

1 Who may insolvency proceedings be brought against?

Prior note:

The legal basis of the information provided in this file is essentially the Insolvency and Business Recovery Code, approved by Decree-Law No 53/2004 of 18 March 2004 and revised most recently by Law No 8/2018 of 2 March 2018, which will be referred to hereinafter by its Portuguese abbreviation, CIRE.

CIRE may be consulted in Portuguese, in principle in its most up-to-date version, on the website of the Lisbon District General Prosecutor's Office:

<http://www.pgdlisboa.pt>

Given the European Commission's recommendation that this questionnaire be answered in detail, the highly specialised nature of the questions, and the requirement arising from Article 86 of Regulation 2015/848 for European Judicial Network Contact Points for civil and commercial matters to provide information on national law to assist professionals who deal with cross-border insolvency cases in other Member States, in many of the answers below I have opted to quote the legal provisions applicable to each situation. I have done so to avoid any inaccuracies in the technical information requested and as it seemed to me that replacing the content of these provisions with a different explanation would result in a longer text. In other cases I felt that it was sufficient to refer to the legal provisions, without quoting them, and to summarise the respective situation to which they apply.

All replies in this file contain information on the insolvency procedure referred to in Article 1(1) of CIRE.

In addition to the insolvency procedure itself, CIRE also provides for two special procedures: the special restructuring or 'revitalisation' procedure referred to in Article 1(2) of CIRE and the special procedure for payment agreement referred to in Article 1(3) of CIRE. Information on both these special procedures can be found in the reply to Question 2.

The information that is made public in insolvency proceedings (set out in Article 24 of Regulation 2015/848), in the special revitalisation procedure and the payment agreement procedure may be consulted on Citiús, the website for courts provided by the Ministry of Justice:

<https://www.citius.mj.pt/portal/consultas/ConsultasCire.aspx>

TYPES OF PROCEEDINGS

Article 1 of CIRE provides for three different types of proceedings which may be brought with respect to different categories of creditors:

Insolvency proceedings, which may apply to companies or natural persons;

The special revitalisation procedure, which applies only to companies (Articles 17-A to 17- J of CIRE);

The special payment agreement procedure, which may apply to any debtor other than a company (Articles 222-A to 222-J of CIRE).

Article 1 of CIRE reads as follows:

'Article 1

Purpose

1 - Insolvency proceedings consist of a universal enforcement process where the aim is to satisfy creditors in the manner set out in an insolvency plan based on the recovery of the company via the insolvency assets, or, when this is not possible, by liquidating the debtor's assets and distributing the proceeds among the creditors.

2 - When a company is in a difficult economic situation or threatened by imminent insolvency, it may ask the court to open a special revitalisation procedure, in accordance with Articles 17-A to 17-J.

3 - When a debtor of any other nature is in a difficult economic situation or threatened by imminent insolvency, the said debtor may ask the court to open the special payment agreement procedure as set out in Articles 222-A to 222-J.'

In particular, Article 2 of CIRE states that insolvency proceedings may be brought against:

Any natural or legal persons

Inheritance in abeyance

Associations having no legal personality and special commissions

Civil law companies

Commercial companies or civil law companies having a commercial form up to the date of final registration of the contract by which they are incorporated

Cooperatives, prior to the registration of their incorporation

Individual limited liability establishments

Any other autonomous estates.

Insolvency proceedings may not be brought against:

Public legal persons and corporate public entities

Insurance undertakings, credit institutions, financial corporations, investment firms providing services which entail holding funds or securities belonging to third parties and collective investment undertakings, as insolvency proceedings are incompatible with the special schemes provided for such entities.

2 What are the conditions for opening insolvency proceedings?

INSOLVENCY PROCEEDINGS

Conditions for opening insolvency proceedings provided for in Article 1(1) of CIRE:

Insolvency proceedings may be based on the recovery of the company or to liquidate assets and pay creditors.

Within the insolvency procedure, Articles 235 to 266 of CIRE also set out specific provisions for the insolvency of natural persons, including non-business people and small business owners, as well as for the insolvency of both spouses.

Instigating proceedings

It is possible to open insolvency proceedings when the conditions provided for in Article 3 of CIRE are met:

'Article 3

Insolvency

1 - A debtor is considered to be insolvent when he is unable to comply with his due obligations.

2 - Legal persons and autonomous estates for whose debts no natural person has personal and unlimited liability, either directly or indirectly, are also considered to be insolvent when the liabilities are manifestly greater than the assets, as evaluated in accordance with applicable accounting standards.

3 - The provisions of the preceding paragraph do not apply when the assets are greater than the liabilities, as evaluated in accordance with the following rules:

- a) among the assets and liabilities, account is taken of identifiable items, even when they do not appear on the balance sheet, at their fair value;
- b) when the debtor owns a company, evaluation is based on a perspective of continuity or liquidation, depending on which is more likely, but in any case, excluding the heading of commercial transfer;
- c) Debts only requiring payment through distributable funds or via assets remaining after the rights of other creditors of the debtor have been satisfied or safeguarded are not included in liabilities.

4 - Imminent insolvency will be considered equivalent to actual insolvency when a debtor declares insolvency.'

Active and passive legitimacy

Furthermore, Articles 18, 19 and 20 of CIRE, quoted below, define who may request and who must declare insolvency and under what circumstances:

'Article 18

Duty to declare insolvency

1 - A debtor must request declaration of his insolvency within 30 days after the date of becoming aware of such insolvency, as described in Article 3(1), or on the date when he should have been aware thereof.

2 - Natural persons who are not owners of a company on the date of insolvency are exempted from the duty to declare insolvency.

3 - When a debtor is the owner of a company, knowledge of the insolvency situation must be assumed when at least three months have passed since general non-compliance with obligations of any of the types set out in Article 20(1)(g).'

'Article 19

Who may request insolvency?

When a debtor is a not an able natural person, the respective corporate body will be responsible for declaring insolvency, or, when this is not the case, any of the directors.'

'Article 20

Other persons and entities who may request insolvency

1 - Declaration of insolvency of a debtor may be requested by the person legally responsible for the debts, by any creditor, even if conditional and whatever the nature of the claim, or by the Public Prosecutor's Office, representing the entities whose interests are legally entrusted to it, when any of the following occur:

- a) general suspension of payment of due obligations;
- b) non-compliance with one or more obligations which, due to the sum involved or the circumstances of the non-compliance, demonstrate the debtor's incapacity to promptly satisfy most of its obligations;
- c) abscondment of the owner of the company or the debtor's directors or desertion of the company's registered office or place of main business, related to the debtor's lack of creditworthiness and in the absence of the appointment of a substitute of good standing;
- d) dispersal, abandonment, hurried or destructive liquidation of assets and fictitious constitution of credits;
- e) insufficiency of seizable assets to pay the respective claim in enforcement proceedings brought against the debtor;
- f) non-compliance with obligations set out in an insolvency or payment plan, as provided for in Article 218(1)(a) and (2);
- g) general non-compliance, in the previous six months, with debts of any of the following types:
 - i) tax;
 - ii) social security contributions and dues;
 - iii) debts arising from an employment contract, or breach or termination of such contract;
 - iv) payments for any type of lease, including financial leases, payments of the purchase price or of a loan guaranteed by a mortgage, with respect to the place where the debtor carries out his activity or has his registered office or residence;
 - h) should the debtor be one of the entities referred to in Article 3(2), where it has greater liabilities than assets as shown on the last approved balance sheet, or is behind by more than nine months in the approval and filing of accounts, if legally required to do so.

2 - The provisions of the previous paragraph do not prejudice the possibility of representation of public entities in accordance with Article 13.'

Form and content of the request

The grounds that must be put forward and substantiated in making an insolvency request are set out in Articles 23 to 25 of CIRE:

'Article 23

Form and content of the application

1 - Filing for insolvency or requesting a declaration of insolvency is carried out by a written application setting out the facts behind the declaration requested and then formulating the corresponding request.

2 - In the application, the applicant must:

- a) if he is the actual debtor, state whether he is already insolvent or whether insolvency is merely imminent and, in the case of a natural person, whether he is claiming exemption for the remaining liabilities in accordance with the provisions of Chapter I of Title XII;
- b) identify the directors of the debtor who are legally appointed and effectively occupying that position and its five largest creditors, excluding the applicant himself;
- c) if the debtor is married, identify the respective spouse and state the marriage property regime;
- d) attach a certificate from the civil registry, the business registry or any other public register to which the debtor is subject.

3 - When it is not possible for the applicant to provide the information and attachments set out in the previous paragraph, it is requested that such information and attachments be provided by the debtor himself.'

'Article 24

Documents to be provided by the debtor

1 - Where the debtor is the applicant, the following documents must be provided with the application:

- a) an alphabetical list of all creditors stating their respective addresses, the amounts owed, the due dates and nature of those claims, guarantees that they benefit from and the possible existence of special relationships, in accordance with the provisions of Article 49;
- b) a list and identification of all actions and enforcement measures outstanding against the debtor;
- c) a document setting out the activity or activities in which the debtor has been engaged in the last three years and the establishments he owns, as well as the reasons which the debtor believes have caused the situation in which he finds himself;

- d) a document identifying the person whose estate is being administered, where an estate in abeyance is involved, the partners, associates or known members of the legal person, if applicable, and, in other situations where the insolvency does not relate to a natural person, those persons who are legally responsible for the insolvency claims;
- e) a list of assets which the debtor holds under arrangements for rental, hire or financial lease or sale subject to reservation of ownership, and all other assets and entitlements owned with an indication of their nature, place where they can be found, registration details, if applicable, acquisition value and estimate of their current value;
- f) where a debtor has organised accounts, the annual accounts relating to the last three financial years, as well as the respective management, supervision and audit reports, opinions from the supervisory body and legal certification documents, should they be obligatory or exist, and information on the most significant changes to property ownership after the reporting date of the most recent accounts and on operations which, due to their nature, object or size, go beyond the debtor's day-to-day activity;
- g) where a company is covered by consolidation of accounts, the consolidated management reports, consolidated annual accounts and other account reporting documents for the last three financial years, as well as the respective supervisory and audit reports, opinions from the supervisory body, legal certification documents and a report of intragroup operations conducted during the same period;
- h) reports and special accounts and quarterly and six-monthly information, on an individual and consolidated basis, reported at dates after the end of the last financial year which the company is required to provide in accordance with the Securities Code and Securities Market Commission Regulations;
- i) a list of staff in the service of the debtor.

2 - The debtor is further required to:

- a) provide a document confirming the powers of directors representing the debtor and a copy of the document setting out the decision to initiate the request by the respective corporate management body, if applicable;
- b) justify the non-submission or non-compliance with any of the documents required in paragraph 1.

3 - Without prejudice to later submissions, in accordance with the provisions of Articles 223 et seq., the request thus submitted by the debtor may be accompanied by an insolvency plan.'

'Article 25

Request by a different person or entity entitled to do so

1 - Where the request is not submitted by the debtor himself, the person or entity requesting the declaration of insolvency must justify in the application the origin, nature and amount of his claim, or his responsibility for the claims on the insolvency, depending on which is the case, and provide any information he may have on the debtor's assets and liabilities.

2 - The applicant must also provide all means of proof at his disposal, and is further required to present witnesses in accordance with the limits laid down in Article 511 of the Code of Civil Procedure.'

Start date for the procedure and time limits

The start date for the procedure and the time limits for filing opposition and/or handing down decisions, and the decision on the insolvency declaration, are essentially laid down in Articles 4, 27 to 30, 35 and 36 of CIRE:

'Article 4

Date of insolvency declaration and start of procedure

1 - Whenever accuracy may be an important factor, references made in this Code to the date of the declaration of insolvency are to be interpreted as the time when the respective judgement was handed down.

2 - All time limits in this Code which have the start of insolvency proceedings as their final end point also cover the period from this date to the declaration of insolvency.

3 - If insolvency is declared in proceedings which should have been suspended in accordance with Article 8(2), due to previously instigated proceedings against the same debtor being pending, the start date of the latter will be used for the purposes of the time limits referred to in the previous paragraph. The same applies should older proceedings be suspended owing to the application of Article 264(3)(b).'

'Article 27

Preliminary assessment

1 - On the day of distribution or, should this not be feasible, up to the third working day thereafter, the judge:

- a) issues a preliminary dismissal of the request for a declaration of insolvency where it is manifestly unfounded, or where unavoidable exceptions causing delays have clearly occurred, of which the judge should have knowledge of its own motion;
- b) grants the applicant a maximum of five days to correct the remediable defects in the application – failing which the application will be rejected – in particular where it lacks the legal requirements or is not accompanied by the necessary documents, in cases where such absence is not duly justified.

2 - In cases of requests for insolvency, preliminary dismissal decisions which are not based totally or partially on the absence of the documents required by Article 24(2)(a) will be published on the Citius website within the time provided for in Article 38(8), and will contain the information referred to in Article 37(8).'

'Article 28

Immediate declaration of a situation of insolvency

Where a debtor files for insolvency, he is deemed to have acknowledged his insolvency, which must be declared up to the third working day after the distribution of the initial application or, should there be correctable defects, after these have been corrected.'

'Article 29

Serving process on debtor

1 - Without prejudice to Article 31(3), if the request has not been filed by the debtor and there is no reason for preliminary dismissal, the judge will serve personal process on the debtor, within the time limit set out in the preceding article.

2 - When process is served, the debtor is informed of the penalties provided for in paragraph 5 of the following article and that the documents referred to in Article 24(1) must be ready to be sent immediately to the insolvency practitioner should insolvency be declared.'

'Article 30

Opposition by the debtor

1 - A debtor may file opposition within 10 days, in which case the provisions of Article 25(2) will apply.

2 - Without prejudice to the provisions of the following paragraph, when filing opposition, a debtor is required to provide, under penalty of non-acceptance of the said opposition, a list of his five largest creditors excluding the applicant, stating their respective domicile.

3 - Opposition by the debtor to the requested declaration of insolvency may be based on the absence of a fact on which the request is based or the non-existence of a situation of insolvency.

4 - It is the responsibility of the debtor to prove solvency, based on legally required accounting, if applicable, duly organised and correctly presented, without prejudice to the provisions of Article 3(3).

5 - Should the hearing of the debtor not be waived in accordance with Article 12 and the debtor does not file opposition, the facts alleged in the initial application are considered to be duly accepted, and insolvency is declared on the working day after the end of the period referred to in paragraph 1, should such facts satisfy any of the situations set out in the subparagraphs of Article 20(1).'

'Article 35

Discussion and judgement hearing

1 - Where a debtor has filed opposition, or where the hearing has not been waived, a discussion and judgement hearing is immediately scheduled for one of the five following days, and the applicant, the debtor and all legally appointed directors or such directors as identified in the initial application are notified to attend personally or be properly legally represented .

