Insolvency/bankruptcy

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Malta

1 Who may insolvency proceedings be brought against?

Insolvency Proceedings (Companies) and Bankruptcy Proceedings (Partnerships and traders)

Under National law one may identify two forms of persons to which insolvency proceedings may apply, these being commercial partnerships, and traders. Different regimes are applicable to these types of persons. Commercial partnerships may be subdivided into partnerships *en nom collectif*, partnerships *en commandite* and the limited liability company.

Insolvency proceedings may be brought against all the aforementioned persons (natural and legal) however different procedures, rules and legislation will apply. In fact bankruptcy proceedings (Chapter 13 of the Laws of Malta) may be instituted against partnerships *en nom collectif*, partnerships *en commandite,* and against traders. Partnerships *en nom collectif*, partnerships *en commandite* are for all intents and purposes considered as traders for the sake of bankruptcy proceedings. The term "trader" is defined under Chapter 13 as any person who, by profession, exercises acts of trade in his own name, and includes any commercial partnership.

Reorganization Proceedings (Company Recovery)

Reorganisation procedures may be brought against companies in terms of Articles 327 to 329B of Chapter 386 - The Companies Act 1995.

2 What are the conditions for opening insolvency proceedings?

Insolvency Proceedings (Companies)

The company following a decision of the general meeting, its board of directors, any debenture holder, creditor or creditors, or any contributory or contributories may file proceedings in Court for the company to be dissolved and consequently wound up if the company is unable to pay its debts. The test to be applied in terms of Article 214(2)(a)(ii) of Chapter 386 is as follows:

The company shall be deemed to be unable to pay its debts -

(a) if a debt due by the company has remained unsatisfied in whole or in part after twenty-four weeks from the enforcement of an executive title against the company by any of the executive acts specified in article 273 of the Code of Organization and Civil Procedure; or

(b) if it is proved to the satisfaction of the court that the company is unable to pay its debts, account being taken also of contingent and prospective liabilities of the company.

The court will grant the parties the opportunity to make their case and eventually decide whether the requisites for insolvency exist, in which case the court will order dissolution and the deemed date of insolvency will be the date of filing of the application to the court in terms of article 223 of Chapter 386.

In the period between the order for dissolution in the case of insolvency and the filing of the application for insolvency to court, the court may at any time appoint a provisional administrator, and charge him with the administration of the estate or business of the company as the court may specify in the order appointing him. The provisional administrator holds office until such time as the winding up order is made or the winding up application is dismissed unless before such time he resigns or he is removed by the court upon good cause being shown.

Insolvency - Voluntary Creditors winding up

Apart from the above a company may dissolve voluntarily and if the directors are of the opinion that the assets of the company are not sufficient to cover the liabilities, a meeting of creditor will be called for appointing an insolvency practitioner (and/or a liquidation committee) who enjoys and the trust of the creditors who will be charged with the winding up of the company without the need of court proceedings. The rules to be followed are laid down under Articles 277 *et seq* of Chapter 386.

Reorganization Proceedings (Company Recovery)

The company following an extraordinary resolution, the directors following a decision of the board of directors, or the creditors of the company representing more than half in value of the company's creditors, may file reorganization proceedings (Recovery procedures in terms of Article 329B of Chapter 386) in Court if the company is unable to pay its debts, or is imminently likely to become unable to pay its debts. As in the previous case, a company shall be deemed to be unable to pay its debts -

(a) if a debt due by the company has remained unsatisfied in whole or in part after twenty-four weeks from the enforcement of an executive title against the company by any of the executive acts specified in article 273 of the Code of Organization and Civil Procedure; or

(b) if it is proved to the satisfaction of the court that the company is unable to pay its debts, account being taken also of contingent and prospective liabilities of the company.

The Court will decide whether to put the company into reorganization, thus issuing a company recovery order within twenty working days from the application to court to administer the business of the company for a period to be specified by the Court (currently a period of one year which me be extended by a subsequent period of 1 year, however in virtue of amendments which are in the pipeline, this period shall be reduced to a period of four months which may be extended by further periods of four months up to a maximum period of twelve months.

Bankruptcy Proceedings (Partnerships and traders)

Bankruptcy proceedings may be filed by any creditor, whether the debt owing to him is a commercial debt or otherwise, and even though such debt has not yet fallen due, to proceed summarily before the Civil Court, First Hall, against the debtor or his lawful representative, demanding a declaration that such debtor is in a state of bankruptcy.

The criterion to be declared as bankrupt is the suspension of payment of debts by the debtor. The court will deliver its judgment declaring the bankruptcy, and appoint one or more curators to exercise the functions assigned to them in terms of the Commercial Code, Chapter 13.

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?

Insolvency Proceedings (Companies)(including creditors voluntary winding up)

All the assets of the company will be liquidated to cover the liabilities of the debtor. There will be no distinction between assets which already formed part of the estate of the debtor, and those which devolve on the debtor after the opening of the insolvency proceedings.

Bankruptcy Proceedings (Partnerships and traders)

In bankruptcy proceedings which relate to traders and partnerships *en nom collectif* and *en commandite*, all assets whether movable and immovable can form part of the estate to be liquidated. In the case of bankruptcy, once a declaration of bankruptcy has been delivered, the bankrupt is ipso jure dispossessed of the administration of all his property whether such property relates to his business or otherwise, save for his right to a daily maintenance in order to subsist.

His assets shall be held in the possession of a curator who in turn shall have the right to sell and alienate the property with the Court's approval. The property of the bankrupt which is perishable shall be sold by means of a licensed auctioneer after obtaining Court authority.

In the case of non-perishable merchandise and other property this also requires Court authority.

