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The International Comparative Legal Guide to:

Project Finance 2014

3rd Edition

A practical cross-border insight into project finance

Published by Global Legal Group, with contributions from:

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URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd.
April 2014

ISBN 978-1-908070-94-4
ISSN 2048-688X

Strategic Partners

General Chapters:

Country Question and Answer Chapters:

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1 Overview

1.1 What are the main trends/significant developments in the project finance market in Portugal?

In general, development projects were cancelled or postponed as a result of the guidelines set out in the Financial Assistance Programme signed by the Portuguese state, the EU and the IMF in May 2011.

In the energy sector, most renewables projects agreed with the Portuguese state an extension of the feed-in tariff period against payments made for reduction of short/medium-term public debt.

In the road sector PPPs, the Portuguese state envisages generating savings by rationalising via the introduction of real toll regimes in shadow toll road projects, reducing the scope of construction contracts and reviewing operation service levels, in line with EU standards, in addition to reducing shareholders' IRR.

Final agreements with concessionaires were expected by the end of 2013 but the concrete terms and conditions of the amendments to the concession agreements are in general still being discussed and are awaiting approval from the lenders.

1.2 What are the most significant project financings that have taken place in Portugal in recent years?

As mentioned, project finance activity is currently low, the main relevant activities in the sector thereafter being the renegotiation and/or refinancing of the existing deals. The main relevant deals in recent years are:

- Project Artenius – a financing, installation and operation project for a PTA production plant, located in Sines, Portugal;
- reorganisation of Brisa, the largest motorway operator in Portugal, consisting of the transfer of Brisa's main concession to a ring-fenced company and the reorganisation of the Brisa Group;
- financing 481MW and 352MW windfarm portfolios developed by ENEOP – the first and second phases of the 1200MW were awarded to ENEOP, and involve 12 borrowers (windfarm companies) and 22 windfarms in different stages of development;
- design, construction, financing, maintenance and availability of the High Speed Railway – Poceirão/Caia section (HSR PPP1);
- hospital PPPs (Cascais, Braga, Vila Franca, Loures) – DBFO of the new hospital buildings (for a period of 30 years) and provision of health care services for the National Health Service (for a period of 10 years); and
- road concessions – amendment and reinstatement of most subconcession contracts closed after 2008 following denial of the visa from the Accounts Court, including changes to the structure of equity and debt following the re-profiling of concessions payments.

2 Security

2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

The concept of a fixed charge is the only form of security interest generally admissible in Portugal, security being in accordance with the type of assets at stake in accordance with specific terms and formalities.

Accordingly, no "floating charge" concept applies under Portuguese law, without prejudice to the possibility of creating security over different assets through a single security agreement.

As an exception to the above principles, Portuguese law does provide for the existence of financial collateral – on shares, debentures and bank accounts – in line with the terms of the Directive on Financial Collateral Arrangements. This type of security generally takes the form of a pledge but permits limited foreclosure remedies as well as a floating charge on assets (money, securities) in bank accounts.

2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

Security on immoveable assets or rights relating thereto or on moveable assets subject to registration (such as automobiles, ships, planes) is created by means of mortgages, executed through notarial deeds and subject to registration as a condition for the validity thereof.

The creation of security interests over plant and machinery may be made by means of a specific type of mortgage called a "factory mortgage", which covers the factory's land, as well as the equipment and moveable assets used in the factory's activity, identified in an inventory attached to the mortgage deed.

Pledges may be created over moveable (non-registered) assets or credits, shall be effected by written agreement, and require the transfer of possession over such assets to the pledgee or to a third party. Exceptions to this transfer of possession requirement are the creation of a pledge having as its beneficiary a credit institution authorised to carry out business in Portugal, in which case specific rules apply, and the creation of financial pledges under the Directive on Financial Collateral Arrangements.

2.3 Can security be taken over receivables where the chargor is free to collect the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?

A pledge over receivables qualifies as a pledge of credits. The validity of a pledge of credits is subject to (i) the pledgor's counterparty being served notice thereof, (ii) the pledgee coming into possession of the documents required in order to enforce the rights arising from the relevant contract directly against the pledgor's counterparty.

A pledge of credits covers all payments to be made in connection with the contractual relationship underlying such credits. After the debtor is notified, such payments must nevertheless be made jointly to the pledgor and the pledgee. As a means to circumvent practical difficulties arising from the joint payment requirement, it is usual for the pledgee to authorise the third party debtor to continue to carry out the relevant payments to the pledgor until notice is given to the contrary, and/or to construe the relevant pledge agreement as a financial collateral arrangement, in accordance with the Directive on Financial Collateral Arrangements.