2 - Should the debtor or the appointed representative fail to attend, the facts alleged in the initial application are considered to be accepted, if the hearing of the debtor has not been waived in accordance with Article 12.

3 - Should the situation as described in the previous paragraph not occur, the non-attendance of the applicant or a representative is considered equivalent to the withdrawal of the request.

4 - The judge will immediately record, depending on the case, either a ruling declaring insolvency, should the facts alleged in the initial application fall under Article 20(1), or a ruling equivalent to withdrawal of the request.

5 - Where both parties are in attendance, or only the applicant or his representative, but the hearing of the debtor has been waived, the judge issues an order to identify the object of the dispute and list the aspects of evidence.

6 - The claims submitted are then decided, followed immediately by the production of evidence.

7 - Upon termination of the production of evidence, oral pleadings take place and the court then hands down a judgement.

8 - If the judgement cannot be handed down immediately, it is given within five days.'

'Article 36

Judgement declaring insolvency

1 - In the judgement declaring insolvency, the judge:

- a) states the date and time of the respective ruling, and the said ruling will be considered to have been provided at midday in the absence of such indication;
- b) identifies the insolvent debtor, stating his registered office or residence;
- c) states and determines the residence of the debtor's directors, legally appointed and effectively occupying such a position, as well as the debtor's residence when the said debtor is a natural person;
- d) appoints the insolvency practitioner, stating his professional address;
- e) rules that the insolvent estate will be administered by the debtor, when the requirements in Article 224(2) are met;
- f) rules that the debtor will immediately send to the insolvency practitioner the documents referred to Article 24(1) which are still missing from the file;
- g) requires the seizure, for immediate handover to the insolvency practitioner, of the debtor's accounting documents and all assets, even when seized, pledged or in any way attached or held and without prejudice to the provisions of Article 150(1);
- h) orders that items indicating that a criminal offence may have taken place be handed over to the Public Prosecutor for due effects;
- i) when in possession of information justifying the opening of a procedure to examine the culpability of the insolvency, declares the opening of such a procedure, of a full or limited nature, without prejudice to the provisions of Article 187;
- j) sets a time limit of up to 30 days to lodge claims;
- l) advises creditors that they are required to inform the insolvency practitioner promptly of any real guarantees they benefit from;
- m) advises the debtors of the insolvent party that the payments they are required to make will be made to the insolvency practitioner and not to the insolvent party;
- n) sets a date and time in the following 45 to 60 days to hold the creditors' meeting as set out in Article 156, referred to as a report appraisal meeting, or declares, on due grounds, to forego the said meeting.

2 - The provisions of the final part of paragraph 1(n) do not apply in cases where the submission of an insolvency plan is expected or where it is decided that administration of the insolvency is to be undertaken by the debtor.

3 - In cases where no date is set for holding the report appraisal meeting, in accordance with paragraph 1(n), and any interested party, within the time limit set for lodging claims, asks the court to call such a meeting, the judge will set a day and time for the meeting in the 45 to 60 days following the judgement declaring insolvency.

4 - In cases where no date is set for holding the report appraisal meeting, in accordance with paragraph 1(n), the time limits provided for in this Code calculated with reference to the holding of that meeting are calculated with reference to the 45th day after the date of the judgement declaring insolvency.

5 - A judge who has decided not to hold a report appraisal meeting must, at the time of the judgement, adapt the timetable of the proceedings to that fact, taking account of the specific case in question.'

Notification and publication of the judgement

Rules on notification and publication of the judgement declaring insolvency are laid down in Articles 37 and 38 of CIRE:

'Article 37

Notification of judgement and summons

1 - The debtor's directors whose residence has been determined are notified personally of the judgement in accordance with and in the manner provided for in procedural law on summons. Copies of the initial application are also sent to them.

2 - Without prejudice to any notifications which prove to be necessary under labour legislation, more specifically with respect to the Salary Guarantee Fund, the Public Prosecutor, the Social Security Institute, the applicant for the declaration of insolvency and the debtor are also notified of the judgement, under the terms provided for the summons, should the judgement not already have been delivered personally under the procedure to the debtor and, if the debtor is the owner of a company, to the workers' committee.

3 - The five largest known creditors, excluding the applicant, are notified in accordance with the provisions of paragraph 1 or by registered letter, depending on whether or not they have their habitual residence, registered office or domicile in Portugal.

4 - Known creditors who have their habitual residence, domicile or legal registered office in a Member State other than that in which proceedings were opened, including the tax authorities and social security bodies of those Member States, are notified immediately by registered letter, in accordance with Article 54 of Regulation (EU) No 2015/848 of the European Parliament and of the Council of 20 May 2015.

5 - When claims exist in the name of the State, public institutions that are not public companies or social security institutions, such entities are notified by registered letter.

6 - The provisions of the previous paragraphs do not preclude the possibility of notification and summons by electronic means, in accordance with a ministerial implementing order issued by the Ministry of Justice.

7 - Other creditors and other interested parties are notified by public notice, with a five-day grace period, displayed at the registered office or residence of the debtor, in the establishments of the debtor and at the court itself and in a notice published on the Citius website.

8 - The public notices referred to in the previous paragraph must indicate the case number, the grace period and the possibility of appeal or raising objections and contain the information set out in Article 36(a) to (e) and (i) to (n), noting that the time limit for appeal, objections and lodgement of claims only starts at the end of the grace period and the said grace period is calculated from the date of publication of the notice referred to in the previous paragraph.'

'Article 38

Publication and registration

[...]

2 - The declaration of insolvency and the appointment of an insolvency practitioner are automatically registered based on the respective certificate, sent for the purpose by the secretariat:

a) at the Civil Registry, if the debtor is a natural person;

b) at the Business Registry, if there are any facts relating to the insolvent debtor which are subject to such registration;

c) at the entity responsible for any other type of registration to which the debtor may be subject.

3 - Without prejudice to the provisions of Article 43(5) of the Building Registration Code, the declaration of insolvency is also recorded at the Building Registry with respect to assets which form part of the insolvent estate, based on a judicial certificate of the final judgement of the declaration of insolvency, if the registration service is unable to access the necessary information via electronic means, and also on a declaration issued by the insolvency practitioner who identified the assets.

4 - When the registration provided for in the previous paragraph is carried out provisionally, it is done so based on the information on the court's electronic page, in accordance with paragraph 6(b), and on the declaration of the insolvency practitioner who identified the assets.

5 - If any record exists of acquisition or recognition of entitlement of property or mere possession in favour of any person other than the insolvent party with respect to assets which form part of the insolvency estate, the insolvency practitioner must attach a certificate of such records to the case file.

6 - The secretariat:

a) automatically registers the declaration of insolvency and the appointment of the insolvency practitioner in the computerised register of enforcements established by the Civil Procedure Code;

b) records the inclusion of this information and the time limit granted for claims, on the court's electronic page;

c) notifies the Bank of Portugal of the declaration of insolvency so that it may make the necessary registration in its central credit risk database.

7 - The professional address of the insolvency practitioner will be noted on the registration of the appointment of the said practitioner.

8 - All publication and registration of the judgement will be carried out within five days.

9 - Publication and public registration of the decision to open foreign insolvency proceedings and, if applicable, of the decision appointing the insolvency practitioner, as referred to in Articles 28 and 29 of Regulation (EU) No 2015/848 of the European Parliament and of the Council of 20 May 2015, must be requested at the Portuguese court in the area where the establishment of the debtor is located, or, should this not be the case, at the Lisbon Commercial Court. The court may require a certified translation by a person who is competent for the purpose in accordance with the law of a European Union Member State.

10 - Without prejudice to the provisions of the previous paragraph, if the law of the State of the insolvency proceedings provides for registration arrangements unknown in Portuguese law, registration is determined based on that which presents greatest similarities.

11 - Without prejudice to the provisions of Article 9, the publication provided for by Article 29(1) of Regulation (EU) No 2015/848 of the European Parliament and of the Council of 20 May 2015, will be determined automatically by the competent registration departments if the debtor owns an establishment located in Portugal.'

Precautionary measures

The possibility of precautionary measures being ordered is provided for in Article 31 of CIRE:

'Article 31

Precautionary measures

1 - Should there be justified concern that maladministration may take place, the judge will automatically, or at the request of the applicant, order the precautionary measures deemed to be necessary or appropriate to stop the degradation of the debtor's estate, until judgement is handed down.

2 - Precautionary measures may consist of appointing a provisional legal administrator with exclusive powers to administer the debtor's estate, or to assist the debtor in such administration.

3 - The implementation of precautionary measures may take place prior to the notification of the debtor, should such early action be deemed indispensable so as to avoid jeopardising the useful effect. However, the said notification may in no case be sent more than 10 days after the time limit which would otherwise apply.'

SPECIAL REVITALISATION PROCEDURE

Conditions for opening the special revitalisation procedure provided for in Article 1(2) of CIRE:

The second procedure referred to above, provided for in Article 1(2) of CIRE, is the special revitalisation procedure (PER – *Processo Especial de Revitalização*), which may be requested by a company experiencing economic difficulties or in a situation of imminent insolvency.

Purpose and formalities of a special revitalisation procedure

The purpose of the special revitalisation procedure, the request to open it, the formalities associated with it and the concept of difficult economic situation are provided for in Articles 17-A, 17-B and 17-C of CIRE, respectively.

'Article 17-A

Purpose and nature of the special revitalisation procedure

1 - The special revitalisation procedure is intended to allow a company which is proven to be in a difficult economic situation or in imminent danger of insolvency, but which still may be recovered, to negotiate with its respective creditors so as to be able to conclude an agreement with them leading to the revitalisation of the company.

2 - The procedure referred to in the previous paragraph may be used by any company which, by a written and signed statement, attests to the fact that it satisfies the conditions necessary for revitalisation, and submits a further statement, signed no more than 30 days previously by a certified accountant or a statutory auditor, whenever the review of accounts is legally required, attesting that the company is not in a current situation of insolvency according to the criteria set out in Article 3.

3 - The special revitalisation procedure is urgent in nature and all the rules set out in this Code which are not incompatible with its nature shall apply.'

'Article 17-B

Concept of difficult economic situation

For the purposes of this Code, a company is in a difficult economic situation when it faces serious difficulty in promptly complying with its obligations owing to a lack of liquidity or if it is unable to obtain credit.'

'Article 17-C

Request and formalities

1 - The special revitalisation procedure begins at the request of the company and a creditor or creditors which, not being especially related to the company, have related non-lower-ranking claims of at least 10% pursuant to 3(b), via a written declaration to initiate negotiations leading to the revitalisation of the company through an approved recovery plan.

2 - The declaration referred to in the previous paragraph shall be signed and dated by all of the respective declarants.

3 - The company notifies the court competent to declare its insolvency in a petition setting out its request as referred to in paragraph 1, accompanied by the following:

a) the written declaration referred to above;

b) a copy of the documents listed in Article 24(1), which remain available at the secretariat for consultation by creditors throughout the entire procedure;

c) a proposed recovery plan accompanied by, as a minimum, a description of the company's asset, financial and credit situation.

4 - Once the request referred to in the previous paragraph has been received, the judge immediately appoints, through an official order, a provisional judicial administrator, with the provisions of Articles 32 to 34 applying mutatis mutandis.

5 - The company is immediately notified of the official order referred to in the previous paragraph, with the provisions of Articles 37 to 38 applying mutatis mutandis.

6 - At the reasoned request of the company and the creditor or creditors which, satisfying the provisions of paragraph 1, hold, at least, claims in the value of 5% of reported claims, or following a reasoned request from the company, the judge may reduce the limit of 10% referred to in paragraph 1, taking into consideration the total amount of reported claims and the composition of all of the creditors when evaluating the request.

7 - Automatically, or at the request of the provisional judicial administrator, special revitalisation procedures brought by commercial enterprises with which the company is in a controlling or group relationship pursuant to the Commercial Companies Code are attached to the case files. Such a request may also be made by any of the companies in those circumstances which have instigated a special revitalisation procedure.

8 - The attachment referred to in the previous paragraph may only be requested up to the start of the time limit for negotiations as set out in Article 17-D(5) in the procedure to which all other documents must be attached, with the provisions of Article 86(4) applying mutatis mutandis.'

Furthermore, Articles 17-D to 17-I of CIRE, relating to special revitalisation procedures, provide for:

the subsequent procedural stages (e.g. invitation to all creditors who have not signed the declaration giving rise to the proceedings to participate in negotiations with a view to revitalisation);

the effects (e.g. the procedure impedes the opening of any other actions for recovery of debts against the debtor);

the conclusion of negotiations with approval of the recovery plan leading to revitalisation or with no approval of the plan;

the guarantees agreed between the debtor and the creditors;

the approval of out-of-court agreements for the recovery of the debtor.

SPECIAL PAYMENT AGREEMENT PROCEDURE

Conditions for opening a special payment agreement procedure provided for in Article 1(3) of CIRE:

The third procedure mentioned in Article 1(3) of CIRE is the special payment agreement procedure provided for in Articles 222-A to 222-J of CIRE.

The special payment agreement procedure is urgent in nature and may be used with respect to any debtor which is not a company and is confirmed to be experiencing a difficult economic situation or is in danger of imminent insolvency.

Pursuant to Article 222-B of CIRE, a debtor is in a difficult economic situation when he faces serious difficulty in promptly complying with his obligations owing to a lack of liquidity or inability to obtain credit.

This special procedure starts:

with a written statement from the debtor and from one or more of the creditors, in which they request their wish to initiate negotiations leading to the drawing-up of a payment agreement,

or

through submission of an out-of-court agreement, signed by the debtor and by creditors representing at least the majority of votes.

The abovementioned statement or agreement, accompanied by a list of the creditors and a list of all pending debt recovery actions, are submitted to the court. Once the statement or agreement has been received, the court appoints the provisional judicial administrator.

Immediately after being notified of the official order appointing the provisional judicial administrator, the debtor must send a registered letter to all of the creditors which have not signed the initial statement or agreement, inviting them to participate. In cases where the debtor has submitted an out-of-court payment agreement, the secretariat notifies the creditors which have not participated in such an agreement and which appear on the list of claims reported by the debtor.

After the publication of the official order appointing the provisional judicial administrator on the Citius website, any creditor then has 20 days to lodge claims with the said judicial administrator.

Then, the provisional judicial administrator draws up a list of claims and submits it to the court secretariat. The list is also published on the Citius website. The list may be challenged within five working days.

The effects on other procedures are as follows:

With the opening of the special payment agreement procedure and the subsequent appointment of the provisional judicial administrator, no other action for debt recovery may be brought against the debtor.

Suspension of the provision of essential public services is prevented.