The Judge in such circumstances shall give such directions that he considers most advantageous in the interest of the bankrupt and the creditors, even if the circumstances so arise, to allow the curator to re-establish the bankrupt's affairs or increase his assets, as long as this is to the benefit of the creditors to.

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

Insolvency Proceedings (Companies)

As soon as the court orders the dissolution of a company on grounds that it is insolvent, it will appoint an insolvency practitioner (insolvency practitioner).

Chapter 386 imposes an obligation that such insolvency practitioner needs to be a natural person, who is qualified as an advocate or a certified public accountant and/or auditor, or is registered with the Registrar of Companies as fit and proper to exercise the function of insolvency practitioner.

A further restriction is that an insolvency practitioner may not act as insolvency practitioner of a particular company if he has held the office of director or company secretary or has held any other appointment with or in connection with that particular company, at any time during the four years prior to the date of dissolution of the company.

The court has wide discretion in determining who shall pay for the remuneration of the insolvency practitioner. By default the insolvency practitioner shall be remunerated out of the assets of the company. However if these are insufficient the Court may order that payment is effected by other (connected) persons and on such basis as the Court may direct.

In terms of Article 296 of Chapter 386 the powers of the company officers (directors and company secretary) shall cease on the appointment of an insolvency practitioner, and therefore neither the directors, including any delegate, nor the company secretary shall have the authority to transact in the name and on behalf of the said company in liquidation. The insolvency practitioner will take into his custody or under his control all the property and all rights to which he has reasonable cause to believe the company to be entitled.

In terms of Article 238 of Chapter 386, the insolvency practitioner in a winding up by the court shall have the power, with the sanction either of the court or of the liquidation committee:

(a) to bring or to defend any action or other legal proceeding in the name and on behalf of the company;

(b) to carry on the business of the company so far as may be necessary for the beneficial winding up thereof;

(c) to pay creditors according to their ranking at law;

(d) to make any compromise or arrangement with creditors or persons claiming to be creditors, or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or which may be due in damages against the company or whereby the company may be rendered liable, and to refer any such matter to arbitration;

(e) to make calls on contributories or alleged contributories and to effect any compromise or arrangement in relation to debts, liabilities and claims of the company present or future, certain or contingent, ascertained or which may be due in damages, subsisting or supposed to subsist between the company and a contributory or alleged contributory or other debtor or alleged debtor, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as may be agreed, and take any security for the discharge of any such call, debt, liability or claim and give a complete discharge in respect thereof;

(f) to represent the company in all matters and to do all such things as may be necessary for winding up the affairs of the company and distributing its assets.

In addition the Court may provide that the insolvency practitioner may, where there is no liquidation committee, exercise any of the powers mentioned in paragraphs (a) or (b) above without the sanction of the Court.

In general, the insolvency practitioner in a winding up by the court shall, have the power -

(a) to sell the movable and immovable property, including any right, of the company by public auction or private agreement with power to transfer the whole or any part thereof;

(b) to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts and other documents;

(c) to raise on the security of the assets of the company any money requisite;

(d) to appoint a mandatory to act for him in his capacity as insolvency practitioner for particular purposes.

The exercise by the insolvency practitioner in a winding up by the court of the powers conferred by this article shall be subject to the control of the court, and any creditor or contributory may apply to the court with respect to any exercise or proposed exercise of any of those powers.

In the interim period between the order for dissolution in the case of insolvency and the filing of the application for insolvency to court, where the court appoints a provisional administrator, the powers of the company officials shall also cease to the extent that the court will charge the administrator with the administration of the estate or business of the company as the court may specify in the order appointing him.

Reorganization Proceedings (Company Recovery)

In terms of article 329B(6)(a) of Chapter 386, during the period that a recovery (reorganization) order is in force, the company shall continue to carry on its normal activities under the management of the special controller.

The special controller needs to be an individual who the Court has ascertained to its satisfaction that he/she enjoys proven competence and experience in the management of business enterprises, is qualified and willing to accept the appointment, and has no conflict of interest in relation to his appointment.

The remuneration of the special controller is covered by the company. In fact in its appointment the court determines a period, not exceeding ten working days from the making of the company recovery order, within which the company shall deposit a sum of money in Court or offer other suitable guarantee or other appropriate arrangement, which, in the opinion of the Court, is sufficient to cover the remuneration, and charges of the special controller connected to his appointment.

On the appointment of the special controller, any power conferred on the company in terms of any law or by its Memorandum & Articles of Association shall be suspended unless the consent of the special controller to exercise such power has been obtained, which consent may be given either generally or in relation to a particular case or cases. In the absence, any such power shall vest in the special controller.

In general, the special controller will have the authority to:

(a) take into his custody or under his control all the property of the company and he shall thenceforth be responsible to manage and supervise its activities, business and property.

(b) after informing the Court, to remove any director of the company and to appoint any individual to serve as a

manager;

(c) engage persons for the provision of professional or administrative services, and commit the company to the payment of their respective fees or charges; and

(d) to call any meeting of the members or creditors of the company.

In addition, the special controller shall have the power, with the prior express authorisation of the Court, to:

(i) engage the company into any commitment of more than six months duration;

(ii) terminate the employment of company employees as he considers necessary for insuring the continuation of the company as a viable going concern in whole or in part;

Bankruptcy Proceedings (Partnerships and traders)

As explained above, with regard to traders carrying out their business in their personal name and partnerships, it is the Commercial Code under the Title of Bankruptcy, which in the applicable law.

With regard to the powers of the insolvency practitioner under bankruptcy, such insolvency practitioner is termed a 'curator' , and a 'curator' is a person or persons who the Court deems fit to faithfully discharge the duties of this office, even if such 'curator' may be a relation of the bankrupt or may be a creditor of the bankrupt.

