co-operation and supervision of the creditors committee is independent from the auditing of liabilities and can be started once the declaratory sentence decreeing bankruptcy, or the first instance decision rejecting the opposition, has become *res judicata*.

After liquidation of the assets and after a court decision grading the acknowledged claims, privileged or preferential creditors are paid out of the proceeds obtained from the sale of the assets standing as security for their respective credits, and the proceeds obtained from the sale of the remaining assets are prorated between the common creditors and the preferential or privileged creditors.

The competent court to deal with recovery proceedings or bankruptcy proceedings is the Commercial Court – a court of specialised competence - of the place where the debtor is based or has its domicile, and the trial judge will deal with the procedure and decide on all its phases, incidents and appendices. Where recovery or bankruptcy procedures are pending with different courts in respect of related companies, such procedures are



A. M. PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE & ASSOCIADOS
Sociedade de Advogados

attached to the proceedings concerning the company that presents the highest assets value. Whenever the debtor is based or has domicile in a foreign country and activity in Portugal, the competent court is that where the permanent representation of the debtor is located or, if no representation exists, the center of its major interests, in relation to proceedings arising from obligations undertaken in Portugal, or which should be satisfied in Portugal, liquidation being restricted to the assets existing in Portuguese territory.

Chapter 5.2. Legal effects of the initiation of bankruptcy

Once a court order has been passed for continuing the bankruptcy proceedings, this will suspend immediately any executions against the debtor as well as any enforcement measures aimed to attach the debtor's assets, including those based on privileged or preferential claims.

Suspension will last until the end of the maximum period established for a resolution of the creditors assembly, or until *res judicata* of the decision homologating or rejecting the approved recovery measure, declaring terminated the effects of the order for proceeding or determining legal cancellation. Moreover, no new executions can be filed against the debtor.

There is also a suspension of all periods of limitation and expiry opposable by the debtor to its creditors, which is also started with the order that determined resumption of the proceedings.

The ordered suspension thus comprises two areas completely distinct: one respects to the procedural steps proper to execution proceedings filed against the debtor, where his assets are at stake; the other respects to lapsing and expiry of time periods granted to third parties for exercising their rights against the debtor.

During the aforesaid period, the company's debts existing at the date of submission of the initial petition to the court, whatever their nature, do not bear interest.

In addition, any legal transactions *inter vivos* will be ineffective against the debtor which are subsequent to the order for resuming the proceedings and involve the acquisition, alienation or encumbrance of shares, or equity participations of the debtor company, or equity participations in other companies, or the acquisition of real estate and the alienation, encumbrance or lease of real estate of the company, cessation of exploitation, conveyance, or extinction of the right to lease establishments owned by the company, unless previously authorised or ratified by the judge, in either case with a favourable opinion of both the judicial administrator and the creditors committee.

However, if they were established against payment, with third parties in good faith, transactions will only be ineffective if executed after registration of the order for resumption of the proceedings.



A. M. PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE & ASSOCIADOS
Sociedade de Advogados

Chapter 5.3. Legal effects of bankruptcy as such

The bankruptcy declaration implies two categories of legal effects: personal effects and effects relating to property.

Thus, as personal effects we shall designate all those that assume an instrumental function to the bankruptcy procedure (such as the duty of presentation and the setting up of residence) or consisting in an incapacity of the bankrupt (such as the prohibition to carry on business, the different juridical-bankruptcy, juridical-penal and juridical-political effects).

Conversely, as patrimonial effects, there are, on the one hand, those bearing on the bankrupt's assets and meant to protect directly the claimant creditors, through the awarding of a number of items for satisfaction of the interests of the claimant creditors (the loss of power to dispose of and manage the present and future assets), and on the other hand, those aimed to hold responsible the subjects that contributed significantly to the bankruptcy.

Personal effects.

Fixing residence.