Any insolvency proceedings in which the debtor's insolvency has previously been sought are suspended, provided that a judgement declaring insolvency has not been made in such proceedings (cancelled immediately after approval of the payment agreement).

Pending recovery actions are suspended (cancelled immediately after approval of the payment agreement, except when the said agreement provides for their continuation).

Time limits for periods of limitation or peremptory time limits which are challengeable by the debtor are suspended.

After proceedings have started, the debtor is prohibited from undertaking actions of special relevance without the prior authorisation of the judicial administrator.

The negotiations between the debtor and the creditors are governed by the terms agreed among all those involved or, in the absence of agreement, by the rules defined by the provisional judicial administrator.

When negotiations are concluded with the unanimous approval of the payment agreement, involving all the creditors, the said agreement must be signed by everyone, and immediately attached to the file, for approval or refusal by the judge.

Should negotiations conclude with approval of the payment agreement but without the involvement of all of the creditors, the said agreement is sent to the court for approval or refusal by the judge and is published on the Citius website. Interested parties then have 10 days from the date of publication to request the non-approval of the plan.

A payment agreement is considered approved when:

it is voted for by creditors whose claims represent at least one third of all claims relating to voting rights, set out in the claims list, and it obtains the favourable vote of more than two thirds of all votes cast and more than half of votes cast corresponds to non-lower-ranking claims, whereby abstentions are not taken into consideration,

or

it obtains the favourable vote of creditors whose claims represent more than half of all claims relating to voting rights, and more than half of these votes correspond to non-lower-ranking claims, where abstentions are not taken into consideration.

Should the debtor or the majority of creditors conclude that it is not possible to reach an agreement, or should the time limit of two months to conclude the negotiations be exceeded, the negotiation process is terminated. In the absence of an agreement, the closure of the procedure gives rise to the cancellation of all its effects for the debtor, should the said debtor still not be in a situation of insolvency. Otherwise, the closure of the procedure shall give rise to the insolvency of the debtor.

The guarantees agreed with the debtor during the special payment agreement procedure, to provide the said debtor with the financial means to continue his activity, are maintained even when, at the closure of the procedure, the insolvency of the debtor is declared, within a time limit of two years. Moreover, creditors which have financed the activity of the debtor during the procedure with a view to compliance with the payment agreement, enjoy a general property credit privilege, conferred before the general property credit privilege granted to workers.

3 Which assets form part of the insolvency estate? How are the assets treated which are acquired by or which devolve on the debtor after the opening of the insolvency proceedings?

Article 46 of CIRE sets out which assets are covered by the insolvent estate:

'Article 46

Concept of insolvent estate

1 - The insolvent estate is intended to satisfy the creditors' claims on the insolvency, after their own debts have been paid, and, except as otherwise provided for, covers all the debtor's property at the date of the declaration of insolvency, as well as the assets and entitlements acquired by the debtor in the course of proceedings.

2 - Assets which are exempt from seizure are only included in the insolvent estate if the debtor voluntarily submits them and their non-seizability is not absolute.

In this regard, Article 736 of the Portuguese Civil Procedure Code states that in addition to goods exempt from seizure by special provision, the following are absolutely unseizable: inalienable items and entitlements; assets in the public ownership of the State and of other public legal persons; objects whose seizure would be offensive to good customs or which would require economic justification due to their reduced commercial value; objects especially intended for public worship; tombs; instruments and objects which are indispensable for the disabled and the treatment of patients.

4 What powers do the debtor and the insolvency practitioner have, respectively?

These powers are provided for in Articles 223 and 224 of CIRE:

Administration by the debtor

'Article 223

Limitation to companies

The provisions herein apply only to cases where the insolvent estate refers to a company.'

'Article 224

Preconditions for administration by the debtor

1 - In the judgement declaring insolvency, the judge may decide that the insolvent estate be administered by the debtor.

2 - The following preconditions apply to the decision referred to in the previous paragraph:

- a) the debtor has requested such administration;*
- b) the debtor has already submitted, or has pledged to submit within 30 days after the judgement declaring insolvency, an insolvency plan providing for the continuity of operations by the company;*
- c) there is no reason for concern with respect to delays in dealing with the case or other disadvantages for creditors;*
- d) the insolvency applicant gives his agreement, when the said applicant is not the debtor.*

3 - Administration is also entrusted to the debtor should the debtor have so requested and the creditors at the report appraisal meeting or at the meeting which precedes it so decide, regardless of whether the preconditions set out in 2(c) and (d) exist, and the time limit provided for in 2(b) is calculated as of the date of decision by the creditors.'

Appointment and status of the practitioner

The powers of the insolvency practitioner and the qualifications required are provided for in Articles 52, 53 and 55 of CIRE:

'Article 52

Appointment by the judge and status

1 - The judge is competent for appointing the insolvency practitioner.

2 - The provisions of Article 32(1) apply to the appointment of the insolvency practitioner, but the judge may take into account information provided by the debtor or the creditors' commission, if any, or by the creditors. This also applies should the insolvent estate involve a company with establishment or establishments in activity or when the insolvency proceedings are particularly complex, and preference is given, in the first designation, to the provisional judicial administrator carrying out duties at the date of declaration of insolvency.

3 - The recruitment process for the official lists as well as the status of insolvency practitioner are set out in a specific law, without prejudice to the provisions of this Code.

4 - Should the insolvency proceedings be particularly complex, or if special knowledge is required of the insolvency practitioner, the judge may, automatically or at the request of any interested party, appoint more than one insolvency practitioner. When such a request is made, it is the responsibility of the applicant to provide a duly reasoned proposal regarding the insolvency practitioner to be appointed, as well as to remunerate the insolvency practitioner so proposed, should such insolvency practitioner be appointed and the insolvent estate is not sufficient to provide for such remuneration.

5 - In the event of disagreement between the insolvency practitioner appointed by the judge under paragraph 1 and the insolvency practitioners appointed at the request of any interested party, should an impasse exist, then the opinion of the judge-appointed insolvency practitioner will prevail.

6 - When the debtor is a commercial company that, pursuant to the Commercial Companies Code, is in a controlling or group relationship with other companies with respect to which insolvency proceedings have been proposed, the judge, automatically or at the request of the debtor or creditors, may appoint a single insolvency practitioner for all the companies. In such a case, the judge is also required to appoint, in general terms, a further insolvency practitioner with duties restricted to the appraisal of claims lodged among debtors in the same group, immediately after the existence of such claims has been confirmed by the first insolvency practitioner.

'Article 53

Choice of a different practitioner by creditors

1 - Under the condition that prior to voting, the document confirming acceptance of the proposal is attached to the case files, the creditors at the creditors' meeting, may, after the appointment of an insolvency practitioner, elect a different person for the position, whether or not registered on the official list, and decide on his remuneration through approval reached by a majority of the voters and votes issued. Abstentions are not considered.

2 - The election of a person not registered on the official list may only take place in cases justified due to the size of the company in the insolvent estate, the specific nature of the company's field of activity or the complexity of the case.

3 - The judge may only refuse to appoint the person elected by the creditors as the insolvency practitioner, as a replacement for the current practitioner, if the said judge considers that such person does not have the good standing or capability to exercise the position, that the remuneration approved by the creditors is manifestly excessive or, when the person concerned is not registered on the official list, that none of the situations set out in the previous paragraph exist.'

'Article 55

Duties and performance of duties

1 - In addition to other tasks so conferred, it is the insolvency practitioner's responsibility, with the cooperation of and under the supervision of the creditors' commission, if any, to:

a) prepare the payment of the insolvent party's debts using the money available in the insolvent estate, more specifically, via sums obtained through the disposal, which the insolvency practitioner is responsible for executing, of the assets in the said estate;

b) in the meantime, ensure the conservation and enjoyment of the insolvent party's entitlements and the continuation of company operations, should this be the case, avoiding the worsening of its economic situation as far as possible.

2 - Without prejudice to cases of obligatory use of legal representation or the need for the prior agreement of the creditors' commission, the insolvency practitioner personally carries out the duties of the position. The insolvency practitioner may delegate, in writing, specific actions to a different insolvency practitioner with up-to-date registration on the official lists.

3 - The insolvency practitioner, in the performance of his duties, may be assisted under his own responsibility by specialist or other auxiliary staff, paid or unpaid, including the debtor himself, further to prior agreement by the creditors' commission or the judge, where such a commission does not exist.

4 - The insolvency practitioner may hire, for a determined or undetermined duration, the workers necessary for the liquidation of the insolvency estate or the continuation of the company's operations. However, new contracts will expire upon the final closure of the establishment where the workers provide such service, or, except if otherwise agreed, at the time of transfer.

5 - The insolvency practitioner is also responsible for providing the creditors' commission and the court in good time with all of the information necessary on the administration and liquidation of the insolvent estate.

6 - At the request of the insolvency practitioner and whenever the insolvency practitioner does not have direct access to the information required, the judge orders any public entities and credit institutions to provide, based on their respective records, the information considered necessary or useful for the purposes of the proceedings, more specifically with regard to assets forming part of the insolvent estate.

7 - The remuneration of the insolvency practitioner referred to in the final part of paragraph 2 is the responsibility of the insolvency practitioner who has delegated such work, and it is this latter insolvency practitioner who is responsible for actions undertaken by the delegated practitioner under the delegation of powers referred to in the same paragraph.

8 - The insolvency practitioner has the power, subject to agreement by the creditors' commission, to desist, transact or make admissions in any judicial case in which the insolvent party or the insolvent estate is a party.'

Judicial supervision

The judge supervises the activity of the insolvency practitioner in accordance with Article 58 of CIRE:

'Article 58

Supervision by the judge

The insolvency practitioner performs duties under the supervision of the judge, who may, at any time, require information on any matter or the presentation of a report on the activities carried out and the status of the administration and liquidation.'

The creditors' commission also has powers to supervise the activity of the insolvency practitioner in accordance with Article 68 of CIRE.

Remuneration of the insolvency practitioner

The remuneration of the insolvency practitioner is determined in accordance with Article 60 of CIRE:

'Article 60

Remuneration

1 - The insolvency practitioner appointed by the judge is entitled to the remuneration provided for in his terms and conditions and to the reimbursement of expenses which he has reasonably deemed useful or indispensable.

2 - When the insolvency practitioner is elected by the creditors' meeting, his remuneration is as provided for in the respective decision.

3 - An insolvency practitioner who has not previously agreed to the remuneration set by the creditors' meeting for drawing up the insolvency plan, managing the company after the report appraisal meeting or supervising the approved insolvency plan, may withdraw from the position provided that he does so at the respective meeting where the decision is made.'

5 Under which conditions may set-offs be invoked?

Claims on the insolvent estate may be set off against debts to the said insolvent estate, should the requirements of Article 99 of CIRE be met:

'Article 99

Set-offs

1 - Without prejudice to other provisions laid down in this Code, after the declaration of insolvency, insolvency claimants may set off their claims against debts to the estate provided that at least one of the following requirements is met:

- a) the legal preconditions for the set-off were satisfied before the date of the declaration of insolvency;
- b) having a claim on the insolvency satisfied the requirements set out in Article 847 of the Civil Procedure Code before the counter-claim of the estate.

2 - For the purposes of subparagraphs a) and b) above, the following do not apply:

- a) the loss of the time limit benefit provided for in Article 780(1) of the Civil Procedure Code;
- b) the early maturity and conversion into cash resulting from the provisions of Article 91(1) and Article 96.

3 – Set-offs are not prejudiced by the fact that the obligations have different currencies or calculation units as their object, if their reciprocal conversion is free in the place of the payment of the counter-claim, and the conversion is made at the exchange rate in force on the date on which the set-off produces its effects.

4 – Set-offs are not allowed:

- a) if the debt to the estate was constituted after the date of the declaration of insolvency, more specifically as a consequence of the rescission of acts to benefit the insolvent estate;
- b) if the insolvency creditor acquired the claim from another person, after the date of the declaration of insolvency;
- c) using debts of the insolvent party for which the estate is not responsible;
- d) between debts to the estate and subordinated claims on the insolvency.'

In addition to the general rule of Article 99 of CIRE, other legal provisions exist which provide for the possibility of set-offs: Articles 102(3)(e), 154(1), 242(3) and 286 of CIRE

6 What effect do insolvency proceedings have on current contracts the debtor is a party to?

The effects of insolvency on current contracts to which the debtor is party depend on the nature of the contract and are set out in particular in Articles 102 to 119 of CIRE:

'Article 102

General principle with respect to ongoing business

1 - Without prejudice to the provisions of the following articles, in any bilateral contract in which, at the date of declaration of insolvency, full compliance has still not taken place either by the insolvent party or the other party, such compliance will be suspended until the insolvency practitioner decides to execute the contract or to refuse compliance.

2 - The other party may, however, set a reasonable time for the insolvency practitioner to exercise such an option, after which compliance is considered to have been refused.

3 - Once compliance has been refused by the insolvency practitioner, and without prejudice to the separation of cases, if applicable:

- a) neither of the parties has the right to restitution of that which has been provided;
- b) the insolvent estate has the right to demand the value of the consideration corresponding to the payment already made by the debtor, when it has not yet been provided by the other party;
- c) the other party has the right to, as an insolvency claim, the value of the payment by the debtor of the part not complied with, less the value of the corresponding consideration which has not as yet been provided;
- d) the right to compensation for loss caused to the other party by the non-compliance:
 - i) only exists up to the value of any obligation imposed pursuant to subparagraph b);
 - ii) is deducted from the amount to which the other party is entitled, through application of subparagraph c);
 - iii) constitutes an insolvency claim;
- e) either party may declare the set-off of the obligations referred to in subparagraphs c) and d) against that referred to in subparagraph b), up to the amount of the respective sums.

4 - The option for execution is abusive if timely compliance with contractual obligations by the insolvent estate is manifestly unlikely.'

'Article 103

Indivisible services

1 - If the contract requires the other party to provide a service which by nature is not fungible, or which is divisible on delivery into different items which are not easily substituted, involving a functional connection, and the insolvency practitioner refuses compliance:

- a) the entitlement referred to in 3(b) of the previous article is replaced by the right to demand of the other party the restitution of that which has been provided, to reflect the respective enrichment at the date of the declaration of insolvency;
- b) the aim of the entitlement provided for in 3(c) of the previous article is the difference, if favourable to the other party, between the values of all the contractual services;

c) the other party is entitled, as an insolvency claimant, to the reimbursement of the costs or the restitution of the value of the part of the service made prior to the declaration of insolvency, depending on whether such service is fungible or not.

2 - The other party is entitled, however, to complete its service and demand, as an insolvency claim, the part of the consideration owed, in which case the provisions of paragraph 1 and the previous article no longer apply.