The curator upon assuming his duties of this office shall take possession of all the bankrupts' property and rights of any kind belonging to the bankrupt. Furthermore, the bankrupt shall take all the necessary steps to preserve the rights of the bankrupt against his debtors and also register in the Public Registry any hypothec affecting the property of the debtors of the bankrupt. The curator is responsible for his actions towards the bankrupt.

The curator also has the duty to sue for the payment of debts which are due to the bankrupt, but it shall not be lawful for the curators to make any compromise or refer any dispute to arbitration without the consent in writing of the majority in value of the creditors of the bankrupt, and the authority of the Judge.

Within one month from the delivery of the judgment of bankruptcy, the curator shall make up an inventory of the bankrupt's property.

Every creditor has a right to see such a list and the creditor and the bankrupt are bound to assist in the making up of the inventory.

This inventory shall contain a true list together with a description and valuation of all bankrupt's property.

The curator cannot dispose of property without the Court's consent and the whole procedure is open to public scrutiny. The proceeds of any sale made by the curator on behalf of the bankrupt or partnership shall be listed and all receipts and invoices are to be properly documented.

It shall be in the power of the Court to demand of the curators, the bankrupt and the creditors to give on oath all information as it may deem necessary.

With regard to the powers of the debtor (in this case I understand the bankrupt person or bankrupt partnership), the debtor has the right to oversee that the curator is conducting the affairs of the bankruptcy in accordance to law and correctly.

The debtor has the right to whistle-blow to the Court if such actions taken by the curator are not conducted in accordance to the terms of the Court decree or if his affairs are being mismanaged.

The books and papers of the bankrupt shall be open to inspection at all times, so this signifies also that the debtor has a right to know, check and verify the actions of the curator appointed by the Court.

The debtor also has a right at law to a regular maintenance for his subsistence, meaning that the Court will allow the debtor an allocation of funds out of his own property, to be given to him by the curator which will be a subsistence allowance for his living and for his family, so long as there is no presumption that the bankrupt has acted fraudulently.

5 Under which conditions may set-offs be invoked?

Insolvency and Reorganization Proceedings (Companies) / Bankruptcy Proceedings (Partnerships and traders)

In terms of Chapter 459 any close-out netting provision or any other provision in any contract providing for or relating to the set-off or netting of sums due from each party to the other in respect of mutual credits, mutual debts or other mutual dealings shall be enforceable in accordance with its terms, whether before or after bankruptcy or insolvency, in respect of mutual debts, mutual credits or mutual dealings which have arisen or occurred before the bankruptcy or insolvency of one of the parties, against:

(a) the parties to the contract,

(b) any guarantor or any person providing security for any party to the contract,

(c) the insolvency practitioner, receiver, curator, controller, special controller or other similar officer of either party to the contract, and

(d) the creditors of the parties to the contract.

The above shall not apply in respect of any close-out netting agreement entered into at a time at which the other party knew or ought to have known that an application for the dissolution and winding up of the company by reason of insolvency was pending, or that the company has taken formal steps under any applicable law to bring about its dissolution and winding up by reason of insolvency.

It shall also not apply where the insolvent party is an individual (not a trader) or a commercial partnership other than a company (partnership *en nom collectif* or partnership *en commandite)* and the other party knew or ought to have known of events of the same nature as stated in the preceding paragraph in relation to the insolvent party.

Any authority or mandate in a contract to implement any close-out netting provision shall not be revoked by the declaration of bankruptcy or the insolvency of any other party to the contract.

It is further provided that notwithstanding the provisions of any other national law, nothing shall limit or delay the application of any provision of any contract providing for or relating to set-off or netting which would otherwise be enforceable and no order of any court nor any warrant or injunction or similar order issued by a court or otherwise and no proceedings of whatever nature shall have any effect in relation thereto. However notwithstanding what is being said in this paragraph, nothing shall prevent the application of any law which would render netting or set-off unenforceable in any particular case on the grounds of fraud or on any similar ground, or permit the enforceability of netting or set-off if any provision of a contract between the parties concerned would make netting or set-off void because of fraud or any similar ground.

The law specifies that it would be lawful for the parties to a contract:

- to agree on any system or mechanism which would enable the parties to convert a non-financial obligation into a monetary obligation of equivalent value and to value such obligation for the purposes of any set-off or netting;
- to agree on the rate of exchange or the method to be used to establish the rate of exchange to be applied in effecting any set-off or netting when the sums to be set off or netted are in different currencies, and to establish the currency in which payment of the net sum is to be effected;
- to agree that any transactions or other dealings carried out pursuant to any contract, whether identified specifically or by reference to a type or class of transactions or dealings, shall be treated as a single transaction or dealing for the purpose of the set-off or netting provisions in the contract and that all such transactions or dealings shall be treated as a single transaction or dealing by the parties or any insolvency practitioner, receiver, curator, controller or special controller or other officer acting for the parties and any court.

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

Insolvency Proceedings (Companies)

Article 303 of Chapter 386 makes provision for privileges, hypothecs or other charges, transfer or other disposal of property or rights, and any payment, execution or other act relating to property or rights made or done by or against a company, and any obligation incurred by the company within six months before the dissolution of the company to be deemed as fraudulent preference against its creditors whether such transaction is of a gratuitous nature or an onerous nature if it constitutes a transaction at an undervalue or if a preference is given. In such cases the transaction (fraudulent preference) shall be void.