The bankrupt's residence is fixed in the bankruptcy declaratory sentence, whether the bankrupt is an individual or a company (and in that case the directors' residence is fixed too). The bankrupt may not change residence or stay away from the assigned residence for more than 5 days without communicating the new residence or the place where he can be found. It is understood that a prior court authorisation is required for those acts.

The duty of presentation.

The bankrupt and, in the case of a legal entity or a company, its directors, have a presentation duty which consists in the obligation of personal appearance before the court whenever such appearance is determined by the judge or by the judicial administrator, with a view to presenting the necessary clarifications.

Inhibition to carry on business.

A declaration of bankruptcy implies an immediate inhibition of the bankrupt to carry on business, including the possibility of holding any office in a corporate body of a commercial or civil company, association or private foundation of economic activity, public company or cooperative. Also considered prohibited is the exercise of trade in a direct or indirect form, as a sole trader or on behalf of a third party. That inhibition covers only the professional exercise of trade and not the occasional exercise, allowing the bankrupt to perform isolated or sporadic acts of trade. The bankrupt will be



A. M. PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE & ASSOCIADOS
Sociedade de Advogados

immediately subject to prohibition, which will only be lifted if the bankrupt proves that in the exercise of his business he acted with normal correctness and diligence.

But inhibition may also be applied by the Judge, after hearing the judicial administrator, to the managers, administrators or directors. In this case the exercise of trade will only be prevented if it is demonstrated in the bankruptcy proceedings that they contributed to the company's insolvency and therefore that they are unfit for such activity.

Juridical-penal effects.

Bankruptcy crimes result from the attribution of juridical-penal relevance to the offence to the creditors' property. Penal protection should only be triggered when the solutions of civil law are insufficient to prevent such unfulfilment, that is, when the debtor goes into a state where its assets are not sufficient to cover the liabilities, violating the duty to keep a sufficient volume of assets for complete satisfaction of its creditors.

A) Crime of fraudulent insolvency.

It is a crime applicable in the hypothesis where the debtor, with the intention to cause detriment to the creditors, performs facts like: a) destroying, damaging, rendering useless or making disappear part of its assets; b) diminishing fictitiously its assets, dissimulating things, invoking supposed debts, acknowledging fake credits, inciting third parties to present them, or simulating, by any other means, a wealth condition inferior to what it is in reality, in particular through means of inaccurate accountancy, false balance sheet, destruction or concealing of accounting documents, or failing to organise the accounts as required; c) creating or artificially aggravating losses or reducing profits; d) to retard bankruptcy, buying goods on credit, with the purpose of selling them or using them as payment for a price inferior to current price.

In the event the debtor is a legal entity, a company or a mere association of fact, whoever has exercised in fact the respective management or effective control and performed some of the said facts will be responsible. The existence of this crime also depends on the following alternative assumptions being satisfied: the practice of some of the facts listed in the precept and the debtor's bankruptcy; or the acknowledgement of the insolvency situation and the agent's intention to cause detriment to the creditors.

B) Crimes of negligent insolvency and favouring of creditors

The debtor can also be punished for the crime of negligent insolvency or for favouring creditors.

The crime of negligent insolvency exists when the debtor: through serious neglect or imprudence, prodigality or clearly exaggerated expenditure, ruinous speculations or serious negligence in the exercise of his activity, creates a state of insolvency; or when b) being aware of the economic and financial difficulties of his company, fails to apply for any recovery measure in time. If the debtor is a legal entity, a company or a mere



A. M. PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE & ASSOCIADOS
Sociedade de Advogados

association of fact, the person who has actually exercised its management or effective control and who practised any of the said facts will be responsible.

The debtor is responsible for the crime of favouring creditors where, being aware of his state of insolvency or anticipating it, practises facts like settling debts before due date or settling debts otherwise than through payment in cash or the usual means, or providing security for his debts without being so obliged) with the intention of favouring certain creditors in detriment of others.

Other effects and restrictions.