2.4 Can security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

A pledge over cash deposited in bank accounts is deemed a pledge of credits (see above).

Generally the taking of security over bank accounts by financial institutions is made through financial pledges allowing the beneficiary to use and dispose of the deposited funds.

2.5 Can security be taken over shares in companies incorporated in Portugal? Are the shares in certificated form? Briefly, what is the procedure?

In companies the capital of which is represented by immaterial nominative participations ("quotas"), the creation of security requires a written agreement and registration of the same with the relevant Commercial Registry Office.

On the other hand, in companies the capital of which is represented by shares, security is created by means of a pledge in accordance with the following formalities:

(i) bearer shares represented by certificates: delivery of the share certificates;

(ii) nominative shares represented by certificates: pledge declaration written by the chargor on the certificates and request for registration of the pledge in the issuer's share ledger book; and

(iii) dematerialised shares: by means of an entry as to the creation of the pledge in the chargor's bank account.

It is common practice to have a written contract governing the terms of the relevant pledge.

2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?

The creation of security interests over assets located in Portugal (including share pledges) attracts stamp duty, levied on the secured amount. Stamp duty shall not be payable in the case of security interests that are ancillary and created simultaneously with a loan, provided that the loan has already been subject to a similar taxation (no duplication of tax applies).

2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

The registration before the local Registry Offices of the creation of pledges over quotas, will involve a cost of €100/per quota, and that of mortgages will involve a cost of €500/per real estate (regardless of the number of mortgages).

As for the time involved, the registration of pledges over quotas generally takes one business day to be completed, and that of mortgages takes up to ten days (or, if an urgency fee is paid, one business day).

2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground), etc.?

The creation of security over assets which are in the private domain does not, in general, require any regulatory or similar consents.

However, the creation of security over public domain assets is prohibited, and some restrictions in respect of the creation of security over concession/regulated assets may be imposed – notably through specific regulations or the relevant Concession Contracts.

3 Security Trustee

3.1 Regardless of whether Portugal recognises the concept of a "trust", will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?

Trusteeship is generally not recognised by Portuguese law. Thus, even if the relevant agreements indicate that the security agent holds security for the benefit of a given lending syndicate, unless all lenders are disclosed as holders thereof, the security agent shall appear as the sole beneficiary of the security entitlements and shall be the sole entity with authority to file enforcement procedures in respect thereof.

Hence, in the context of the enforcement procedures, the security agent may be required to prove before a court that it holds title to the secured obligations.

3.2 If a security trust is not recognised in Portugal, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

The only *prima facie* way to have all the lenders recognised as beneficiaries of a given security is to name them as holders of the secured obligations and corresponding security. However, this entails the need to amend the relevant agreement (or execute a new notarial deed) each time the lenders assign, buy or sell part of the loans, which is not a practical solution. For this reason attempts have been made to set up alternatives and to put in place more lender-friendly solutions, as is the case in having the security agent as the registered beneficiary of the security, and either to have it benefiting from a parallel debt or to have it contractually bound to assign the secured obligations to all of the lenders prior to enforcement of the security. Other alternatives correspond to having the entire lending syndicate registered as secured creditors but having in place proper intercreditor arrangements (setting up the rules for action by individual creditors and for allocation of the proceeds of security enforcement).

4 Enforcement of Security

4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/liquidator), or (b) (in respect of regulated assets) regulatory consents?

Enforcement of mortgages consists of a sale of the relevant assets through court proceedings. Sale of pledged assets may be made through court or out-of-court proceedings. Alternatively, financial pledges may also be enforced by appropriation of the relevant assets.

Appropriation or foreclosure of the asset is not available to mortgagees or to pledgees under pledges that are not financial pledges.

Court procedures usually take several months or even more than a year if the complexity of the legal arguments at stake leads to court appeals.

4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?

No different rules apply to domestic or foreign investors in this respect.

5 Bankruptcy and Restructuring Proceedings

5.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the security?

Upon the opening of bankruptcy proceedings, all security other than financial collateral over the insolvent's assets must be enforced within the bankruptcy proceedings, and payment of creditors' claims shall be made in accordance with the Portuguese Insolvency and Company Recovery Code ("CIRE") rules.

Also the insolvency order delivered by the court suspends any outstanding executory proceedings having as an object the attachment or seizure of the insolvent's assets, and prevents the bringing of any new executory proceedings or the enforcement of any security against the insolvent entity. Any lawsuits related to such assets are attached to the bankruptcy proceedings.

In addition, all claims from creditors of the insolvent entity must be lodged within the Insolvency Proceedings. Therein the creditor shall mention the amount of its claim as well as any security from which it may benefit over the assets of the Insolvent Entity.