Undervalue is defined as follows:

(a) a company enters into a transaction at an undervalue if:

(i) the company makes a gift or otherwise enters into a transaction on terms that provide for the company to receive no consideration, or

(ii) the company enters into a transaction for a consideration the value of which, in money or money's worth, is significantly less than the value in money or money's worth of the consideration provided by the company;

Preference is defined as follows:

(b) a company gives a preference to a person if:

(i) that person is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities; and

(ii) the company does anything or suffers anything to be done which, in either case, has the effect of putting that person into a position which, in the event of the company going into insolvent winding up, will be better than the position he would have been had that act or omission not occurred.

An exception to the above is made if the person, in whose favour the transaction is made, done or incurred, proves that he did not know and did not have reason to believe that the company was likely to be dissolved by reason of insolvency.

Apart from the above, there is no other provision which has any direct effect on contracts.

Reorganization Proceedings (Company Recovery)

No ad-hoc enactments deal with the effect of reorganization proceedings on contracts.

Bankruptcy Proceedings (Partnerships and traders)

Under the Commercial Code and more precisely under Article 485, every act transferring property or any obligation entered into, or any renunciation to a succession made by the bankrupt under a gratuitous or onerous title, which has the purpose of defrauding his creditors, can be annulled.

Unlike the Companies Act, the Commercial Code does not specify a time limit such as in article 303 of Chapter 386 of the Laws of Malta.

In such above cases, if it is proven that the bankrupt knew of the existence of circumstances giving rise to a declaration of bankruptcy, than in such case, such actions can be annulled.

7 What effect does an insolvency proceeding have on proceedings brought

by individual creditors (with the exception of pending lawsuits)?

Insolvency Proceedings (Companies)

As soon as an insolvency proceeding is opened (the company is dissolved by court order on grounds of insolvency) no action or proceeding shall be commenced (prohibition to commence actions) against the company or its property except by the leave of the court and subject to such terms as the court may impose. The law does not specify in which cases the court would allow a court proceeding by a creditor to commence of continue, but in general the principle is that during an insolvency proceeding the assets of the company are administered in an orderly fashion for the benefit of all the creditors and that particular creditors should not be able to obtain an advantage by bringing proceedings against the company.

Reorganization Proceedings (Company Recovery)

National law provides for a stay of proceedings during reorganization (company recovery) proceedings. In fact article 329B(4) of Chapter 386 states that upon the submission of an application for reorganization (company recovery), and unless it is dismissed, or during the period during which the company recovery procedure is in force:

(a) any pending or new winding up application shall be stayed;

(b) no resolution for the dissolution and consequential winding up of the company may be passed or given effect to;

(c) the execution of claims of a monetary nature against the company and any interest that may otherwise accrue thereon shall be stayed;

(d) during the tenure of the lease, no landlord or other person to whom rent is payable may exercise any right of termination of lease in relation to premises leased to the company in respect of a failure by the company to comply with any term or condition of its tenancy of such premises, except with leave of the Court and subject to such terms as the Court may deem fit to impose;

(e) no other steps may be taken to enforce any security over the property of the company, or to repossess goods in the possession of the company under any hire-purchase agreement, except with the leave of the Court and subject to such terms as the Court may deem fit to impose;

(f) no precautionary or executive act or warrant mentioned in the Code of Organization and Civil Procedure, Chapter 16, shall be made against the company or any property of the company except with leave of the Court and subject to such terms as the Court may deem

fit to impose; and

(g) no judicial proceedings shall be commenced or continued against the company or its property except with leave of the Court and subject to such terms as the Court thinks fit to impose.

Bankruptcy Proceedings (Partnerships and traders)

In bankruptcy proceedings against a trader or partnership, once a curator has been appointed by the Court, then in such case, all actions against the person and property of the bankrupt can only be brought against the curator/s and not against the bankrupt or the bankrupt partnership, and this in accordance to article 500 of Chapter 13.

The creditor has a right to know, scrutinize and verify how the curator is administering the affairs of the bankrupt, and request recourse to the Court if his rights are being prejudiced by the curator/s.

In recovery proceedings, the Court has the discretion to issue a temporary decree in order to provide respite for the recovery of the affairs of the bankrupt/partnership.

Nonetheless, unlike in company recovery, actions may still be brought by creditors against the curator representing the bankrupt trader or bankrupt partnership.

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

Insolvency Proceedings (Companies)

As soon as an insolvency proceeding is opened (the company is dissolved by court order on grounds of insolvency) no action or proceeding shall be proceeded with (stay) against the company or its property except by the leave of the court and subject to such terms as the court may impose. The law does not specify in which cases the court would allow a court proceeding by a creditor to commence of continue, but in general the principle is that during an insolvency proceeding the assets of the company are administered in an orderly fashion for the benefit of all the creditors and that particular creditors should not be able to obtain an advantage by bringing proceedings against the company.

Reorganization Proceedings (Company Recovery)

National law provides for a stay of proceedings during reorganization (company recovery) proceedings. In fact article 329B(4) of Chapter 386 states that upon the submission of an application for reorganization (company recovery), and unless it is dismissed, or during the period during which the company recovery procedure is in force:

(a) any pending or new winding up application shall be stayed;

(b) no resolution for the dissolution and consequential winding up of the company may be passed or given effect to;

(c) the execution of claims of a monetary nature against the company and any interest that may otherwise accrue thereon shall be stayed;

(d) during the tenure of the lease, no landlord or other person to whom rent is payable may exercise any right of termination of lease in relation to premises leased to the company in respect of a failure by the company to comply with any term or condition of its tenancy of such premises, except with leave of the Court and subject to such terms as the Court may deem fit to impose;

(e) no other steps may be taken to enforce any security over the property of the company, or to repossess goods in the possession of the company under any hire-purchase agreement, except with the leave of the Court and subject to such terms as the Court may deem fit to impose;

(f) no precautionary or executive act or warrant mentioned in the Code of Organization and Civil Procedure, Chapter 16, shall be made against the company or any property of the company except with leave of the Court and subject to such terms as the Court may deem

fit to impose; and

(g) no judicial proceedings shall be commenced or continued against the company or its property except with leave of the Court and subject to such terms as the Court thinks fit to impose.