3 - If the insolvency practitioner does not refuse compliance, the right of the other party to consideration only constitutes a claim on the estate in the part which exceeds the value of that which would have been calculated by applying the provisions of 1(c), should the insolvency practitioner have opted to refuse compliance.

4 - When provision of a service is of the type referred to in paragraph 1 imposed by the contract on the insolvent party, and the insolvency practitioner refuses such compliance:

- a) the right referred to in 3(b) of the previous article no longer applies or is replaced by the right to restitution of the value of the part of the payment already made before the declaration of insolvency, depending on whether such service is fungible or not;
- b) the provisions of 1(b) apply when the other party is also entitled to reimbursement of that which has already been provided, as well as an insolvency claim.

5 - When provision of a service is of the type referred to in paragraph 1 imposed by the contract on the insolvent party and the insolvency practitioner does not refuse such compliance, the entitlement of the other party to consideration owed, fully constitutes a claim on the estate.

6 - If the infungible service is broken down into autonomous parcels and payment of one or some of such parcels has already been made, the provisions of the previous paragraphs only apply to the remaining parcels, with the consideration being divided appropriately among them.'

'Article 104

Sale with retention of title and similar operations

1 - In a purchase and sale contract with retention of title where the vendor is the insolvent party, the other party may demand compliance with the contract if the item has already been delivered at the date of the declaration of insolvency.

2 - In the event of the insolvency of the lessor, the provisions of the previous paragraph apply to the financial leasing contract and to the leasing contract with a clause stating that the leased item will become the property of the lessee after all of the agreed payments have been made.

3 - When the purchaser or the lessee is the insolvent party, and the item is in the possession of the said purchaser or lessee, the time limit set by the insolvency practitioner pursuant to Article 102(2), may not lapse before five days have passed since the date of the report appraisal meeting, except if the asset in question could reduce significantly in value during such a period and the other party expressly warns the insolvency practitioner of this fact.

4 - The retention of title clause in contracts to dispose of a specific item in which the purchaser is the insolvent party may only be challenged by the estate when it has been stipulated in writing, up to the point of delivery of the item.

5 - The effects of refusal of compliance by the insolvency practitioner, when admissible, are set out in Article 102(3). It is understood that the object of the right laid down in the respective subparagraph (c) is the payment, as an insolvency claim, of the difference, when positive, between the sum of the payments or rents scheduled until the end of the contract, updated to the date of declaration of insolvency by applying the provisions of Article 91(2), and the value of the item at the date of refusal, if the other party is the vendor or the lessor, or of the difference, when positive, between this latter value and that sum, if the said other party is the purchaser or the lessee.'

'Article 105

Sale without delivery

1 - Without prejudice to the provisions of Article 107, if the vendor's obligation to deliver has not yet been fulfilled, but the property has already been transferred:

a) the insolvency practitioner may not refuse compliance with the contract, in the event of the insolvency of the vendor;

b) refusal to comply by the insolvency practitioner, in the event of the insolvency of the purchaser, has the effects set out in Article 104(5), applicable mutatis mutandis.

2 - The provisions of the previous paragraph also apply, mutatis mutandis, to contracts transferring other real usage rights.'

'Article 106

Promissory agreement

1 - In the event of the insolvency of the promissory vendor, the insolvency practitioner may not refuse compliance with the promissory contract with real effectiveness if the item has already been handed over to the promissory-purchaser.

2 - In the event of refusal to comply with the promissory sale and purchase contract by the insolvency practitioner, the provisions of Article 104(5) will apply mutatis mutandis, whether the insolvency concerns the promissory-purchaser or the promissory-vendor.'

'Article 107

Operations with a specific delivery date

1 - If the delivery of goods, or the execution of financial services which have a market price, has to be carried out on a specific date or within a certain time limit, and the date or time limit falls after the insolvency has been declared, execution may not be demanded by either party. The purchaser or vendor, depending on the case, will only be entitled to the payment of the difference between the adjusted price and the market price of the goods or financial service on the second day after the date on which insolvency is declared, with respect to contracts with the same date or deadline for compliance, which, as it is demandable of the insolvent party, constitutes a claim on the insolvency.

2 - In either case, the vendor will return the sums already paid, and may compensate such obligation with the claim conferred on it by the previous paragraph, up to the amount of the respective sums. When the vendor is the insolvent party, the right to return constitutes a claim for the other party on the insolvency.

3 - For the purposes of the previous paragraph, financial services are considered to be:

a) the delivery of securities, except if shares representing at least 10% of the company's capital are involved, and the settlement provided for in the contract is not merely financial in nature;

b) the delivery of precious metals;

c) payments in cash which are directly or indirectly determined by the exchange rate of a foreign currency, by the statutory interest rate, by a calculation unit or by the price of other goods or services;

d) options or other entitlements to the sale or delivery of the goods referred to in a) and b) or to the payments referred to in c).

4 - When different transactions concerning financial services are integrated in a framework contract which may only be terminated as a single unit in the event of noncompliance, the set of transactions is considered as a bilateral contract for the purposes of this article and Article 102.

5 - Operations with a specific delivery date not covered by paragraph 1 are subject to the provisions of Article 104(5), mutatis mutandi.'

'Article 108

Leasing where the lessee is the insolvent party

1 - The declaration of insolvency does not suspend a leasing contract where the insolvent party is the lessee, but the insolvency practitioner may always cancel such a contract giving 60 days' notice, if shorter notice is not sufficient under the law or the contract.

2 - An exception from the previous paragraph is where the lease relates to the place of residence of the insolvent party, in which case the insolvency practitioner may only declare that the entitlement to payment of rent accrued after 60 days have passed since such a declaration will not be enforceable in the insolvency proceedings. In this case, the lessor will be entitled to make a claim in the insolvency for compensation for damages suffered in the event of eviction due to non-payment of one or more of the abovementioned lease payments, up to the sum of the payments corresponding to one quarter.

3 - Cancellation of a contract by the insolvency practitioner as provided for in paragraph 1 requires the payment, as an insolvency claim, of the amounts due corresponding to the intervening period between the date of production of effects and the end of the time limit stipulated in the contract, or the date on which cancellation would otherwise have been possible by the insolvent party, less the costs involved in the provision of the service by the lessor during this period, as well as the earnings obtained through an alternative application of the leased property, provided that they are attributable to the early ending of the contract, with an updating of all amounts pursuant to Article 91(2) to the date of production of effects of the cancellation.

4 - The lessor may not demand the cancellation of the contract after the declaration of insolvency of the lessee based on either of the following grounds:

a) non-payment of the lease or hire payments relating to the period prior to the date of declaration of insolvency;

b) deterioration of the financial situation of the lessee.

5 - When the item so leased has not yet been handed over to the lessee at the date of the declaration of insolvency of the said lessee, both the insolvency practitioner and the lessor may cancel the contract, and either may set a different, reasonable time limit for the purpose, after which time the right to cancel lapses.'

'Article 109

Leasing where the lessor is the insolvent party

1 - The declaration of insolvency does not suspend the execution of the leasing contract where the insolvent party is the lessor, and the cancellation of the contract by either party is only possible at the end of the time limit under way, without prejudice to cases of compulsory renewal.

2 - However, should the item not have been handed over to the lessee at the date of the declaration of insolvency, the provisions of Article 108(5) apply mutatis mutandi.

3 - The disposal of the item so leased in the insolvency proceedings does not deprive the lessor of the rights recognised by civil law in such circumstances.’
‘Article 110

Representation and management contracts

1 - Representation contracts, including commission contracts, which fall within the insolvency estate, expire at the declaration of insolvency of the principal, even if the representation has also been conferred in the interest of the representative or third party. The representative will not be entitled to any compensation for damages suffered.

2 - However, a representation contract will be considered to continue:

a) should it be necessary for the representative to carry out actions to avoid foreseeable damage to the insolvent estate, until the insolvency practitioner takes due steps;

b) for the period during which the representative has carried out duties unaware, at no fault of theirs, that a declaration of insolvency has been issued for the principal.

3 - In the event of 2(a), remuneration and reimbursement of expenses for the representative constitute a debt for the insolvent estate, and in the event of 2 (b), an insolvency debt.

4 - The provisions of the previous paragraphs apply, mutatis mutandis, to any other contracts through which the insolvent party has entrusted the management of asset matters to a third party, with a minimum of autonomy, more specifically portfolio and asset management contracts.’

‘Article 111

Long-term service contract

1 - Contracts which require the provision of a long-term service in the interest of the insolvent party, and which do not expire through effects of the provisions of Article 110, are not suspended at the declaration of insolvency, and may be cancelled by either party pursuant to Article 108(1), applicable mutatis mutandis.

2 - Early cancellation of the contract only requires the payment of compensation for damages caused when such cancellation is carried out by the insolvency practitioner, and in such a case compensation is calculated, mutatis mutandis, pursuant to Article 108(3), and constitutes an insolvency claim for the other party.’

‘Article 112

Proxies

1 - Except in the cases covered by Article 110(2)(a), proxies relating to the assets of the insolvent estate expire at the declaration of insolvency of the represented party, even if they were also granted in the interest of the person acting as proxy or a third party.

2 - With regard to actions undertaken by the person acting as proxy after the proxy has expired, the provisions of Article 81(6) and (7) apply, mutatis mutandis .

3 - A person acting as proxy who is unaware of the declaration of insolvency of the represented party, at no fault of theirs, is not responsible with respect to third parties for the ineffectiveness of the act due to the withdrawal of powers of representation.’

‘Article 113

Insolvency of workers

1 - The declaration of insolvency of workers does not suspend the labour contract.

2 - The payment of compensation for losses arising from a possible breach of contractual obligations may be claimed from the insolvent party.’

‘Article 114

Provision of service by the debtor

1 - The provisions of Article 113 apply to contracts through which the insolvent party, as a natural person, is required to provide a service, except if such service forms part of the activity of the company which the said natural person owns and is not fungible in nature.

2 - Without prejudice to the provisions of the previous paragraph, the provisions of Article 111 will apply, mutatis mutandis, to contracts which have as their object the longterm provision of a service by the debtor. However, the duty to provide compensation only exists if cancellation is made by the other party.’

‘Article 115

Assignment and pledge of future claims

1 - Where the debtor is a natural person and has granted or given in pledge, prior to the declaration of insolvency, future claims arising from a labour or provision of services contract, or entitlement to other future payments such as unemployment benefits and retirement pensions, the effectiveness of the act will be limited to earnings relating to the period prior to the date of declaration of insolvency, the remainder of the current month on that date and the following 24 months.

2 - The effectiveness of the assignment made or pledge constituted by the debtor prior to the declaration of insolvency which has as its object rental or hire payments under a leasing contract which the insolvency practitioner may not cancel or terminate pursuant to Article 104(2) and Article 109(1), respectively, will be limited, whether the debtor is a natural person or not, to payments relating to the period prior to the declaration of insolvency, the remainder of the current month on that date and the following month.

3 - A debtor with the claims referred to in the previous paragraphs may set them off with debts to the estate, without prejudice to the provisions of Article 99(1) (b) and Article 99(4)(b) to (d).’

‘Article 116

Current accounts

The declaration of insolvency will require the termination of current account contracts to which the insolvent party is signatory, and the closure of the respective accounts.’

‘Article 117

Partnership associations

1 - Partnership associations are cancelled through the insolvency of the associate contracting party.

2 - The associate contracting party is required to hand over to the insolvent estate of the associate, his part, not yet settled, in losses in which he is required to participate, conserving, however, the right to claim as a credit under the insolvency, the payments made and which may not be included in his participation in the losses.’

'Article 118

Complementary grouping of companies and European economic interest groupings

1 - Without prejudice to provisions otherwise set out in a contract, a complementary grouping of companies and European economic interest groupings are not dissolved as a result of insolvency of one or more members of a grouping.

2 - The member so declared insolvent may free itself from the complementary grouping of companies.

3 - Contract clauses requiring the member declared insolvent to compensate damage caused to the remaining members or a grouping are null and void.'

'Article 119

Mandatory provisions

1 - Any agreement by the parties which excludes or limits the application of the previous provisions of this chapter is null and void.

2 - Especially null and void are clauses attributing to the situation of insolvency of one of the parties the value of a resolutive condition in respect of a transaction or in such a case conferring on the other party entitlement to compensation, cancellation or withdrawal in accordance with terms other than those set out in this chapter.

3 - The provisions of the previous paragraphs do not prevent the situation of insolvency from constituting just cause for cancellation or withdrawal due to the nature and content of the contractual payments.'

7 What effect does an insolvency proceeding have on proceedings brought by individual creditors (with the exception of pending lawsuits)?

Effects on proceedings

The declaration of insolvency prevents the opening of any enforcement action by insolvency creditors [Article 88(1) of CIRE].

Effects on claims

The effects of insolvency on claims existing in relation to the insolvent estate are laid down in Articles 90 to 101 of CIRE:

'Article 90

Exercising claims related to insolvency

Insolvency creditors may only exercise their rights in accordance with the provisions of this Code, during the insolvency proceedings.'

'Article 91

Immediately payable debts

1 - The declaration of insolvency results in all obligations of the insolvent party that are not subject to a condition precedent becoming immediately payable.

2 - All obligations not yet demandable at the date of the declaration of insolvency for which no remuneratory interest is due, or for which interest is due at a rate lower than the statutory interest rate, are considered to be reduced to a sum which, if the interest calculated were added to such a sum at the statutory rate or at a rate which is equal to the difference between the statutory rate and the agreed rate, respectively, for the period by which the due date has been brought forward, would correspond to the value of the obligation in question.

3 - In the case of a dividable obligation, the provisions of the previous paragraph apply to each of the payments not yet demandable.

4 - When calculating the period by which the due date has been brought forward, it is considered that payment would occur on the date on which the obligations became demandable, or on which this would probably occur, where the latter date is undetermined.

5 - The reduction in the amount of the debt provided for in the previous paragraphs also applies even if loss of the benefit of the time limit has occurred due to the insolvency situation not yet being legally declared, as set out in Article 780(1) of the Civil Procedure Code.

6 - Subrogation in the rights of the creditor arising from compliance by the insolvent party with a third-party obligation will take place in proportion to the amount paid with regard to the sum of such third-party debt, updated pursuant to paragraph 2.

7 - The provisions of the previous paragraph apply to the right of recourse with respect to other co-debtors.'

'Article 92

Settlement plans

The immediate payability, pursuant to Article 91(1), of debts which are covered by a tax or social security contribution settlement plan has the effects which the respective laws attribute to non-compliance with such a plan. The demandable amounts are calculated in accordance with the provisions of the said laws.'

'Article 93

Maintenance allowances

The right to demand maintenance allowance from the insolvent party for the period after the declaration of insolvency may only be exercised against the estate if none of the persons referred to in Article 2009 of the Civil Procedure Code is able to provide such an allowance. In such a case, the judge will set the respective amount.'