In addition to these restrictions, the bankrupt is also subject to a series of different prohibitions concerning the exercise of other types of duties and activities. For example, he may not be elected or designated as: member of an audit board or sole auditor of a limited liability company or limited partnership by shares; certified accountant, member of a complementary grouping of companies; judicial liquidator; commercial mandatary; agent; member of the board of directors or audit board of a credit institution or finance company; manager of companies and representation offices; member of the board of directors or audit board of limited liability companies or friendly societies; or hold qualified participations in a credit institution.

Effects with regard to property

Deprivation of power to dispose of and manage property.

As a consequence of a bankruptcy declaration, the bankrupt is immediately prevented from exercising, by himself or, in the case of a company or a legal entity, by the representation bodies, management rights and powers to dispose of currently existing or future property, which become the bankrupt's assets, entrusted to the judicial liquidator's administration and power of disposal. The main limitations respect to civil obligations and rights *in rem* held by the bankrupt.

Regarding obligations, no legal act or fact performed by the bankrupt and with efficacy on the bankrupt's estate can be a source of obligations. The bankrupt's property must be assigned for satisfaction of the creditors' claims, the bankrupt being forbidden to engage in any conduct which would put such goal at jeopardy.

With regard to rights in rem, the bankrupt is not deprived of title but only, as far as ownership is concerned, of the right of enjoyment, the right of transformation, the right of alienation. The right of restitution and compensation, the right of exclusion and defence may not be effective under the bankruptcy procedure as far as the bankrupt's assets are concerned, regarding which the bankrupt is deprived of his standing to sue or to be sued.

The bankrupt is deprived of the power to dispose of and administer all his assets, currently existing or future, which, after bankruptcy has been declared, form a separate



A.M. PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE & ASSOCIADOS
Sociedade de Advogados

property, assigned for satisfaction of the creditors' claims. Furthermore, in the scope of the bankruptcy procedure, the principle prevails that all property acquired by the bankrupt after the bankruptcy declaration go automatically into the bankrupt's estate, without any initiative being required on the part of the judicial liquidator.

Chapter 5.4. 'Excusability' following bankruptcy

The bankruptcy declaration determines the closure of the bankrupt's books and implies his inhibition to carry on business, including the possibility of holding any office in any corporate board of any business corporation, civil company, association or private foundation of economic activity, public company or cooperative, these consequences not being applicable where criminal proceedings have not been started and the judge recognises that the debtor or, in the case of a company or legal entity, the respective director, acted with correctness and normal diligence in the exercise of his activity.

In the case of a company or legal entity being declared bankrupt, the inhibition will be applied by the judge, after hearing the judicial liquidator, to the managers, administrators or directors.

Possibility to restart or continue economic activity

A) Judicial authorisation

The person who is subject to inhibition may, however, be authorised by the judge, on his request or on proposal of the judicial liquidator, to exercise the aforesaid activities, provided the authorisation is justified by the need to earn the indispensable means of sustenance and provided it does not adversely prejudice the liquidation of the bankrupt's estate.

B) Extraordinary agreement

It is possible to discontinue the bankruptcy proceedings and avoid a declaration of bankruptcy, through means of an extraordinary agreement established between the creditors whose claims have been verified, and the bankrupt.

At any phase of winding up, but after delivery of the sentence for verification of claims, the absolute majority of recognised creditors, representing at least two thirds of the value of the verified common claims, may apply, jointly with the bankrupt, his heirs or representatives, for judicial homologation of the extraordinary agreement, contained in an authentic or authenticated document signed between them.

If the agreement is definitively homologated, the bankruptcy procedure is declared ended. Thus, the debtor recovers, in the agreed terms, the right to freely dispose of his property and to freely manage his affairs. After homologation of the agreement, the creditors may only exercise against the debtor the rights they have not waived, but they



A. M. PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE & ASSOCIADOS
Sociedade de Advogados

keep the right to request the debtor's bankruptcy, upon satisfaction of the respective legal requisites or unfulfilment of the agreement.