Bankruptcy Proceedings (Partnerships and traders)

National law under the Commercial Code does not provide for any stay of proceedings. Nonetheless, it would be possible at the request of the curator to request that such application brought before the Courts, is heard by the same Judge who is conducting the bankruptcy, so that the Judge may regulate and conduct the affairs of the bankruptcy safeguarding the rights and obligations of the bankrupt and ascertaining that the rights in accordance with the application submitted by the creditor are heard and decided upon.

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

Insolvency Proceedings (Companies)

Creditors may intervene in insolvency proceeding if they prove they have a judicial interest and as such would be able to make submissions during the proceedings before the court.

Creditors are informed of the ongoing process by the insolvency practitioner, who also holds meetings and creditors are allowed to give their opinion.

Reorganization Proceedings (Company Recovery)

Article 329B of Chapter 329B specifically states that both the court and the special controller shall act *inter alia* in the best interest of the creditors.

The special controller is also bound to call creditors' meeting/s, with the first one taking place by not later than one month from his appointment.

During such meeting/s the special controller is required to appoint a joint creditors and members committee to render such advice and assistance as the special controller may require in the management of the affairs, business and property of the company and its recovery as a viable going concern.

Bankruptcy Proceedings (Partnerships and traders)

Creditors may intervene in bankruptcy proceedings and participate if they prove they have a judicial interest and would be able to make submissions during proceedings before the court.

Creditors are informed of the ongoing process by the curator who also holds meetings and creditors are allowed to give their opinion

Creditors also have the right to give their vote and a final agreement as to scheme of arrangement as proposed, requires the consent of three-fourths in value of the creditors who have proven their claim.

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

Insolvency Proceedings (Companies)

The insolvency practitioner will be able to sell the property by obtaining the most advantageous offer for the assets of the company.

Reorganization Proceedings (Company Recovery)

The special controller will not be able to dispose of the property of the company without specific authorization by the court, or as suggested in the recovery plan which is subsequently approved, with or without amendments by the court. In any case the court will direct or approve the method of disposal of the assets of the company

Bankruptcy Proceedings (Partnerships and traders)

In bankruptcy proceedings,, the curator shall dispose of the property by obtaining the most advantageous offer for the assets of the company, and this by obtaining Court authorization to do so.

In the recovery of a partnership or bankrupt, article 498 of Chapter 13, the curator shall adhere to the recovery plan, however there is wide discretion on the Judge to give such directions as he considers most advantageous in the interest of the bankrupt and of the creditors

It is possible nonetheless for a creditor to oppose such authority of the Judge, if the creditor on just cause being

shown, demonstrates that this is no in the interest of the creditors.

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?

Insolvency Proceedings (Companies)

No difference is made between claims arising after the opening of insolvency proceedings, or those which existed before. In insolvency proceeding however the court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges and expenses incurred in the dissolution and winding up in such order of priority as the court thinks fit, and the court shall have regard to the following general order of priority:

(a) expenses properly chargeable or incurred by the official receiver or the insolvency practitioner in preserving, realising or collecting any of the assets of the company;

(b) any other expenses incurred or disbursements made by the official receiver or under his authority, including those incurred or made in carrying on the business of the company;

(c) the remuneration of the provisional administrator, if any;

(d) the costs of the applicant, and of any person appearing on the application whose costs are allowed by the court;

(e) the remuneration of the special manager, if any;

(f) any amount payable to a person employed or authorised to assist in the preparation of a statement of affairs or of account;

(g) any allowance made by order of the court, towards costs on an application for release from the obligation to submit a statement of affairs, or for an extension of time for submitting such a statement;

(h) any necessary disbursements by the insolvency practitioner in the course of his administration, including any expenses incurred by members of the liquidation committee or their representatives and allowed by the insolvency practitioner;

(i) the remuneration of any person employed by the insolvency practitioner to perform any services for the company, as required or authorised by the provisions of Chapter 386

(j) the remuneration of the official receiver and of the insolvency practitioner.

Reorganization Proceedings (Company Recovery)

N/A

Bankruptcy Proceedings (Partnerships and traders)

No difference is made between claims arising after the opening of bankruptcy proceedings, or those which existed before. In bankruptcy proceedings the court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges and expenses incurred in the dissolution and winding up in such order of priority as the court thinks fit, and the court shall have regard to the following general order of priority

(a) expenses properly chargeable or incurred by the curator in preserving, realising or collecting any of the assets of the company;

(b) any other expenses incurred or disbursements made by the curator or under his authority, including those

incurred or made in carrying on the business of the company;

(c) the remuneration of the curator, if any;

(d) the costs of the applicant, and of any person appearing on the application whose costs are allowed by the court;

(e) the remuneration of the special manager and of the registrar, if any;

(f) any amount payable to a person employed or authorised to assist in the preparation of a statement of affairs or of account;

(g) any allowance made by order of the court, towards costs on an application for release from the obligation to submit a statement of affairs, or for an extension of time for submitting such a statement;

(h) any necessary disbursements by the curator in the course of his administration, including any expenses incurred by members of the committee if any, or their representatives, and allowed by the curator;

Once these are paid, then secured creditors are paid in accordance to the date of registration of their claim and after such secured creditors, all other creditors are paid as to when they were registered. If for the latter claims (the unsecured creditors) there are insufficient funds, these rank *pari passu*.