5.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g. tax debts, employees' claims) with respect to the security?

The insolvency administrator is entitled to terminate agreements which may be qualified as detrimental to the insolvent estate by notice to the relevant counterparty. The counterparty may either accept termination of the contract and return to the insolvency estate the consideration received or, alternatively, challenge the termination of the contract in court.

There are certain acts and transactions which are legally deemed to be detrimental to the insolvent company's estate. Other than these, acts performed within the two years prior to the opening of the corporate bankruptcy proceedings that generally diminish, jeopardise or delay the rights of the debtor's creditors, may be qualified as detrimental to the insolvent estate, provided that the challenge of these acts requires proof of bad faith of the relevant parties. Bad faith is presumed by law in case the counterparty or the beneficiary of the act is related to the insolvent entity.

Upon payment of the insolvency procedure costs (which must be settled prior to all other claims), claims shall be paid in the following order: secured claims (those with security over assets which are part of the insolvent estate up to the value of those assets); preferential claims (including: (i) general creditors' preferential claims over the assets in the insolvent estate up to the value of the assets over which such preferential claims exist and where the claims are not extinguished as a consequence of the declaration of insolvency; (ii) certain debts to tax and social security authorities; (iii) employees' claims over the specific company premises where they carry out their activity; and (iv) claims by the party that applied for the opening of the insolvency proceedings); unsecured claims; and subordinated claims.

5.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Bankruptcy proceedings are generally applicable to all persons or legal entities, with the exception of the Republic of Portugal and public/administrative entities and companies. In addition, insurance companies, credit institutions and other financial corporations are subject to specific insolvency rules (and not to the CIRE).

5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?

A creditor may, without filing a judicial proceeding, retain possession of the assets pertaining to a certain entity if it is in the possession of such assets and if the claim arises from expenses or damages caused by such assets.

Creditors may also enforce security over assets of the project company outside the court, provided such security was granted under the Directive on Financial Collateral Arrangements.

5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cramdown of dissenting creditors?

The Portuguese insolvency law provides for a special recovery proceeding which aims to promote a rehabilitation of debtors facing financial difficulties (*Processo Especial de Revitalização* – "*PER*"). These proceedings are available to a debtor which finds itself in a distressed financial situation but where its insolvency has not been declared by a court. Special recovery proceedings are designed to provide a moratorium on creditor action while a recovery plan is agreed.

Portuguese law further provides for an out-of-court recovery system (*Sistema de Recuperação de Empresas por Via Extrajudicial* – "*SIREVE*"), which is a non-judicial procedure that aims to obtain a settlement between a company which may be insolvent or facing imminent insolvency, and its creditors. It involves an arrangement between the company and all or part of its creditors (representing at least 50% of the company's total debts) which will enable the company to overcome its financial difficulties.

5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in Portugal.

Directors may continue to trade even if a company is facing financial difficulties, provided that they act with a special duty of care and do not violate their legal duties and legal principles applicable to the management of companies.

Within insolvency proceedings, the insolvent entity's directors may be found liable if they fail to meet their legal obligation to file for corporate insolvency proceedings within 30 days of the debtor becoming insolvent, or if the insolvency situation has been created or aggravated as a consequence of a felonious or gross fault during the period of three years before the opening of the corporate insolvency proceedings.

Directors may be subject to ancillary penalties – prohibition from performing commercial activities – and/or condemned to pay amounts unduly received from the insolvent company, as well as deemed jointly and severally liable with the company in certain circumstances.

Where the debtor is declared insolvent by the court, directors may also be held criminally liable for fraudulent insolvency, negligent insolvency and the unlawful favouring of creditors.

6 Foreign Investment and Ownership Restrictions

6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?

There are no restrictions under general Portuguese law on foreign direct investment or foreign ownership of a project company. However, the exercise of an economic activity within the regulated sectors (such as energy, water and waste management, telecoms, postal services, railways, commercial aviation and financial services) may require authorisation from the regulator to both Portuguese and foreign investors.

Restrictions may apply under the Law of Money Laundering and Terrorism Financing, which transposed the EU Money Laundering regulations into Portuguese law. There may also be temporary embargo situations applying to persons or entities residing in non-EU states.

There are no currency controls under Portuguese law and money can be freely transferred into or out of Portugal. Also, there are no restrictions on the remittance of profits or investments abroad.

6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?

No particular restrictions in relation to foreign direct investment apply.

6.3 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

The protection of private property is upheld by the Constitution. Accordingly, the nationalisation, expropriation or requisition of private property can only take place on the grounds of public interest and provided that private entities are duly compensated.