C) Sale of the entirety of the establishment

With the purpose of saving the continuity of the company as a unit of economic production, the law provides, in the ambit of the sale of the bankrupt's estate, that in the event the bankrupt's assets include some establishment, as far as that part is concerned the sale will cover the whole establishment, unless a satisfactory proposal fails to be obtained or if a separate sale of the property composing the establishment is recognised as advantageous.

Chapter 5.5. Responsibility of the Company's management in case of bankruptcy of a limited liability company

The main purpose of the bankruptcy procedure - the protection of the claimant creditors - is reinforced by a particular responsibility regime: the responsibility of the managers, administrators or directors who have significantly contributed for the situation of insolvency (bankrupt's responsibility), on the one hand; and, on the other hand, the bankruptcy's custody of the civil responsibility of the promoters, managers, or directors, contemplated in the Companies Code (corporate responsibility).

Bankrupt's Responsibility.

In the event of bankruptcy of a company or a legal entity, the managers, administrators or directors, or simply the persons who have actually managed it and who have significantly contributed for the situation of insolvency through the actions performed over the last two years previous to the sentence, should be declared, if so requested by the Public Prosecutor or by any creditor) as jointly and unlimitedly responsible for the bankrupt's debts and, in consequence, sentenced to pay the respective liabilities.

Thus, the joint responsibility of these "officers" depends on the following cumulative requisites: a) the holding of office as manager, director or administrator (either in law or in fact) (subjective requisite); b) the practice of any acts, in the two years previous to the bankruptcy declaration, which have significantly contributed for insolvency (objective requisite); and c) a request by the Public Prosecutor or any creditor (procedural requisite).

Corporate responsibility.

The CPEREF expressly assigns juridical-bankruptcy relevance to the civil responsibility of promoters, managers, administrators or directors as contemplated in the Companies Code. Corporate law provides for several modalities of civil responsibility of promoters, managers, directors or administrators, according to the beneficiary: responsibility



A.M. PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE & ASSOCIADOS
Sociedade de Advogados

towards the company, responsibility towards creditors of the company, and responsibility towards the partners and third parties (article 79 of the Companies Code).

The CPEREF meant to cover the responsibility towards the creditors of the company, since this bankruptcy's custody of the company's responsibility was aimed at the protection of their credits. The responsibility towards the company seems to be equally covered, since, on the one hand, the legal reference to the promoters' responsibility makes sense only in the case of responsibility towards the company and, on the other hand, the compensation amount will be added to the bankrupt's assets and will therefore benefit the creditors.

Lastly, the responsibility towards the partners and third parties seems, in principle, to be excluded from the reach of referral to corporate law, as it does not benefit the claimant creditors, except in one hypothesis: in a irregular insolvency process, since the partners are bankrupt too and therefore the increase of assets also benefits the claimant creditors.

The amount of compensation should comply with the legal criterion, corresponding to the known liabilities of the company or legal entity at the date of bankruptcy declaration. It is a subsidiary responsibility, or limited to the amount of the damage caused by the referred persons, if considered inferior. Therefore, it is a limited responsibility.

Uncovered liabilities means the value that cannot be paid out of the company's assets. The real value of uncovered liabilities cannot in principle be assessed at the date of bankruptcy declaration, but only later, at the final phase of the procedure, after the assets have been sold out and the amount of liabilities has been established. On the other hand, it is possible to request at any time a condemnation for deposit of uncovered liabilities and, therefore, such sentence can be delivered at the date of bankruptcy declaration.

TITLE 6. PROSPECTS AND RECOMMENDATIONS

Notwithstanding the law having privileged the company recovery procedure in detriment of the bankruptcy procedure, the truth is that, in spite of the legal designation, the company recovery procedure is not very directed to a real recovery, in the sense of rehabilitation and revitalisation of the company. The main objective of the procedure - as well as the objective of its priority over the bankruptcy procedure - is the satisfaction of the creditors' interests.