'Article 94

Claims under a resolutive condition

Claims subject to a resolutive condition are dealt with in insolvency proceedings as unqualified up to the point where the condition is satisfied, without prejudice to the duty to return payments made, when the condition is verified.'

'Article 95

Joint liability and guarantors

1 - Creditors may claim all of their credit from each of the different insolvent estates of jointly liable debtors and guarantors, although the total sum of the amounts received from all of such debtors may not exceed the amount of credit.

2 - Rights against the insolvent debtor arising from the possible future payment of the debt by a jointly liable co-debtor or by a guarantor may only be exercised in the insolvency proceedings as a claim under a condition precedent if the creditor of the abovementioned debt does not claim it.'

'Article 96

Conversion of claims

1 - For the purposes of the participation by the respective owner in the proceedings:

a) non-pecuniary claims are met by the estimable value in euros at the date of the declaration of insolvency;

b) pecuniary claims the sums of which are not determined are met by the estimable value in euros at the date of the declaration of insolvency;

c) claims expressed in foreign currency or indices are met by the value in euros at the exchange rate in effect at the date of the declaration of insolvency in the place of the respective payment.

2 - Once recognised, the claims referred to in 1(a) and (c) are considered to be permanently converted into euros.'

'Article 97

Cancellation of credit privileges and real guarantees

1 - On the declaration of insolvency, the following are cancelled:

- a) general credit privileges which are ancillary to insolvency claims held by the State, local authorities and social security institutions constituted more than 12 months prior to the start date of the insolvency proceedings;
 - b) special credit privileges which are ancillary to insolvency claims held by the State, local authorities and social security institutions due more than 12 months prior to the start date of the insolvency proceedings;
 - c) legal mortgages the registration of which has been requested in the two months prior to the start date of the insolvency proceedings, and which are ancillary to insolvency claims held by the State, local authorities and social security institutions;
 - d) if they are not independent of registration, real guarantees on immovable or movable property, subject to registration and forming part of the insolvent estate, which are ancillary to insolvency claims and which have already been constituted, but not yet registered and not subject to a registration request;
 - e) real guarantees on assets forming part of the insolvent estate which are ancillary to claims treated as lower-ranking claims.
- 2 - Once insolvency has been declared, the registration of legal mortgages guaranteeing claims on the insolvency is not allowed, including after the closure of proceedings, except if the respective request has been submitted prior to the abovementioned declaration, or, when mortgages are involved as referred to in 1(c), two months prior to the same date.'

'Article 98

Granting of privilege to a requesting creditor

1 - At the request of the person whose insolvency has been declared, non-lower-ranking claims of creditors will benefit from general claim privilege, ranked in last place, on all of the movable property forming part of the insolvent estate, with respect to a quarter of the respective sum, corresponding to a maximum of 500 CU.

2 - If the pursuit of proceedings brought by a creditor is prejudiced by the declaration of insolvency of the debtor in proceedings instigated at a later date, the privilege referred to in the previous paragraph is attributed to the applicant of the older proceedings; in the case provided for in Article 264(3)(b), the general privilege on the movable property of the requesting spouse and on half of the common property is the responsibility of the applicant in the proceedings brought initially, notwithstanding the suspension of its effects.

'Article 99

Set-offs

1 - Without prejudice to other provisions laid down in this Code, after the declaration of insolvency, insolvency claimants may set off their claims against debts to the estate provided that at least one of the following requirements is met:

- a) the legal preconditions for the set-off were satisfied before the date of the declaration of insolvency;
- b) having a claim on the insolvency satisfied the requirements set out in Article 847 of the Civil Procedure Code before the counter-claim of the estate.

2 - For the purposes of subparagraphs a) and b) above, the following do not apply:

- a) the loss of the time limit benefit provided for in Article 780(1) of the Civil Procedure Code;
- b) the early maturity and conversion into cash resulting from the provisions of Article 91(1) and Article 96.

3 - Set-offs are not prejudiced by the fact that the obligations have different currencies or calculation units as their object, if their reciprocal conversion is free in the place of the payment of the counter-claim, and the conversion is made at the exchange rate in force on the date on which the set-off produces its effects.

4 - Set-offs are not allowed:

- a) if the debt to the estate was constituted after the date of the declaration of insolvency, more specifically as a consequence of the rescission of acts to the benefit of the insolvent estate;
- b) if the insolvency creditor acquired the claim from another person, after the date of the declaration of insolvency;
- c) using debts of the insolvent party for which the estate is not responsible;
- d) between debts to the estate and lower-ranking claims on the insolvency.'

'Article 100

Suspension of limitation and prescription periods

The judgement of declaration of insolvency will lead to the suspension of all limitation and prescription periods which can be challenged by the debtor, during the course of proceedings.'

'Article 101

Liquidation systems

The rules set out in this chapter apply without prejudice to the provisions of Articles 283 et seq. of the Securities Code.'

8 What effect does an insolvency proceeding have on the continuation of lawsuits pending at the moment of the opening of the insolvency proceeding?

The effects of insolvency proceedings on pending actions are provided for in Articles 85 to 89 of CIRE:

'Article 85

Effects on pending actions

1 - Once insolvency has been declared, all actions in which issues are examined relating to the assets of the insolvent estate, brought against the debtor or even against third parties, but the result of which may influence the value of the estate, and all actions brought by the debtor that are exclusively concerned with property are attached to the insolvency proceedings, provided that such attachment is requested by the insolvency practitioner, when appropriate for the purposes of the proceedings.

2 - The judge requests the court or the competent authority to send, for purposes of attachment to the insolvency files, all cases in which any action of seizure or retention of goods relating to the insolvent estate has been carried out.

3 - The insolvency practitioner replaces the insolvent party in all the cases referred to in the previous paragraphs, independently of the attachment to the insolvency proceedings or the agreement of the other party.'

'Article 86

Attachment of insolvency proceedings

1 - At the request of the insolvency practitioner, cases are attached to the insolvency files in which insolvency has been declared of persons who are legally liable for the debts of the insolvent party or, in the case of a married natural person, the spouse, if the property regime is not separation of estate.

2 - When the debtor is a commercial company, the same effects will apply with respect to cases in which insolvency has been declared of companies which, pursuant to the Commercial Companies Code, the said company controls or which are in a group relationship with the said company.

3 - The attachment provided for in paragraph 2 may be determined automatically by the judge in the case to which documents are attached or may be requested by all of the debtors declared insolvent in the cases to be attached.

4 - When proceedings are under way in courts with different competence due to the matter involved, attachment may only be determined if requested by the insolvency practitioner in proceedings brought in a court of specialised competence or if insolvency is decided by the judge involved in the same case.'

'Article 87

Arbitration agreements

1 - The effectiveness of arbitration agreements relating to disputes in which the insolvent party is involved and where the result of such disputes may influence the value of the estate, will be suspended, without prejudice to the provisions of applicable international treaties.

2 - Pending cases at the date of declaration of insolvency will continue accordingly, without prejudice, if applicable, to the provisions of Article 85(3) and Article 128(5).'

'Article 88

Enforcement proceedings

1 - A declaration of insolvency will lead to the suspension of any enforcement proceedings or measures brought by insolvency creditors which affect the assets of the insolvent estate and prevent the instigation or pursuit of any enforcement proceeding brought by the insolvency creditors. However, if actions are proceedings against other parties, enforcement will continue against such parties.

2 - Where enforcement is being pursued against other parties and there is no need for attachment to the proceedings pursuant to Article 85(2), only a transcription of the cases relating to the insolvent party is sent for attachment.

3 - Enforcement proceedings suspended pursuant to paragraph 1 are dissolved, with respect to the insolvent party, as soon as the insolvency proceedings are closed pursuant to Article 230(1)(a) and (d), except for purposes of exercising the legal entitlement to reversal.

4 - It is the responsibility of the insolvency practitioner to notify, in writing and preferably electronically, the enforcement agents appointed in enforcement proceedings affected by the declaration of insolvency, of which the said insolvency practitioner is aware, or to notify the court, when enforcement proceedings are instigated by a court clerk, of the occurrence of the facts described in the previous paragraph.'

'Article 89

Actions relating to debts of the insolvent estate

1 - For the three months following the date of the declaration of insolvency, no enforcements may be proposed for payment of debts of the insolvent estate.

2 - Actions, including enforcement proceedings, relating to the debts of the insolvent estate continue through attachment to the insolvency proceedings, with the exception of enforcements regarding tax debts.'

9 What are the main features of the participation of the creditors in the insolvency proceeding?

The insolvency bodies consist of the insolvency practitioner, the creditors' commission and the meeting of creditors. The creditors' commission and the meeting of creditors involve the participation of creditors in accordance with the provisions of Articles 66 to 80 of CIRE:

'Article 66

Appointment of the creditors' commission by the judge

1 - Prior to the meeting of creditors, more specifically at the judgement of the declaration of insolvency, the judge appoints a creditors' commission consisting of three or five members and two alternates. The chair will preferably fall to the largest creditor of the company and the choice of the other members will ensure the suitable representation of the different classes of creditors, with the exception of lower-ranking creditors.

2 - The judge may decide not to proceed with the appointment provided for in the previous paragraph when he deems it justified due to the small size of the insolvent estate, the simplicity of the liquidation or the limited number of insolvency creditors.

3 - For the purposes of paragraph 1, one of the commission members represents the workers who have claims against the company, and the choice of this member will be in line with the designation made by the workers themselves or by the workers' commission, if any exists.

4 - The members of the creditors' commission may be natural or legal persons. When a legal person is chosen, the said legal person will appoint its representative through a proxy or document signed by a person whose signatures bind the company.

5 - The State and social security institutions may only be appointed to the chair of the creditors' commission if the case files contain an official order, issued by the member of Government with oversight of the entities in question, which authorises the exercising of the function and indicates the representative.

'Article 67

Intervention by the creditors' meeting

1 - The creditors' meeting may dispense with the creditors' commission, substitute any of the members or alternates of the commission appointed by the judge, elect two additional members, and, if the judge has not formed the commission, set up a commission themselves, consisting of three, five or seven members and two alternates, appoint the chair and change, at any time, the respective composition, regardless of the existence of just cause.

2 - The members of the creditors' commission elected by the meeting do not have to be creditors, and, when choosing them, as in the appointment of the chair, the meeting is not bound to comply with the criteria provided for in Article 66(1), but is only required to respect the criterion imposed by Article 66(3).

3 - Decisions by the meeting of creditors referred to in paragraph 1 will be made by the majority required in Article 53(1), except when the dismissal of a member for just cause is involved.'

'Article 68

Duties and powers of a creditors' commission

1 - In addition to other tasks especially entrusted to it, the commission is responsible for supervising and cooperating with the insolvency practitioner.

2 - In the exercise of its duties, the commission may freely examine items from the debtor's accounts and request the insolvency practitioner to provide the information it considers necessary.'

'Article 69

Decisions of the creditors' commission

1 - The creditors' commission will meet whenever called by the chair or by another two members.

2 - The commission may not deliberate without the presence of a majority of its members. Decisions will be made by a majority of the votes cast by members present, and the chair will have the casting vote in the event of a tie.

3 - Written votes will be allowed in deliberations when previously agreed to by all members.

4 - The decisions of the creditors' commission will be communicated to the judge by the respective chair.

5 - The decisions of the creditors' commission may not be appealed against before the court.'

'Article 70

Responsibility of the members of the commission

Members of the commission are accountable to the insolvency creditors for damages arising from culpable non-compliance with their duties, and the provisions of Article 59(4) will apply.'

'Article 71

Reimbursement of expenses

Members of the creditors' commission are not remunerated and are only entitled to the reimbursement of expenses strictly necessary for the performance of their duties.'

'Article 72

Participation in the creditors' meeting

1 - All insolvency claimants are entitled to participate in the creditors' meeting, as are those holding the rights referred to in Article 95(2) which, pursuant to that provision, may not be exercised in the proceedings.

2 - The provisions of paragraphs 1 and 4 of the following article apply to the right to participate in the meeting of lower-ranking claimants, mutatis mutandi.

3 - Creditors may be represented by a representative with special powers for the purpose.

4 - When necessary for the smooth running of business, the judge may limit participation in the meeting to claimants whose claims attain a specific sum,

which may not be set at more than 10 000 euros. Creditors affected as a result may be represented by a different creditor whose claim is at least equal to the limit set, or group together so as to reach the sum required and participate through a common representative.

5 - The insolvency practitioner, the members of the creditors' commission and the debtor and the debtor's directors have the right and duty to participate.

6 - Participation in the meeting is also open to up to three representatives of the workers' commission or, should no such commission exist, up to three representatives of the workers appointed by them. The Public Prosecutor's office may also participate.'

'Article 73

Voting rights

1 - Claims confer one vote for each euro or fraction thereof if such claims have already been recognised by a final decision handed down in the attachment verifying and ranking the claims or in a later verification measure, or when both of the following conditions are met:

a) the creditor has already lodged a claim in the proceedings, or, if the time limit set in the judgement for lodging claims has not elapsed, such claims are lodged at the meeting itself, solely for the purpose of participating in the said meeting;

b) the claims are not subject to challenge at the meeting by the insolvency practitioner or by a creditor with voting rights.

2 - The number of votes conferred by claim under condition precedent is always set by the judge, taking into account the likelihood of that condition being met.

3 - Lower-ranking claims do not confer voting rights, except when a decision by the creditors' meeting relates to approval of an insolvency plan.

4 - At the request of an interested party, the judge may confer votes to contested claims, setting the respective amount, weighing all of the relevant issues including the likelihood of the sum and nature of the lower-ranking claim, and, when claims under condition precedent are involved, the likelihood of that condition being met.

5 - Appeals may not be made against the judge's decision provided for in the previous paragraph.

6 - Under no circumstances will decisions made by the meeting be deemed invalid as a result of subsequent confirmation that creditors were actually entitled to a different number of votes than that conferred.

7 - Without prejudice to other matters provided for in the previous paragraphs, claims with real guarantees for which the debtor is not personally liable confer one vote for each euro of the sum in question, or the value given as a guarantee, if the latter is lower.

'Article 74

Presidency

The creditors meeting is presided over by the judge.'

'Article 75

Calling a creditors' meeting

1 - The creditors' meeting is called by the judge, at the judge's own initiative or at the request of the insolvency practitioner, the creditors' commission, or by a creditor or group of creditors whose claims represent, in the judge's estimate, at least one fifth of total non-lower-ranking claims.

2 - The date, time, place and agenda of the creditors' meeting will be immediately communicated to interested parties at least 10 days in advance through a notice published on the Citiu website and in notices displayed on the door to the debtor's registered office or residence and the debtor's establishments.