While there is a legal framework setting out the terms for the expropriation process and calculation of the indemnification payable, there is no general framework for nationalisation processes.

There are no distinctions between domestic and foreign investors in this respect.

7 Government Approvals/Restrictions

7.1 What are the relevant government agencies or departments with authority over projects in the typical project sectors?

The governmental agency or department with authority over a project depends mainly on the relevant sector of activity of such project.

In general terms, the relevant Ministries (energy, infrastructures, transports, health, etc., and (when applicable) environment) are responsible for the launching, licensing and major regulation of projects, either directly or through their governmental departments, e.g.: *Direção Geral de Energia e Geologia* (energy); *Instituto da Mobilidade e dos Transportes, I.P.* (roads); *Admisnistração Regional de Saúde* (health), etc.

The approval of the Ministry of Finance may also be required when the project involves public investment.

In this respect reference should be made to the *Unidade Técnica de Acompanhamento de Projetos* ("*UTAP*"), an administrative entity under the supervision of the Ministry of Finance, recently created for the follow-up of the PPP projects.

7.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

Project documents are valid and enforceable without any need for registration, authentication or filing with any governmental authority, save for certain pledge arrangements which need to be authenticated by a Notary or by any competent authority.

Private agreements with acknowledgment of a payment obligation shall also only be directly enforceable before the courts if authenticated by a Notary or by any competent authority.

7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?

Other than assets in the public domain (e.g. the hydric domain, mineral resources, roads or railways) which may not be appropriated by private entities, the ownership of land or other assets does not require a licence.

However, the exercise of a specific economic activity via the use or operation of such assets may require a licence and, in the case of an asset of public domain, the attribution of a right of use (of the relevant asset, normally through a concession regime).

There is no distinction between national and foreign entities in this respect.

7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?

There is no specific tax regime applicable to the extraction or export of natural resources.

Portugal has implemented excise duties on petroleum and energy products, in line with EU legislation, which are triggered on the supply of such products to the final consumer.

The extraction and/or export of natural resources may be subject to the general taxes applicable within the Portuguese tax system, namely, Corporate Income Tax ("CIT") and Value Added Tax ("VAT").

7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?

Income derived from foreign currency exchange may be subject to CIT. Commission fees payable to a financial/credit institution for foreign currency exchange may trigger stamp duty.

In general terms, Portugal does not apply controls on foreign currency exchange, without prejudice to money laundering controls in line with those applicable in other EU Member States. Also, reporting obligations to the Bank of Portugal may also apply to certain transactions.

7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?

Interest or dividends paid by Portuguese resident companies to non-resident entities are, as a general rule, subject to withholding tax at a rate of 25% (this rate may, under certain circumstances, be increased to 35%).

With respect to interest or dividend payments, the withholding tax can be waived or reduced under the EU Interest and Royalties Directive, the EU Parent-Subsidiary Directive or under bilateral double tax treaties signed by Portugal, as long as certain conditions are met.

Note that the CIT legislative reform recently approved by the Portuguese Parliament (but not in force yet) will implement a participation exemption regime for dividends (and capital gains), which will considerably extend the cases in which dividends paid to other jurisdictions (e.g. with whom Portugal has signed a double tax treaty and there is administrative cooperation in tax matters) will not be subject to withholding tax.

7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?

There are no restrictions or limitations regarding the establishment and maintenance of onshore foreign currency accounts or offshore accounts in other jurisdictions.

7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in Portugal or abroad?

Please see question 7.6 with respect to withholding taxes related to the payment of dividends to a foreign parent company. Regarding dividends paid to a resident parent company, exclusion from taxation is also available provided some requirements are met (namely a certain level of shareholding – currently 10% held for at least 12 months, to be reduced to 5% after the implementation of the CIT reform).

7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?

Environmental impact assessments are generally required for infrastructure projects. The PPP law establishes that PPP procurement procedures shall only be launched after approval of the relevant environmental impact declaration. Financing documents also normally include this environmental impact declaration as a CP to the disbursement of funds.

Depending on the sector in question, a project may also be subject to the IPPC European rules. The environmental licence (which is required, in particular, for industrial projects) must be obtained before operation commences and must be successively renewed during the entire period of operation of the relevant plant.

Furthermore, in the context of the EU emissions trading system, for projects in certain industrial sectors and meeting certain conditions and/or thresholds, operators must hold a permit to emit greenhouse gases, and must be the holder of emission allowances.

Depending on the sector of activity, health and safety laws may apply in terms consistent with European directives in this respect.