In this way, production cells can be lost which might be very important and capable of generating significant wealth for the national economy. In addition, the interests of employees, and often the interests of entrepreneurs as well, end up being disregarded in benefit of the creditors' interests.



A.M. PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE & ASSOCIADOS
Sociedade de Advogados

It would be important to review this aspect of our legislation, so as to attribute to each company - and, consequently to all those who, to a greater or smaller degree, depend on the respective survival -, a fundamental role, especially taking into account their own interests.



A. M. PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE & ASSOCIADOS
Sociedade de Advogados

TITTLE 7. STATE OF KNOWLEDGE

1. CARVALHO FERNANDES, Luís e LABAREDA, João, *Código dos Processos Especiais de Recuperação da Empresa e Falência anotado*, 3ª edição, Quid Juris, Lisboa, 1999.
2. COUTINHO DE ABREU. J.M., “*Providências de Recuperação de Empresas e Falência*”, in Boletim da Faculdade de Direito, Vol. LXXIV, Coimbra, 1998, pps. 107-129.
3. LABAREDA, João, “*Providências de recuperação de empresa*”, in Revista Direito e Justiça, Volume IX, Tomo 2, UCP- editora, Lisboa, 1995, pps. 51-112.
4. OLIVEIRA ASCENÇÃO, José, “*Efeitos da Falência sobre Pessoas e Negócios do Falido*”, in Boletim da Faculdade de Direito da Universidade de Lisboa, Volume XXXVI, LEX, Lisboa, 1995, pps. 319-352.
5. TEIXEIRA DE SOUSA, Miguel, “*A verificação do Passivo no Processo de Falência*”, in Boletim da Faculdade de Direito da Universidade de Lisboa, Volume XXXVI, LEX, Lisboa, 1995, pps. 353-370.
6. LEBRE DE FREITAS, José, “*Apreensão, Restituição, Separação e Venda de Bens no Processo de Falência*”, in Boletim da Faculdade de Direito da Universidade de Lisboa, Volume XXXVI, LEX, Lisboa, 1995, pps. 371-382.
7. FERREIRA DE ALMEIDA, Carlos, “*O Âmbito de aplicação dos Processos de Recuperação da Empresa e de Falência: Pressupostos Objectivos e Subjectivos*”, in Boletim da Faculdade de Direito da Universidade de Lisboa, Volume XXXVI, LEX, Lisboa, 1995, pps. 383-400.
8. PALMA, Maria Fernanda, “*Aspectos Penais da Insolvência e da Falência: Reformulação dos Tipos Incriminativos e Reforma Penal*”, in Boletim da Faculdade de Direito da Universidade de Lisboa, Volume XXXVI, LEX, Lisboa, 1995, pps. 401-416.
9. ROMANO MARTINEZ, Pedro, “*Repercussões da Falência nas Relações Laborais*”, in Boletim da Faculdade de Direito da Universidade de Lisboa, Volume XXXVI, LEX, Lisboa, 1995, pps. 417-426.
10. ALMEIDA MORGADO, Abílio Manuel, “*Processos Especiais de Recuperação da Empresa e de Falência – Uma apreciação do novo regime*”, in Ciência e Técnica Fiscal – Boletim da Direcção Geral das Contribuições e Impostos, n.º 370, Abril-Junho, Lisboa, 1993, pps. 51-113.



A.M. PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE & ASSOCIADOS
Sociedade de Advogados

11. LABAREDA, João, “*Recuperação de Empresas e Falências*”, in Textos do Centro de Estudos Judiciários, n.º 347.72, Porto, 1994/1995, pps. 163-211.
12. MORAIS, Luís, “*O Novo Código dos Processos Especiais de Recuperação de Empresa e de Falência. O conceito de Falência Saneamento. Aspectos Comerciais e Processuais*” in, FISCO, n.ºs 55/56, ano V, Junho-Julho, 1993, pps. 20-35.