3 - The five largest creditors as well as the debtor, the debtor's directors and the workers' commission will also be notified of the date, time and place of the meeting via announcements sent by registered post, with the same period of advance notice.

4 - The notices and announcements provided for in the previous paragraphs will also state:

a) the identification of the proceedings;

b) the debtor's name and registered office or residence, if known;

c) notice to claimants who have not yet lodged their claims of the need to do so, if the time limit set in the judgement for lodging claims has not passed, informing them that claims for simple participation in the meeting may be made at the meeting itself, if the abovementioned time limit has not passed on the date of the meeting;

d) possible limits to participation as set out in Article 72(4), with information on the possibility of grouping or representation.'

'Article 76

Suspension of the meeting

The judge may decide to suspend the business of the meeting, ruling that such business be restarted in the following 15 working days.'

'Article 77

Majority

Other than in cases in which this Code requires for the purpose a higher majority, or sets other requirements, decisions by the creditors' meeting are made by a majority of votes issued. Abstentions are not considered in the vote, regardless of the number of creditors present or represented, or the percentage of claims held.'

'Article 78

Complaint to the judge and appeal

1 - The insolvency practitioner or any creditor with voting rights may complain to the judge, verbally or in writing, that decisions of the meeting are contrary to the common interest of the creditors, provided that the complaint is made at the meeting itself.

2 - A decision upholding a complaint may be appealed against by any creditor who cast a vote on the winning side; a decision rejecting a complaint may be appealed against only by the complainant.'

'Article 79

Information

The insolvency practitioner will provide the meeting, at the request of the said meeting, with information on any matters within the scope of his duties.'

'Article 80

Authority of a creditors' meeting

All decisions made by the creditors' meeting may be revoked by the meeting and a favourable decision by the meeting only authorises actions for which this Code requires the approval of the creditors' commission.'

10 In which manner may the insolvency practitioner use or dispose of assets of the estate?

The insolvency practitioner may use or dispose of assets of the insolvent estate in accordance with the provisions of Articles 149, 150, 157 and 158 of CIRE:

'Article 149

Seizure of assets

1 - Once the judgement declaring insolvency has been handed down, accounting documents and all assets making up the insolvent estate will be seized, even if they have been:

- a) subject to a preservation order, pledged or in any way attached or held, in any proceedings, with the exception of those which have been seized as a result of an offence, whether a criminal offence or a mere administrative offence;*
- b) granted to creditors pursuant to Articles 831 et seq. of the Civil Procedure Code.*

2 - If the assets have already been sold, the proceeds from the sale will be seized, should such proceeds not already have been paid to the creditors or divided among them.'

'Article 150

Handing over seized assets

1 - The power to seize assets arises from the declaration of insolvency, and the insolvency practitioner must, without prejudice to the provisions of Article 756 (1) and (2) of the Civil Procedure Code, ensure that the assets are immediately handed over to him, so that they remain in his charge. Such custody will be governed by the general rules and particularly by those which apply to the legal custody of pledged assets.

2 - Seizure is carried out by the insolvency practitioner, assisted by the creditors' commission or by a representative of the said commission, if any exists, and, when appropriate, in the presence of the creditor requesting insolvency and of the insolvent party.

3 - Whenever it is inconvenient for the insolvency practitioner to seize assets personally, where goods are located in a district other than that of the insolvency, such seizure is conducted by a receiver, and the assets are entrusted to a special custodian, but at the order of the insolvency practitioner.

4 - Seizure is conducted by impounding assets, or by direct hand-over using an itemised list, in accordance with the following rules:

a) if the assets have already been entrusted to a judicial custodian, they will remain so although they may be made available and at the exclusive order of the insolvency practitioner;

b) if difficulties are encountered in looking after the assets or if doubts exist with regard to which assets are in custody, the insolvency practitioner may request the court clerk to go to the place where the assets are held and, once the difficulties have been overcome or doubts clarified, the assets will be handed over to the said clerk;

c) when seizure is challenged or resisted, the insolvency practitioner may request assistance from the forces of law and order and the door or safe may be forced open and an official notice of the occurrence will be drawn up;

d) impounding consists of describing, evaluating and taking the assets into custody;

e) both when assets are impounded and when assets are handed over using an itemised list, the insolvency practitioner or his assistant will draw up a document describing and numbering the assets, as in an inventory, declaring, whenever appropriate, the value attributed, whether the assets were handed over to the insolvency practitioner or to the special custodian and mentioning all issues relevant to the proceedings;

f) the document is signed by the person witnessing the procedure and by the owner or holder of the assets seized or, when the latter is unable or unwilling to sign, by two available witnesses.

5 - When evicting an insolvent party from his habitual residence, the provisions of Article 862 of the Civil Procedure Code apply.

6 - Payments received in cash by the insolvency practitioner, save what is strictly necessary to cover current administrative expenses, must be immediately deposited at a credit institution chosen by the insolvency practitioner.

'Article 157

Early shutdown

The insolvency practitioner may close the debtor's establishments, or only one or some of them, prior to the report appraisal meeting:

a) with the favourable opinion of the creditors' commission, should such a commission exist;

b) provided that the debtor is not opposed, where no creditors' commission exists, or if, despite opposition by the debtor, the judge so authorises on the grounds that delaying such a measure until the date of the abovementioned meeting would lead to a considerable reduction in the insolvent estate.'

'Article 158

Start of sale of assets

1 - When the judgement declaring insolvency is made final and the report appraisal meeting has been held, the insolvency practitioner will promptly sell all seized assets for the insolvent estate, regardless of liabilities, provided that the decisions by the creditors at the aforementioned meeting do not oppose such a sale.

2 - However, the insolvency practitioner will carry out an early sale of assets of the insolvent estate which cannot be preserved as they may perish or depreciate.

3 - Should it be decided to hold the early sale of assets as provided for in the previous paragraph, the insolvency practitioner will communicate this fact to the debtor, the creditors' commission, whenever such a commission exists, and to the judge at least two days prior to the sale, and publish the decision on the Citius website.

4 - The judge, at his own initiative or at the request of the debtor, the creditors' commission or any of the creditors of the insolvency or insolvent estate, may stop the early sale of assets referred to in paragraph 2. This decision will be immediately communicated to the insolvency practitioner, the debtor, the creditors' commission and to the creditor making the request. No appeal is allowed.

5 - In the request referred to in the previous paragraph, the interested party must provide reasoned grounds for not selling the assets and must submit, whenever possible, a viable alternative to the operation planned by the insolvency practitioner.'

11 Which claims are to be lodged against the debtor's insolvency estate and how are claims arising after the opening of insolvency proceedings treated?

Classes of claims on the insolvency and the treatment of claims lodged after the opening of the insolvency proceedings, including the debts of the insolvent estate, are essentially provided for in Articles 47 to 51 of CIRE:

'Article 47

Concept of insolvency creditors and classes of claims on the insolvency

1 - Once insolvency has been declared, all claims on the insolvent party's property, or which are guaranteed by assets forming part of the insolvent estate, the basis for which predated the declaration, are considered as insolvency creditors, whatever their nationality or domicile.

2 - The claims referred to in the preceding paragraph, as well as equivalent claims, and the corresponding debts, are referred to in this Code as insolvency claims and insolvency debts, respectively.

3 - Claims that are shown to have been acquired during the course of the proceedings are equivalent to insolvency claims at the date of declaration of insolvency.

4 - For the purposes of this Code, insolvency claims are:

- a) 'guaranteed' and 'privileged' claims, benefiting respectively from real guarantees, including special credit privileges, and from general credit privileges over assets forming part of the insolvent estate, up to the sum corresponding to the value of the assets guaranteed or the general privileges, taking into account possible prevailing encumbrances;
- b) 'lower-ranking' claims, as listed in the following article, except when they benefit from general or special credit privileges, or legal mortgages, which do not expire due to the effects of the declaration of insolvency;
- c) all other claims are 'common'.

'Article 48

Lower-ranking claims

The following claims are considered to be lower-ranking, and ranked after other insolvency claims:

- a) claims held by persons in a special relationship with the debtor, provided that the special relationship already existed when the claim was acquired, and claims held by persons to whom they were transmitted in the two years preceding the start of the insolvency proceedings;
- b) interest on non-lower-ranking claims constituted after the declaration of insolvency, with the exception of claims covered by a real guarantee and by general credit privileges, up to the value of the respective assets;
- c) claims for which lower ranking was agreed by the parties;
- d) claims which have as their object payments by the debtor without charge;
- e) claims on the insolvency which, as a consequence of rescission to the benefit of the insolvent estate, accrue for a third party as a result of bad faith;
- f) interest on lower-ranking claims constituted after the declaration of insolvency;
- g) claims in respect of shareholders' loans.'

'Article 49

Persons in a special relationship with debtor

1 – The following persons are considered to be in a special relationship with a debtor who is a natural person:

- a) the spouse and persons divorced from the debtor in the two years prior to the start of the insolvency proceedings;
- b) ascending or descending family or siblings of the debtor or of any of the persons referred to in the previous subparagraph;
- c) the spouses of the ascending or descending family or siblings of the debtor;
- d) persons who have habitually lived with the debtor in a shared household for a period within the two years preceding the start of insolvency proceedings.

2 – The following persons are considered to be in a special relationship with a debtor that is a legal person:

- a) partners, associates or members who are legally responsible for the debts, and the persons who have had such status in the two years preceding the start of insolvency proceedings;
- b) entities which, if applicable, have been in a controlling or group relationship with the company, pursuant to Article 21 of the Securities Code, in the two years preceding the start of insolvency proceedings;
- c) the legal or de facto directors of the debtor and those who have been legal or de facto directors at any time in the two years preceding the start of insolvency proceedings;
- d) entities related to any of those mentioned in the preceding subparagraphs in any of the forms referred to in paragraph 1.

3 - In cases where insolvency relates only to one autonomous property, the persons who are considered to be in a special relationship are the respective owners and directors, as well as those who are connected to such persons in any of the forms provided for in the preceding subparagraphs and when an inheritance in abeyance is involved, those persons connected to the person whose estate is being administered in any of the forms provided for in paragraph 1, at the date of the opening of the administration or in the two preceding years.

'Article 50

Claims under condition precedent

1 - For the purposes of this Code, claims under condition precedent and resolutive condition are, respectively, those whose constitution or continued existence is subject to a future and uncertain event taking place or otherwise, enforceable under law, judicial decision or legal business.

2 - Claims under condition precedent are:

- a) those resulting from refusal of enforcement or early termination by the insolvency practitioner of bilateral contracts under way on the date of the declaration of insolvency, or the rescission of acts to the benefit of the insolvent estate, while such termination, refusal or rescission has not taken place;
- b) those which may not be exercised against the insolvent party without prior foreclosure on the property of another party, while such foreclosure has not taken place;
- c) those relating to the insolvency for which the insolvent party is not personally responsible, while the debt is not demandable.'

'Article 51

Debts of the insolvent estate

1 - Unless otherwise expressly provided for in law, in addition to other debts classified as such in this Code, the following are debts of the insolvent estate:

- a) the costs of the insolvency proceedings;
- b) remuneration of the insolvency practitioner and his expenses and those of the members of the creditors' commission;
- c) debts arising from actions for the administration, liquidation and division of the insolvent estate;
- d) debts resulting from actions by the insolvency practitioner in the performance of his duties;
- e) any debt resulting from a bilateral contract compliance with which may not be refused by the insolvency practitioner, unless it refers to a period prior to the declaration of insolvency;
- f) any debt resulting from a bilateral contract compliance with which may not be refused by the insolvency practitioner, unless it corresponds to compensation already provided by the other party prior to the declaration of insolvency, or which refers to a period prior to such declaration;
- g) any debt resulting from a contract which has as its object a long-standing payment, corresponding to compensation already provided by the other party and compliance with which has been demanded by the provisional judicial administrator;
- h) debts constituted by actions of the provisional judicial administrator in the performance of his duties;
- i) debts which have as their source the enrichment without cause of the insolvent estate;
- j) the obligation to provide maintenance payments relating to a period prior to the date of the declaration of insolvency, pursuant to the provisions of Article

2 - Claims corresponding to debts of the insolvent estate and the holders of such claims are referred to in this Code as estate claims and estate creditors, respectively.

12 What are the rules governing the lodging, verification and admission of claims?

The rules applying to the lodging, verification and admission of claims are laid down in Articles 128 to 140 of CIRE:

'Article 128

Lodging claims

1 - Within the time limit set for the purpose in the judgement declaring insolvency, insolvency creditors, including the Public Prosecutor's Office in the defence of the interests of the entities it represents, are required to lodge the verification of claims through a request, accompanied by all of the supporting documents available, which sets out:

- a) the origin, due date, amount of capital and interest;
- b) the subordinate conditions, both precedent as well as resolatory;
- c) the nature of the claims, whether common, lower-ranking, privileged or guaranteed, and, in this latter case, the assets or entitlements which are the object of the guarantee and the relevant registration information, if applicable;
- d) the existence of any personal guarantees, with identification of the guarantors;
- e) the applicable late-payment interest rate.

2 - The request is addressed to the insolvency practitioner and sent by electronic data transmission, pursuant to the provisions of Article 17(2) of the relevant Ministerial Implementing Order.

3 - Whenever insolvency creditors are not sponsored, the request to lodge claims is submitted to the professional address of the insolvency practitioner or sent via email or registered post. The insolvency practitioner will sign upon delivery, or send the creditor within three days from receipt, confirmation of receipt, in the same manner used to send the claim.

4 - The lodging of claims provided for in paragraph 1 may be carried out by using the form provided for the purpose on the website to be defined in a Ministerial Implementing Order issued by the member of government responsible for justice or in the template form for lodging claims provided for in Articles 54 and 55 of Regulation (EU) No 2015/848 of the European Parliament and of the Council of 20 May 2015, in cases in which this regulation applies.

5 - The purpose of verification is to check all insolvency claims, whatever their nature and basis, and even creditors who have had their claims recognised by a final decision are also required to lodge such claims in the insolvency proceedings, if they wish to obtain payment.'

'Article 129

List of recognised and non-recognised claims

1 - In the 15 days after the end of the time limit for lodging claims, the insolvency practitioner submits to the secretariat a list of all recognised creditors and a list of nonrecognised creditors, both in alphabetical order, relating not only to those who have lodged claims but also those whose rights are set out in the debtor's accounting documents or of whom the insolvency practitioner is aware of in any other way.

2 - The list of recognised creditors includes the identification of each, the nature of the claim, the amount of capital and interest at the date of expiry of the time limit for lodging claims, personal and real guarantees, privileges, the late-payment interest rate applicable, any condition precedent or resolatory condition and the value of the assets forming the insolvent estate over which real credit guarantees exist for which the debtor is not personally responsible.