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

Insolvency Proceedings (Companies)

Claims shall be accepted at the discretion of the insolvency practitioner. There are no specific rules governing the manner in which claims are made. It is pertinent to point out that whenever the Official Receiver is appointed as insolvency practitioner, the following form for claims is used:

OFFICIAL RECEIVER

c/o MFSA

Notabile Road

Attard, BKR3000

Details of Dissolved Company		
1	Name and registration number	
2	Effective date of dissolution	
Details of Creditor		
3	Name and surname/ registration number	
4	Address	
5	E-mail address	
6	Phone/mobile phone number	/
Details of Debt		
7	Total amount of claim, including any uncapitalised interest due as at the date of dissolution	
8	Total amount of uncapitalised interest as at the date of dissolution	
9	Describe origin of debt including any relevant dates	(Attach additional pages if necessary)
10	Details of documents and/or other evidence in support of claim (attach certified true copy and number each document successively)	

(Attach additional pages if necessary)

Details of Security (if any)

11 Describe the type of security given/obtained

(Attach additional pages if necessary)

12 Date/s when security was given/obtained

13 Amount of debt secured

Declaration by Creditor

14 I, the undersigned, hereby declare that the information given in this form is to the best of my knowledge, true, correct and complete:

Signature of Creditor	Name and Surname in Blocks	Identity Card Number

If signing in representation of a legal person, complete below:

15 In the name and on behalf of _____

Reg. No. _____ in my capacity as _____.

As to the time frame within which such claims may be made Article 255 of Chapter 386 gives authority to the court to fix a time or times within which creditors are to prove their debts or claims or are to be excluded from the benefit of any distribution made before those debts are proved.

Reorganization Proceedings (Company Recovery)

No ad-hoc enactments deal with the effect of reorganization proceedings with regards to the lodging, verification and admission of claims.

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

Insolvency Proceedings (Companies)

It should be noted that with respect to insolvency under Maltese legislation there is no definite list of ranking of creditors, since ranking is not found in a specific legislation but is found in various legislation. The legislation which deals with ranking of claims can be found hereunder:

Article 302 of Chapter 386 states that in the winding up of a company the assets of which are insufficient to meet the liabilities, the rights of secured and unsecured creditors and the priority and ranking of their debts shall be regulated by the law for the time being in force.

Article 535 of Chapter 13 also states that creditors having pledges, privileges or hypothecs shall be ranked according to the law for the time being in force.

Both under Article 535 of Chapter 13 and Article 302 of Chapter 386, it is stated that ranking of debt shall be regulated by the law for the time being in force.

Under Maltese law, the *pari passu* principle is indirectly found in article 1996 of the Civil Code, Chapter 16, which states that the lawful causes of preference are privileges, hypothecs and the benefit of the separation of estates. It is also states that it shall be lawful for a creditor to subordinate, postpone, waive or otherwise modify his existing or future rights of payment, enforcement, ranking and other similar existing or future rights in favour of another person. Such subordination, postponement, waiver, modification or similar action may be made by agreement with or by unilateral declaration to any person, including another creditor, whether determined or yet to be determined at the time of the entry of such agreement or the making of such declaration.

Therefore differences in ranking are created by agreement. Consequently, if there are no privileges, hypothecs, or the benefit of the separation of estates, the debtors will rank equally.

In terms of the above, one would have to look at the various specific laws which grant priorities to certain claims, as is the case with the Value Added Tax Act, Chapter 406, the Employment and Industrial Relations Act, Chapter

452 and the Social Security Act, Chapter 318.

Article 62 of the VAT Act states that:

“The Commissioner shall have a special privilege over the assets forming part of the economic activity of a person in respect of any tax due by that person under this Act and the said tax shall, notwithstanding anything contained in any other law, be paid in preference to a debt having any other privilege, excepting a debt having a general privilege and a debt mentioned in article 2009(a) or (b) of the Civil Code.”.

Article 20 of the Employment and Industrial Relations Act states that:

“Notwithstanding the provisions of any other law any claim by any employee in respect of a maximum of three months of the current wage payable by the employer to the employee, and compensation for leave to which the employee is entitled, together with any compensation due to the employee in consideration of the termination of employment, or any notice thereof, shall constitute a privileged claim over the assets of the employer and shall be paid in preference to all other claims whether privileged or hypothecary:

Provided that, in every case, the maximum amount of the privileged claim shall not exceed the equivalent of the national minimum wage payable at the time of the claim over a period of six months.”.

Article 116(3) of the Social Security Act states that:

“Notwithstanding the provisions of any other law, the claim of the Director of any amount due by way of any Class One or Class Two contribution under this article shall constitute a privileged claim in the case of a Class One contribution, ranking equally with wages of employees over the assets of the employer, and, in the case of a Class Two contribution, over the estate of the self- employed or self-occupied person concerned and shall be paid in preference to all other claims (excluding wages) whether privileged or hypothecary.”.

Furthermore, Articles 2088 to 2095 of the Civil Code deal specifically with the order of priority of privileges. It is stated, amongst other things, that debts are to be paid according to the order of registration. Those hypothecs that are registered on the same day would then result in an equal rank.

