INSOLVENCY LAW

AMENDMENTS TO THE INSOLVENCY AND BUSINESS RECOVERY CODE

THE PURPOSE OF THE PRESENT AMENDMENTS IS THE IMPLEMENTATION OF A SET OF MEASURES AIMING, ESSENTIALLY, TWO MAIN OBJECTIVES: SIMPLIFY FORMALITIES AND PROCEDURES, AS WELL AS, CREATE THE *SPECIAL PROCEDURES OF REVITALIZATION*. THESE AMENDMENTS SHALL ENTER IN FORCE ON MAY 20, 2012.

On April, 20, was published in the Portuguese Official Gazette, Law nr 16/2012, approving the sixth amendment to the Insolvency and Business Recovery Code, hereinafter the C.I.R.E., approved by Decree-Law nr 53/2004, March, 18.

This legislation amendment has two main objectives: the first one is the implementation of a set of measures to simplify formalities and procedures; and, the second is the creation of the Special Procedures of Revitalization.

- **Simplification of formalities and procedures**

In order to make the insolvency procedures more effective and smooth, some of the steps that were mandatory are now under the Judge sole discretion.

Resulting on the change imposed on the need to held the Creditors Assemblies to assess the insolvency report; now and upon a grounded declaration, the Judge may waive the same, except in the following cases: (i) when the debtor requesting insolvency has also required the exoneration of the remaining debts; (ii) if the presentation of an insolvency plan is expectable; (iii) when the insolvency administration is allocated to the debtor.

Also the conciliation attempt foreseen within the verification and graduation of credits stage has now an optional nature.

The powers of the Judge have also been increased, imposing to the same the duty to decide immediately if the insolvency has a fortuitous nature, whenever the Public Prosecutor and the Insolvency Administrator have also proposed such qualification. Notwithstanding, this decision is subject to appeal.

Still within the scope of the insolvency qualification stage, the differences implemented are enormous, now this incident relies on the assumption that there are evidences that the insolvency was originated by the debtor or any of its representatives misconduct. This amendment reflects a huge difference in relation to the regime in force until now; in fact it eliminates the opening of this stage for the insolvency qualification from the initial sentence declaring

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the insolvency, and eliminates also the assumption that only after this stage is started it is possible to ascertain the existence or not of facts determining the insolvency as culpable.

Indeed, this legislation amendment reflects what had been shown in practice, i.e. the total inadequacy of the opening of this incident on the moment when the insolvency is declared. This incident is only adequate and justifiable when there are in fact evidences that the insolvency situation was originated by misconduct.

Thus, in the new law wording, only upon a request from the Insolvency Administrator or any other interested party to qualify the insolvency as culpable, the Judge, upon analysing the alleged facts, may declare the insolvency qualification stage to be opened. The referred request must be grounded, appended to the main proceedings, and refer the persons to be affected by such qualification.

If the insolvency is qualified as culpable, the Judge must in the same sentence, condemned those affected by such decision, to compensate the insolvent debtor creditors in an amount corresponding to the unpaid credits, within their assets limits, the liability being jointly.

We also note the amendment implemented regarding the publication of the acts. The acts that were previously published in the Official Gazette are now published in the *Citius Site*. And within the subsequent verification of credits procedures, the traditional citation notice is now effected through electronic means.

Regarding the anticipated sale of goods, the present law amendment foresees that the insolvency administrator, upon prior notice to the debtor, the creditors committee and the Judge, has sufficient powers under his sole discretion to decide the anticipated sale of goods, which are at risk of deterioration or depreciation.

On the other hand, the deadline for the debtor to request insolvency is reduced from 60 to 30 days, as of the date when the insolvency situation is acknowledged.

Upon the request of any interested party, the Judge is also granted with the powers to appoint more than one insolvency administrator. Such party must in a grounded manner propose the administrator to be appointed, and will be liable for his remuneration in case the insolvent estate is not sufficient.

It is also foreseen the termination of acts for the benefit of the insolvent estate, provided that such acts have been performed within the two preceding years, and not four, to the beginning of the insolvency proceedings. On another hand, the limitation period regarding the right to appeal is of tree months, and no longer of six months.

Regarding the insolvency administrator liability, the present amendment specifically foresees that the insolvency administrator will be liable only for damaging conducts or omissions occurring upon its appointment. The tax liability and regarding the deposit of the accounts shall rely on the insolvent's directors.

Upon the insolvency declaration, the corporate bodies members shall remain in office, however, by rule, they will not be remunerated and will be able to resign only after the annual accounts are deposited, as of the liquidation decision date within the insolvency proceedings.

The deadline to start the procedures for the subsequent verification of credits is reduced from one year to six months. Furthermore, these procedures can now be extinguished if due to the claimant negligence no action takes place during 30 days and no longer 3 months.

Please also note the amendment of the name given to the plan intended to provide for the insolvent's recovery, which is now designated by "Recovery Plan" and is differentiated from the "Insolvency Plan".

- **The Special Procedures of Revitalization**

The aim of the special procedures of revitalization is to avoid the insolvency proceedings direct resource, providing smoothness and efficiency to cases in which companies, even if in a difficult economic situation or merely imminent insolvency situation, are still capable of being recovered.

The procedures begin with a written statement from the debtor and, at least, one of its creditors, in which are foreseen possible negotiations leading to the debtor revitalization through the approval of a recovery plan.

The special procedures of revitalization may also start with the filing of an extrajudicial recovery agreement by the debtor, which must be signed by the same and by a significant majority of its creditors.

The debtor must communicate the above referred statement immediately to the Judge of the Court competent to

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declare its insolvency, in which case the Judge must order the appointment of an inte-rim insolvency administrator.

Upon the appointment of the interim insolvency administrator, any relevant acts of the debtor must be previously authorised by the same.

The debtor must also inform all other creditors of these procedures, in order to allow the same to participate in the same in case they wish so.

Upon the publication in the *Citius Site* of the beginning of the special procedures of revitalization, the creditors have 20 days to claim their credits, after which the interim insolvency administrator shall prepare a provisional list of creditors.

After a period of 5 business days for appeals, the parties will have a further period of two months to conclude the negotiations, which may be extended for one more month.

The interim insolvency administrator is responsible, among other functions, to monitor and guide the negotiations, and supervise the development and regularity of the works.

The debtor and its directors in law or in fact are jointly and civilly liable for damages caused to the creditors in case of lack or inaccuracy of the communications or information provided. Any legal actions to determine such liability will be autonomous in relation to the special procedures of revitalization.

During the negotiations inherent to these revitalization procedures, no other debt recovery actions can be started, and all similar pending procedures will be suspended. Unless the recovery plan foresees otherwise, such procedures will be terminated with the approval of the recovery plan.

Upon the conclusion of the negotiations and approval of the recovery plan, the latter must be signed by all the parties involved, and immediately sent to the Court for approval or refusal by the Judge. The Judge decision is binding on all creditors, even when they have not attended the negotiations.

If no agreement is reached with the negotiations and no plan is prepared, the negotiations procedures are terminated and the effects of the revitalization procedures are all extinguished. However, being the debtor already in an insolvency situation, upon the termination of these procedures the Judge shall declare the insolvency, within 3 business days as of the communication regarding the inability of the creditors to reach an agreement.

April 30, 2012

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