3 - The list of non-recognised creditors states the justification for the non-recognition.

4 - All unrecognised creditors, as well as those whose claims are recognised without them having lodged a claim, or in terms other than those of the respective claim so made, must be notified by the insolvency practitioner by registered letter or by one of the means set out in Article 128(2) and (3) and when known creditors are involved who have their habitual residence, domicile or company registered office in a Member State other than that where proceedings were opened, including the tax authorities and social security bodies in those Member States, notice is also sent in accordance with Article 54 of Regulation (EU) No 2015/848 of the European Parliament and of the Council of 20 May 2015.

5 - The communication referred to in the previous paragraph may be sent by email in cases where the claim has been lodged by email and it is considered to have been sent on the date of sending. The insolvency practitioner will attach the respective proof of delivery to the case documents.'

'Article 130

Challenging the list of recognised creditors

1 - In the 10 days following the end of the time limit set in Article 129(1), any interested party may challenge the list of recognised creditors by sending a request to the judge setting out the grounds for the undue inclusion or exclusion of claims, or the incorrect amount of the qualification of the recognised claims.

2 - With respect to creditors notified by registered letter, the time limit of 10 days is calculated as of the third working day after the date of the respective sending.

3 - Should there be no challenges, the judgement of verification and ranking of claims is made immediately, whereby, unless there is manifest error, the list of recognised creditors drawn up by the insolvency practitioner is approved and claims are ranked on the basis of the said list.'

'Article 131

Response to challenge

1 - The insolvency practitioner may respond to any of the challenges as may any interested party taking a contrary position, including the debtor.

2 - However, if the challenge is based on the undue inclusion of a specific claim in the list of recognised creditors, on the omission of the conditions to which it is subject or on the fact that an excessive sum has been attributed or is qualified at a higher degree than that which is correct, only the respective claimant may respond.

3 - The response will be submitted in the 10 days following the end of the time limit referred to in Article 130 or the notification sent to the claimant subject to challenge, depending on the case, under penalty of the challenge being judged favourably.'

'Article 132

Filing of challenges and responses

The lists of claims recognised and not recognised by the insolvency practitioner, challenges and responses are filed in a single attachment.'

'Article 133

Analysis of claims and the insolvent party's accounts

During the period set for challenges and responses, and in order for claims to be analysed by any interested party and by the creditors' commission, the insolvency practitioner must make available the claims, the respective claim documents and the insolvent party's accounting documents at a suitable location, which will be noted at the end of the lists of recognised and unrecognised creditors.'

'Article 134

Means of proof, copies and waiver of notification

1 - The provisions of Article 25(2) apply to challenges and responses.

2 - For consultation by interested parties, the applicant is only required to provide two copies of documents lodged, one copy of which is intended for archive at the court while the other remains in the possession of the court secretariat. When submitted on a digital medium, such documents may be extracted by the secretariat.

3 – By way of exception, in cases where the challenge relates to recognised claims and is not submitted by the respective claimant, an additional copy will be attached or extracted to be handed to the said claimant.

4 - Challenges will only be notified to the respective claimants when they are not the challengers.

5 - During the period set for challenges and responses, the file remains in the possession of the court secretariat for analysis and consultation by interested parties.'

'Article 135

Opinion of the creditors' commission

Within 10 days following the end of the time limit for response to challenges, the creditors' commission will attach their opinion on the challenges to the case documents.'

'Article 136

Winding-up of proceedings

1 - Once the opinion from the creditors' commission has been attached or the time limit set out in the previous article has passed without such attachment taking place, the judge will declare, with the value of a judgement, that the claims on the respective list that are unchallenged have been verified, except in the case of manifest error. The judge may set the day and time for any attempt at conciliation to be carried out, within the 10 following days, notifying all those who submitted challenges and responses, the creditors' commission and the insolvency practitioner so that they may attend personally or be represented by proxies with the necessary special powers.

2 - At the attempted conciliation, claims deserving the approval of all those present under the respective exact terms will be considered as recognised.

3 - Once the attempted conciliation has been concluded, proceedings are immediately closed by the judge so that an official order may be issued in accordance with the provisions of Articles 595 and 596 of the Civil Procedure Code.

4 - (Repealed.)

5 - Also considered as recognised are all other claims which are possible to recognise in light of the evidence set out in the case documents.

6 - With respect to recognised claims, the final official order has the form and value of a judgement, which declares such claims verified and ranked in accordance with the legal provisions.

7 - Should the verification of some claims require the production of evidence, the ranking of all claims will take place at the final judgement, unless the judge considers that the challenges being analysed, in light of the sum involved or their nature, will not impede the immediate delivery of judgement, fully observing the provisions of Article 180(1).

8 - In the event that the judge deems it unsuitable to hold the attempted conciliation, the said judge will immediately issue the official order provided for in paragraph 3.'

'Article 137

Investigative measures

When investigative measures are to be conducted before the discussion and judgement hearing, the judge will order that the necessary steps be taken so that such measures will be concluded within 20 days from the order determining those measures, providing all the interested parties with evidence provided by any of them.'

'Article 138

Setting a date for the hearing

Once evidence has been produced or the time limit set out in letters has passed, the date will be set for the discussion and judgement hearing within the 10 following days.'

'Article 139

Hearing

In the judgement hearing, the terms established for a common case will be observed, with the following specialities:

a) whenever necessary, at a time determined by the court, the insolvency practitioner or the creditors' commission will be heard;

b) evidence will be produced in the order in which the challenges were submitted;

c) during the discussion, firstly, the lawyers of the challengers and then those of the respondents will take the floor, and there will be no reply.'

'Article 140

Ruling

1 - After the judgement hearing has terminated, the judge will rule on the verification and ranking of claims within the 10 following days.

2 – Ranking is general for the assets of the insolvent estate and is special for assets relating to real guarantee rights and credit privileges.

3 - In the ranking of claims, preference is not given as a result of a judicial mortgage or a mortgage arising from a pledge. However, costs paid by the applicant or creditor constitute debts of the insolvent estate.'

13 What are the rules governing the distribution of proceeds? How are claims and the rights of creditors ranked?

The rules applicable to the payment of creditors provide for differences in treatment depending on whether claims are guaranteed, privileged, common or lower-ranking. These rules are set out in Articles 172 to 184 of CIRE. Also provided for in these provisions are: the possibility of third-party debt payment being subject to subrogation; and the arrangements applicable when there is joint liability of debtors.

'Article 172

Payment of the debts of the insolvent estate

1 - Before making payment of insolvency claims, the insolvency practitioner will deduct from the insolvent estate the assets or entitlements necessary to pay the debts of that estate, including those which can be foreseen up to the closure of proceedings.

2 - The debts of the insolvent estate are assigned to the estate's earnings, and, with respect to the excess, to the proceeds of each asset, movable or immovable, in due proportion; however, the amount assigned will not exceed 10% of the proceeds from assets which are subject to real guarantees, unless that is essential for the full payment of the debts of the insolvent estate or to the extent that the full payment of guaranteed claims is not prejudiced.

3 - The payment of the debts of the insolvent estate will take place on the respective due dates, no matter what the status of proceedings.

4 - When actions are brought to verify the right to restitution or separation of assets already sold and where the competent protest has been lodged, an amount equal to the proceeds of the sale, when this can be determined, will remain in deposit and be excluded from payments to creditors of the insolvency

estate or the insolvency, while the effects of the protest remain in force. When the proceeds cannot be determined, an amount equal to the provisions of the inventory will remain in deposit. The provisions of Article 180(2) and (3) apply, mutatis mutandi.'

'Article 173

Start of payment of insolvency claims

The payment of insolvency claims only covers those which have been verified by a final judgement.'

'Article 174

Payment to guaranteed creditors

1 - Without prejudice to the provisions of Article 172(1) and (2), once assets encumbered with real guarantees have been sold and the corresponding expenses deducted, payment is immediately made to guaranteed creditors, with respect to the priority that they have. With regard to creditors who are not fully paid and towards whom the debtor is responsible with his general property, the respective balances are included among the common claims, replacing the estimated balances, should these not coincide.

2 - Prior to the sale of the assets, the estimated balance recognised as a common claim is addressed in the apportionment made among common creditors. However, the amounts corresponding to the apportionment must remain deposited until the actual balance is confirmed. Withdrawal will be authorised as sums are confirmed.

3 - Payment of non-demandable third-party debt:

a) will not take place, in the hypothesis referred to in the first part of Article 164(5) or if the respective claimant renounces the guarantee;

b) cannot exceed the amount of the debt, updated to the date of payment by applying Article 91(2);

c) entails subrogation in the rights of the creditor, in proportion to the amount paid in relation to the amount of debt, updated in the same terms.'

'Article 175

Payment of preferential creditors

1 - Privileged claims will be paid using assets not assigned to prevailing real guarantees, with respect to the priority that they have, and in proportion to the amounts, in relation to those which are equally privileged.

2 - The provisions of the second part of Article 174(1) and (2) will apply, mutatis mutandis.'

'Article 176

Payment of common creditors

Common creditors will be paid in proportion to their claims if the estate is insufficient for full payment.'

'Article 177

Payment of lower-ranking creditors

1 - Payment of lower-ranking claims will only take place after full payment of common claims, and will be made in the order in which such claims are indicated in Article 48, in proportion to the respective amounts, with respect to those referred to in the same subparagraph, if the estate is insufficient for full payment.

2 - Where there is an agreement on the lower ranking of claims, parties may attribute a priority to a claim other than that arising from the provisions of Article 48.'

'Article 178

Partial apportionment

1 - Whenever amounts are deposited ensuring a distribution of not less than 5% of the value of privileged, common or lower-ranking claims, the judicial insolvency practitioner submits a plan and apportionment chart which he considers should be implemented, to be attached to the main case, with the opinion of the creditors' commission, if such a commission exists.

2 - The judge decides on the payments he deems justified.'

'Article 179

Payment in the case of jointly liable debtors

1 - When, in addition to the insolvent party, there is another jointly liable debtor in the same situation, the creditor will not receive any sum without submitting a certificate confirming the sums received from insolvency proceedings involving the remaining debtors; the insolvency practitioner also notifies payment in other proceedings.

2 - A jointly liable debtor only partially paying the debt may not be paid in the insolvency proceedings of the co-debtors without the creditor being fully paid.'

'Article 180

Prevention safeguards

1 - When there is an appeal against the judgement verifying and ranking the claims, or a protest through a pending action, the claims of those lodging the protest or the claims that are the subject of the appeal are considered to be conditionally verified, in the latter case, at the maximum amount which could result from knowledge thereof, for the purpose of being dealt with in the apportionments to be made. However, the amounts so attributed must remain deposited.

2 - After the final decision on the appeal or action, the withdrawal of the amounts deposited will be authorised, insofar as is required, or, where apportionment among creditors is carried out, depending on the case. When partial withdrawals take place, the apportionment will be based on the remaining sum.

3 - Those who, due to their appeal or protest, have not allowed the withdrawal of any amount, and who lose such appeal or protest, will compensate the creditors so damaged, paying late-payment interest at the legally established rate on the delayed amount, from the date of the apportionment in which such amount was included.

4 - When a protest takes place after any apportionment has been carried out, an additional amount necessary to restore equality with equivalent creditors will be attributed to the creditors in question, in later apportionments, without prejudice to this amount remaining deposited if there has not yet been a final decision on the action.'

'Article 181

Claims under condition precedent

1 - Claims under condition precedent are met at the nominal value in partial apportionments. However, the amounts attributed to them must remain deposited while the condition is pending.

2 - In the final apportionment, however, should the condition not be met:

a) claims will not be considered which are devoid of any value due to the manifest unlikelihood of the condition being verified, in which case the amounts deposited pursuant to the previous paragraph will be apportioned among the other creditors;

b) where the situation set out in the previous subparagraph does not occur, the insolvency practitioner will deposit an amount corresponding to the nominal value of the claim at a credit institution to be handed over to the claimant, once the condition precedent is met, or apportioned among the other creditors, after it becomes certain that such a condition is impossible.

'Article 182

Final apportionment

1 - When the liquidation of the insolvent estate has been closed, the distribution and final apportionment are carried out by the secretariat of the court once the case has been sent for calculation of the costs and to the secretariat itself. Closure of liquidation is not prejudiced by activity of the debtor generating income which would add to the estate.

2 - Monies remaining after liquidation which do not even cover the expenses of the apportionment are allocated to the body responsible for the financial and property management of the Ministry of Justice.

3 - The insolvency practitioner may submit during the case a proposal for distribution and final apportionment, accompanied by the relevant supporting documentation, and such information will be appraised by the secretariat.'

'Article 183

Payments

1 - All payments are made, without the need for a request, preferably by bank transfer to the IBAN of the respective recipient, and the amount transferred is withdrawn from the insolvency account.

2 - When it is not possible to make the payment of a claim pursuant to the previous paragraph, the insolvency practitioner must use a cheque drawn on the insolvency account.

3 - Should a cheque not be submitted for payment within one year from the date of notice to the creditor, the respective claim expires and the sum reverts to the Institute of Financial and Equipment Management of the Justice Department (Instituto de Gestão Financeira e Equipamentos da Justiça, I. P.)

4 - The use of any of the means of payment referred to in paragraphs 1 and 2 does not discharge the insolvency practitioner from complying with legal or contractually defined requirements for using the insolvency account. Article 167(2) will apply mutatis mutandi.'

'Article 184

Remainder

1 - If the proceeds from liquidation are sufficient for the full payment of insolvency claims, the balance is handed over to the debtor by the insolvency practitioner.

2 - If the debtor is not a natural person, the insolvency practitioner will hand over the part of the balance to the participating persons that would belong to them if the liquidation had been carried out outside the insolvency proceedings, or the insolvency practitioner will comply with what is otherwise provided for by law and in regulations.'

14 What are the conditions for, and the effects of closure of insolvency proceedings (in particular by composition)?

The conditions and the effects of closure of the insolvency proceedings are laid down in Articles 231 to 234 of CIRE. These provisions set out the situations in which there is: approval of an insolvency plan if the content of the said plan does not oppose closure; end of the insolvency; liquidation and final apportionment; and insufficiency of the insolvent estate.

'Article 231

Closure at the request of the debtor

1 A request by the debtor to close proceedings on the grounds that the insolvency has ended is notified to creditors so that they may, should they so wish, challenge closure, within eight days. The provisions of Article 41(3) and (4) apply.

2 A request by the debtor which is not based on the end of the insolvency will be accompanied by documents confirming the consent of all creditors who have lodged claims, when it is submitted after the time limit granted for the purpose, or, otherwise, of all known creditors.

3 Before deciding on the request, the judge will hear, in either of these cases, the insolvency practitioner and the creditors' commission, should such a commission exist.'