However, in insolvency proceedings the court may (and in most cases will), in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges and expenses incurred in the dissolution and winding up in such order of priority as the court thinks fit, and the court shall have regard to the following general order of priority:

(a) expenses properly chargeable or incurred by the official receiver or the insolvency practitioner in preserving, realising or collecting any of the assets of the company;

(b) any other expenses incurred or disbursements made by the official receiver or under his authority, including those incurred or made in carrying on the business of the company;

(c) the remuneration of the provisional administrator, if any;

(d) the costs of the applicant, and of any person appearing on the application whose costs are allowed by the court;

(e) the remuneration of the special manager, if any;

(f) any amount payable to a person employed or authorised to assist in the preparation of a statement of affairs or of account;

(g) any allowance made by order of the court, towards costs on an application for release from the obligation to submit a statement of affairs, or for an extension of time for submitting such a statement;

(h) any necessary disbursements by the insolvency practitioner in the course of his administration, including any expenses incurred by members of the liquidation committee or their representatives and allowed by the insolvency practitioner;

(i) the remuneration of any person employed by the insolvency practitioner to perform any services for the company, as required or authorised by the provisions of Chapter 386

(j) the remuneration of the official receiver and of the insolvency practitioner.

During insolvency proceedings the insolvency practitioner will prepare a report containing a ranking of creditors and a scheme of distribution, which will be presented in court. The creditors are allowed to make submissions if they are in disagreement with the contents of such report and the court may order rectification. The court will eventually approve the said ranking and scheme and order the insolvency practitioner to proceed with payment to creditors.

Reorganization Proceedings (Company Recovery)

N/A

Bankruptcy Proceedings (Partnerships and traders)

First and foremost the distribution governing the distribution of proceeds are primarily governed by article 531 of the Commercial Code and by laws under the Civil Code which enlists the ranking of creditors between those creditors who have a privilege at law and those creditors who have a secured hypothec. These are secured creditors which emanate either from dispositions of the law or from public deed in accordance to the date of when such registration was enrolled, and which are also regulated by article 535 of the Commercial Code.

Thereafter, simple creditors (which are not registered creditors) are ranked *pari passu* in accordance to their claims.

Once a person is declared bankrupt, a meeting is held within ten days from such declaration whereby an examination of the claims are analyzed before the Judge, the Registrar, the curator, the bankrupt and the creditors and inventory is drawn up.

In this meeting, the bankrupt is heard and the bankrupt proposes the terms of the composition. At this sitting, what is discussed is whether the case before it merits a composition whereby a composition of creditors (the ones who are not registered creditors by way of a privilege or hypothec or by way of a pledge) is appointed to appear instead of all the creditors, and the creditors even individually have the right to contest such within 8 days.

A second meeting would be held whereby in the second meeting the Judge once again presides such meeting, whereby for the composition of creditors to be admitted, it must represent three-fourths of the sums admitted to be due by the bankrupt;

After this procedure, and once the inventory is established of all creditors, another meeting is held whereby at this meeting the Judge shall preside such meeting after due notice of the meeting would have been publicized in accordance to law.

At this meeting, every creditor shall present his case, and if the curator opposes any creditor, than the creditor has to prove his case, to the curator and to the composition of creditors.

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

Insolvency Proceedings (Companies)

During insolvency proceedings as soon as the insolvency practitioner has realised all the property of the company, or so much thereof as can, in his opinion, be realised without needlessly protracting the insolvency, and has distributed a final payment, if any, to the creditors, and has adjusted the rights of the contributories among themselves, and made a final return, if any, to the contributories, and submitted accounts at the company’s expense, on being satisfied that the insolvency practitioner has complied with the requirements of Chapter 386 and such other requirements, if any, as may be laid down by it and, after taking into consideration

the report and any objection which may be raised by any creditor or contributory or person interested, the court will proceed to release the insolvency practitioner from his appointment.

Subsequently the court makes an order that the name of the company be struck off the register from the date of the order. Such order shall be notified to the Registrar of Companies who shall effect the striking off.

Reorganization Proceedings (Company Recovery)

Article 329B(12) provides for different scenarios which involve the termination of the recovery procedure as follows:

(a) If, at any time during which a company recovery procedure is in force, it results to the special controller, after consulting the joint creditors' and members' committee, that it would serve no useful purpose for the company to continue with the said procedure, the special controller shall forthwith make an application to the Court for the termination of the company recovery procedure, containing his detailed and comprehensive reasons there for, and the Court shall order that the company be wound up by the Court.

The procedure contemplated in Chapter 386 relating to insolvency proceedings will apply.

(b) If, at any time during which a company recovery procedure is in force, it results to the special controller, after consulting the joint creditors' and members' committee, that the affairs of the company have improved to the extent that it is in a position to pay its debts, he shall submit an application to the Court, containing his detailed and comprehensive reasons to that effect, and request the Court to issue an order for the termination of the company recovery procedure. In the event that the Court accedes the application, it shall make such provisions and conditions, as it may consider necessary in the circumstances of the case.

In this case the company will continue to operate as a viable going concern. The stay on proceedings will cease as soon as the court accedes to the aforementioned application.

(c) If, at any time during which a company recovery procedure is in force, the directors of the company or the members at an extraordinary general meeting become satisfied that the affairs of the company have improved to the extent that it is in a position to pay its debts, they may submit an application to the Court, accompanied by appropriate supporting documentation and information, confirming that they are so satisfied, and requesting the Court to issue an order for the termination of the company recovery procedure, and the Court shall not proceed to make an order acceding to or declining the application without having first heard the special controller. In the event that the Court accedes the application, it shall make such provisions and conditions, as it may consider necessary in the circumstances of the case.

As in the previous case, the company will continue to operate as a viable going concern. The stay on proceedings will cease as soon as the court accedes to the aforementioned application.

(d) At the end of the period of his appointment, the special controller shall submit a written final report to the Court containing his detailed and comprehensive opinions and reasons as to whether or not the company has a reasonable prospect of continuing as a viable going concern in whole or in part and will be in a position to pay its debts regularly in the future.