'Article 232

Closure due to insufficiency of the insolvent estate

1 Where it is established that the insolvent estate is insufficient to meet the costs of the proceedings and the remaining debts of the insolvent estate, the insolvency practitioner informs the judge of this fact; the said judge may also be automatically informed thereof.

2 Once the debtor, the creditors' meeting and the creditors of the insolvent estate have been heard, the judge will declare the insolvency proceedings closed, unless an interested party deposits, at the order of the court, a sum determined by the judge as what is reasonably deemed to be necessary to ensure payment of the costs of the proceedings and the remaining debts of the insolvent estate.

3 After the case has been sent for calculation of the costs and to the court secretariat, the said secretariat will, after the costs have been paid, distribute the sums of money existing in the insolvent estate among the creditors of the insolvent estate in proportion to their claims.

4 Once the insufficiency of the estate has been confirmed, the insolvency practitioner may immediately interrupt the respective liquidation.

5 Where the insolvency proceedings have been closed due to insufficiency of the estate, in the cases in which a procedure to examine the culpability of the insolvency has been opened and has not yet been concluded, that procedure continues in a limited form.

6 The provisions of the preceding paragraphs will not apply when a debtor benefits from the deferral of the payment of the costs, pursuant to Article 248(1), during the period that benefit is in force.

7 The estate is presumed to be insufficient when the value of assets is less than 5 000 EUR.'

'Article 233

Effects of closure

1 - Once the proceedings have been closed, and without prejudice to the provisions of Article 217(5) with respect to the specific immediate effects of the decision to approve the insolvency plan:

a) all effects resulting from the declaration of insolvency will cease, and the debtor will recover the right to dispose of his assets and the free management of his business, without prejudice to the effects of the qualification of the insolvency as culpable and the provisions of the following article;

b) the tasks of the creditors' commission and the insolvency practitioner will end, with the exception of those relating to the submission of accounts and, if applicable, those conferred by the insolvency plan;

c) the insolvency creditors may exercise their rights against the debtor without restrictions other than those set out in any insolvency plan and payments plan and in Article 242(1), for which purpose the enforceable title will consist of the judgement approving the payments plan and the judgement verifying the claims or the decision handed down in a later verification action, together with the judgement approving the insolvency plan, if applicable;

d) the creditors of the estate may claim against the debtor entitlements which have not been satisfied.

2 - The closure of the insolvency proceedings before the final apportionment will result in:

- a) rescission of acts to the benefit of the insolvent estate becoming ineffective, except if the insolvency plan confers powers on the insolvency practitioner for defence in actions directed at challenging such rescission, as well as in cases in which such rescission can no longer be challenged due to the time limit set out in Article 125 being under way, or in which the challenge brought has been dismissed by a final decision;
- b) discontinuation of proceedings that are pending on the verification of claims and on restitution and separation of assets already liquidated, except if judgement has already been made on the verification and ranking of claims as provided for in Article 140, or if closure arises from the approval of the insolvency plan, in which case appeals lodged against such judgement continue until concluded, as will actions whose applicants or the debtor so wish, within a period of 30 days;
- c) discontinuation of proceedings that are pending against those legally responsible for the debts of the insolvent party proposed by the insolvency practitioner, except if the insolvency plan confers powers on the insolvency practitioner to pursue such cases.

3 - The costs of actions challenging the rescission of acts to the benefit of the insolvent estate which are upheld pursuant to paragraph 2(a) will be the responsibility of the insolvent estate if the case is closed a result of the insufficiency of the said estate.

4 - With the exception of claim verification proceedings, any action which is dependent upon the insolvency proceedings and which is not dismissible, pursuant to paragraph 2(b), or which must not be pursued by the insolvency practitioner in accordance with the insolvency plan, is detached from the case and referred to the competent court. The debtor then has the exclusive legitimacy for the case, regardless of the qualification or agreement of the counterparty.

5 - In the 10 days following closure, the insolvency practitioner will hand over to the court for archiving all documentation in his possession relating to the proceedings, as well as all the debtor's accounting documents which do not need to be returned to the said debtor.

6 - Whenever insolvency proceedings are closed without a procedure to examine the culpability of the insolvency being opened under Article 36(1)(i), the judge must expressly state the incidental nature of the insolvency in the decision as provided for in Article 230.

7 - Closure of insolvency proceedings pursuant to Article 230(1)(e), where assets or entitlements exist for liquidation, will determine only the start of the period of assignment of disposable income.'

'Article 234

Effects on commercial companies

1 Where closure of proceedings is based on the approval of an insolvency plan providing for the continuation of the commercial company, such a return to activity does not require decision by the partners.

2 The partners may decide to restart activity if closure is based on Article 230(1)(c).

3 After the final apportionment has taken place and the closure of proceedings has been registered, the company is considered to be defunct.

4 Where closure takes place due to the insufficiency of the insolvent estate, the liquidation of the company follows the legal regime for administrative proceedings for the dissolution and liquidation of commercial entities. The judge must notify the competent registry of the closure and in relation to the property of the company.'

Effects on natural persons

If the debtor is a natural person, at the debtor's request, he may be granted exoneration from insolvency claims which are not fully paid during the insolvency proceedings or in the five years following closure, as provided for in Articles 235 to 248 of CIRE.

The exoneration of a natural person's liabilities, if allowed, will require the disposable income earned by a debtor to be assigned to a trustee chosen by the court for the five years following the closure of the insolvency proceedings (assignment period). At the end of each year during the assignment period, the trustee uses the sums received: a) to pay outstanding costs of the insolvency proceedings; b) to reimburse the body responsible for the financial and property management of the Ministry of Justice for the remuneration and expenses of the insolvency practitioner and the trustee as incurred by that body; c) to pay his own remuneration and expenses; d) to distribute the remainder among the insolvency creditors pursuant to the provisions laid down on payment to creditors in insolvency proceedings.

When the assignment period has ended, the exoneration of the debtor may be granted by the court and in such a case, all insolvency claims which still remain at the date exoneration is granted will be cancelled, including those which have not been lodged or verified. However, the exoneration does not include: a) maintenance claims; b) compensation due for unlawful acts by the debtor which have been claimed as such; c) claims for fines and other monetary penalties for crimes or administrative offences; d) tax claims.

15 What are the creditors' rights after the closure of insolvency proceedings?

The rights of creditors after the closure of the insolvency proceedings were covered in the reply to the previous question. In principle, after closure of proceedings, insolvency creditors may exercise their rights against the debtor without any restrictions other than those set out in possible insolvency and payment plans and in Article 242(1) of CIRE.

To exercise their rights, the enforceable instrument will be the judgement approving the payment plan and the judgement verifying the claim or, if applicable, the decision handed down in a later verification action, together with the judgement approving the insolvency plan.

Article 242(1) of CIRE states that, in the event of exoneration of a natural person's liabilities, no enforcements will be allowed on the debtor's assets which are intended to meet insolvency claims during the assignment period.

Insolvency proceedings are considered closed at the time set out in Article 230 of CIRE. The time of closure will depend on the circumstances which determined such closure, as follows:

'Article 230

When proceedings close

1 – When proceedings continue after the declaration of insolvency, the judge may decide to close the proceedings:

- a) after the final apportionment has taken place, without prejudice to the provisions of Article 239(6);
- b) after the decision approving the insolvency plan has become final, provided that the said plan does not oppose closure;
- c) at the request of the debtor, when the debtor is not in a situation of insolvency or all of the creditors consent;
- d) when the insolvency practitioner confirms the insufficiency of the insolvent estate to meet the costs of the proceedings and other debts.
- e) when closure has not yet been declared, in the initial order exonerating the liabilities as referred to in Article 237(b).

2 - Creditors are notified of the decision to close proceedings and the decision is published and registered as provided for in Articles 37 and 38, stating the respective grounds.'

16 Who is to bear the costs and expenses incurred in the insolvency proceedings?

The costs and the expenses of the insolvency proceedings are deemed to be debts of the insolvent estate pursuant to Article 51 of CIRE, mentioned above

Before making payment of insolvency claims, the insolvency practitioner will deduct the assets or entitlements necessary to pay the costs and expenses of the proceedings, including those which can be foreseen up to the closure of proceedings. The payment of the costs and expenses of proceedings is assigned in accordance with the abovementioned Article 172 of CIRE.

In the event of exoneration of the natural person's liabilities, the trustee will use the sums received at the end of each year during the assignment period, firstly, to pay the costs and expenses of the proceedings, in accordance with Article 241 of CIRE.

17 What are the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors?

Articles 120 to 127 of CIRE provide for the possibility of cancelling acts which are prejudicial to the collective interests of the creditors, provided that the circumstances set out in these articles are met.

'Article 120

General principles

1 - Acts prejudicial to the insolvent estate which were carried out in the two years prior to the start of the insolvency proceedings may be rescinded to the benefit of the estate.

2 - Acts that diminish, thwart, hinder, jeopardise or delay payment to insolvency creditors are considered to be prejudicial to the estate.

3 - Acts of any of the types referred to in the following article, even if committed or omitted outside the time limits set out therein, are presumed to be prejudicial to the estate, unless evidence is admitted to the contrary.

4 - Except in the cases referred to in the following article, rescission assumes bad faith by the third party, which is presumed with respect to acts carried out or omitted in the two years prior to the start of insolvency proceedings in which a person with a special relationship with the insolvent party participated or from which a person with a special relationship with the insolvent party benefited, even if the said special relationship did not exist at that date.

5 - Bad faith is understood to be knowledge, at the time of the act, of any of the following circumstances:

- a) that the debtor was in a situation of insolvency;
- b) the prejudicial nature of the act and that the debtor was in a situation of imminent insolvency at the time;
- c) the start of the insolvency proceedings.

6 - Legal transactions conducted under the special revitalisation procedure or special payment agreement procedure governed by this law, under recovery and reorganisation measures or in connection with the adoption of the resolution measures in Section VIII of the General Rules on Credit Institutions and Financial Companies, approved by Decree Law No 298/92 of 31 December 1992, may not be rescinded by applying the rules provided for in this chapter. The same applies to transactions conducted under the Out-of-Court Enterprise Reorganisation Scheme or any other equivalent process provided for in special legislation, the purpose of which is to provide the debtor with sufficient means of financing to make recovery viable.'

'Article 121

Unconditional rescission

1 The following acts may be rescinded to the benefit of the insolvent estate, without the need for any other requirement:

- a) partition carried out less than one year before the date of the start of the insolvency proceedings where the share of the insolvent party has been essentially met with easily concealable assets, with the general assets and nominative values falling to the cointerested parties;
- b) acts carried out by the debtor free of charge in the two years prior to the date of the start of the insolvency proceedings, including the denial of inheritance or legacy, with the exception of donations made in the normal course of events;
- c) constitution by the debtor of real guarantees on pre-existing obligations or others which substitute such obligations, in the six months prior to the date of the start of the insolvency proceedings;
- d) surety, sub-surety, guarantees or credit mandates which the insolvent party has signed in the period referred to in the previous subparagraph and which do not respect business operations with real interest for the insolvent party;
- e) constitution by the debtor of real guarantees at the same time as the creation of the obligations guaranteed, in the 60 days prior to the date of the start of the insolvency proceedings;
- f) payment or other acts to terminate obligations the due date for which was after the date of the start of the insolvency proceedings, taking place in the six months prior to the date of the start of the insolvency proceedings, or after such date but before the due date;
- g) payment or other ways of terminating obligations made in the six months prior to the date of the start of the insolvency proceedings under terms which are not usual in legal business and which the creditor may not demand;
- h) acts for consideration carried out by the insolvent party in the year prior to the date of the start of the insolvency proceedings where the obligations undertaken by it manifestly exceed those of the counterparty;
- i) reimbursement of shareholders' loans, when this takes place in the same period referred to in the previous subparagraph.

2 The provisions of the preceding paragraph are overridden by legal rules which exceptionally always require bad faith or other requirements.'

'Article 122

Payment systems

Acts covered by a payment system as defined by Article 2(a) of Directive No 98/26/EC of the European Parliament and of the Council of 19 May, or comparable thereto, may not be rescinded.'

'Article 123

Form of rescission and lapsing of entitlements

1 Rescission may be carried out by the insolvency practitioner by registered letter with acknowledgement of receipt in the six months after the act comes to light, but never after two years have passed since the date of the declaration of insolvency.

2 However, while the business is not concluded, rescission may be declared and is not subject to a time limit, by way of exception.'

'Article 124

Effects with respect to assignees

1 The effects of the rescission of the act with respect to later assignees assume bad faith on their part, except in the case of universal successors or if the new transfer occurred free of charge.

2 The provisions of the preceding paragraph apply, mutatis mutandi, to the constitution of entitlements to the assets transferred for the benefit of a third party.'

'Article 125

Challenging a rescission

The right to challenge a rescission expires in three months, with the corresponding action under way, proposed against the insolvent estate, and reliant on the insolvency proceedings.'

'Article 126

Effects of rescission

- 1 *Rescission has retroactive effects, and the situation which would have existed if the act had not been carried out or omitted, as applicable, must be restored.*
- 2 *The action brought by the insolvency practitioner for the purpose provided for in the previous paragraph is dependent on the insolvency proceedings.*
- 3 *The penalties applied to third parties who do not submit assets or valuables which must be returned to the estate within the time limit set in the judgement will be those provided for in procedural law for the depositary of pledged assets who fails to hand them over in time.*
- 4 *The object provided by the third party will be returned only if it can be identified and separated from those which belong to the remaining part of the estate.*
- 5 *Should the situation described in the previous paragraph not occur, the obligation to return the corresponding value constitutes a debt of the insolvent estate commensurate with the respective enrichment at the date of the declaration of insolvency, and an insolvency debt with respect to any possible remaining sum.*
- 6 *The obligation to return, at the cost of the purchaser, free of charge, will only exist commensurate with his own enrichment, except in the event of real or presumed bad faith.'*

'Article 127

Actio Pauliana

- 1 *Insolvency creditors are not permitted to bring new actiones Paulianae against acts carried out by the debtor, rescission of which has been declared by the insolvency practitioner.*
- 2 *Pending actiones Paulianae at the date of the declaration of insolvency or those proposed thereafter will not be attached to the insolvency proceedings, and, in the event of rescission of the act by the insolvency practitioner, will only go forward if such a rescission is then declared ineffective by a final decision, which will be binding with respect to those actions in respect of issues which the insolvency practitioner has appraised, provided that it does not counter a previously judged case.*
- 3 *When an actio Pauliana is upheld, the interest of the creditor bringing the said action is assessed for the purposes of Article 616 of the Civil Procedure Code, disregarding the changes introduced to the respective claim by a possible insolvency or payments plan.'*

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