Where the final report submitted by the special controller expresses the opinion that the company has a reasonable prospect of continuing as a viable going concern, in whole or in part, it shall additionally have attached to it a precise and detailed recovery plan which shall contain all the proposals required to enable the company to continue as a viable going concern, with such explanations as may be required to give effect to such recovery, including proposals in relation to financial resources, the retention of employees and the future management of the company. The said recovery plan shall also explain the proposed manner of paying creditors the whole or a proportion of their claims, whether a voluntary compromise has been reached with all the creditors, or whether it is proposed that the Court sanction a compromise which has not been approved by all the creditors.

Following receipt of the final report and the recovery plan, the Court may request any explanations and clarifications as it may consider appropriate which shall be provided either verbally or in writing as the Court may direct. Subsequently the Court may either reject the proposed recovery plan, or it may accept and approve

it in whole or in part and may require amendments thereto. Where the Court approves the recovery plan submitted by the special controller, whether with or without amendments as the Court may direct, the recovery plan shall be effective and binding on all interested parties for all purposes of law. The stay on proceedings will cease as soon as the court approves the recovery plan.

(e) If the Court issues an order for the termination of the company recovery procedure on the grounds that the company has no reasonable prospect of continuing as a viable going concern and will not be in a position to pay its debts regularly in the future, it shall order that the company be wound up by the Court.

The procedure contemplated in Chapter 386 relating to insolvency proceedings will apply.

Bankruptcy Proceedings (Partnerships and traders)

During bankruptcy proceedings as soon as the curator has realised all the property of the company, or so much thereof as can, in his opinion, be realised without needlessly protracting the bankruptcy, and has distributed a final payment, if any, to the creditors, and has adjusted the rights of the contributories among themselves, and made a final return, if any, to the contributories, and submitted accounts at the company's expense, on being satisfied that the curator has complied with the requirements under Chapter 13 and such other requirements, if any, as may be laid down by it and, after taking into consideration the report and any objection which may be raised by any creditor or contributory or person interested, the court will proceed to release the curator from his appointment.

Subsequently the court makes an order that the name of the partnership be struck off the register from the date of the order. Such order shall be notified to the Registrar of Companies who shall effect the striking off.

Of course the above applies for partnerships.

With regard to traders, once the trader is declared bankrupt and the proceeds distributed, then in such case the bankrupt by way an application to the Registrar may request to appear before a Judge whereby on such day the Court shall also call upon the creditors and the curator involved in his bankruptcy, to establish whether the trader can be rehabilitated to trade once again.

If such trader did not act fraudulently or maliciously, he may be rehabilitated to trade. This rehabilitation has the effect of discharging the bankrupt, with respect both to his person and to his after acquired property from all debts that could at any time previous to the declaration of bankruptcy have been claimed against him.

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

Insolvency Proceedings (Companies)

In terms of Article 315(1) of Chapter 386, a creditor may be able to seek redress of his rights against any party who is deemed to have carried out the business of the company with intent to defraud the creditors of the company, or creditors of any other person, or for any fraudulent purpose. In such cases following an application to the court, it may declare that any persons who were knowingly parties to the carrying on of the business in the manner aforesaid be personally responsible, without any limitation of liability for all or any of the debts or other liabilities of the company as the court may direct.

Reorganization Proceedings (Company Recovery)

No ad-hoc enactments deal with creditors' rights after the closure of insolvency proceedings.

Bankruptcy Proceedings (Partnerships and traders)

Once the bankruptcy is terminated whether it be a partnership or trader, the creditors' rights are none, unless the creditor can prove that the trader or partnership acted maliciously or fraudulently towards the creditors.

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

Insolvency Proceedings (Companies)

The costs are incurred either by the person filing the application for insolvency or by the company, as the court directs.

Reorganization Proceedings (Company Recovery)

In reorganization (company recovery) proceedings, the company will bear the costs of the proceedings.

Bankruptcy Proceedings (Partnerships and traders)

The costs and expenses are borne by the person lodging the application or by the bankrupt person

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

Insolvency Proceedings (Companies)

Article 303 of Chapter 386 makes provision for privileges, hypothecs or other charges, transfer or other disposal of property or rights, and any payment, execution or other act relating to property or rights made or done by or against a company, and any obligation incurred by the company within six months before the dissolution of the company to be deemed as fraudulent preference against its creditors whether such transaction is of a gratuitous nature or an onerous nature if it constitutes a transaction at an undervalue or if a preference is given. In such cases the transaction (fraudulent preference) shall be void.

Undervalue is defined as follows:

(a) a company enters into a transaction at an undervalue if:

(i) the company makes a gift or otherwise enters into a transaction on terms that provide for the company to receive no consideration, or

(ii) the company enters into a transaction for a consideration the value of which, in money or money's worth, is significantly less than the value in money or money's worth of the consideration provided by the company;

Preference is defined as follows:

(b) a company gives a preference to a person if:

(i) that person is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities; and

(ii) the company does anything or suffers anything to be done which, in either case, has the effect of putting that person into a position which, in the event of the company going into insolvent winding up, will be better than the position he would have been had that act or omission not occurred.

An exception to the above is made if the person in whose favour the transaction is made, done or incurred, proves that he did not know and did not have reason to believe that the company was likely to be dissolved by reason of insolvency.

Reorganization Proceedings (Company Recovery)

No ad-hoc enactments provide for the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors in Reorganization Proceedings (Company Recovery).

Bankruptcy Proceedings (Partnerships and traders)

No ad-hoc enactments provide for the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors in Bankruptcy or Recovery proceedings

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