7.10 Is there any specific legal/statutory framework for procurement by project companies?

In general terms, project companies are not subject to specific procurement rules. There are however some specific cases where a project company may be subject to the regime set forth in the Portuguese public procurement law, namely: (i) if the project company has been established for the specific purpose of meeting general interest needs and is controlled by public entities or financed mainly from the public budget; (ii) if the project company has been created for the specific purpose of meeting general interest needs, operates in the energy, water, transport or postal services, and a public entity exercises a dominant influence over the company; and (iii) if a project company has been granted, without an international public procurement process, special or exclusive rights in the public energy, water, transport or postal services sectors, affecting the ability of third parties to exercise activities in those sectors.

Moreover, public procurement rules shall also apply to construction contracts and services agreements entered into by a project company: (i) which are in more than 50% directly financed by a public entity; and (ii) whose contractual price equals or exceeds €5,000,000 and €200,000 respectively.

8 Foreign Insurance

8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?

Portuguese law does not foresee any restrictions, controls, fees or taxes on the granting of insurance policies by a foreign insurance company.

8.2 Are insurance policies over project assets payable to foreign (secured) creditors?

Yes. No limitation applies under Portuguese law regarding the payment of insurance to foreign secured creditors.

9 Foreign Employee Restrictions

9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?

Generally, no restrictions apply to the employment of foreign workers. However, citizens of non-EU countries must obtain a work, visa residence or equivalent permit to live in Portugal.

10 Equipment Import Restrictions

10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?

In general, the import of goods is a taxable event for VAT and Customs Duties purposes.

VAT and Custom Duties are payable by the importers (whether or not a taxable person) at the time the goods pass the customs control.

10.2 If so, what import duties are payable and are exceptions available?

VAT is charged on importation of goods at the rate that applies to a supply of similar goods within the Portuguese territory. The taxable value of imports is determined in accordance with customs legislation, excluding VAT itself but including customs duties and any other taxes or charges levied on import, as well as incidental expenses such as commissions, packaging, transport and insurance expenses incurred up to the first destination within Portugal.

Customs duties are calculated, on an *ad valorem* basis, as a percentage of the value of the goods being declared for importation. The level of that percentage depends on the kind of product imported and the country of origin.

11 *Force Majeure*

11.1 Are *force majeure* exclusions available and enforceable?

Although Portuguese law does not provide for a specific provision regarding exclusion of liability in case of *force majeure*, the principle is generally accepted and enforceable in Portugal.

In general, project contracts provide for detailed provisions in relation to *force majeure* events and the terms under which the parties have agreed to mitigate the effects of *force majeure*, and exclude liability for breach of contract resulting of a *force majeure* event. The terms agreed between the parties in this respect are generally accepted and enforceable in Portugal.

12 Corrupt Practices

12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

No specific rules apply on corruption and bribery activities in the project sectors. Nevertheless, entities are subject to general criminal law which sets forth corruption and bribery as criminal offences which may be punished with fines or imprisonment up to a maximum of eight years (without prejudice to the possibility of aggravated penalties in specific cases).

We also refer to the provisions of the Law of Money Laundering and Terrorism Financing, which transposed the EU Money Laundering regulations into Portuguese law.

13 Applicable Law

13.1 What law typically governs project agreements?

Project agreements are typically governed by Portuguese law. A different applicable law may be chosen (provided that the choice of law observes the requirements set out in Portuguese law or in the applicable international conventions). We note, however, that Concession Contracts and other project agreements entered into with public entities are mandatorily governed by Portuguese law.

13.2 What law typically governs financing agreements?

The parties may freely choose the law which will govern the financing agreements, with observation of the requirements set out in Portuguese law or in the applicable international conventions. Although financing agreements in project finance deals in Portugal are commonly subject to Portuguese law, it is also rather common for international lending syndicates to require finance agreements to be governed by English law.

13.3 What matters are typically governed by domestic law?

In the context of project finance deals, the creation of security interests over assets which are located in Portugal is, according to the applicable conflict of laws rules, mandatorily governed by Portuguese law.

14 Jurisdiction and Waiver of Immunity

14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?

Portuguese courts recognise the parties' autonomy to select the forum of their disputes, even when the selected forum has no particular connection with the dispute, and have consistently recognised the provisions of the Brussels Regulation as prevailing over the Portuguese Code of Civil Procedure, under which the parties are required to establish a significant interest in the designated jurisdiction to select it as the appropriate forum for their disputes.

Notwithstanding, Portuguese courts may ignore foreign jurisdiction clauses and assume jurisdiction in special cases where they may claim to hold exclusive jurisdiction, e.g. actions relating to local land, in proceedings related to the validity of the incorporation or the dissolution of companies domiciled in Portugal, in proceedings relating to the validity of entries in public registers, or in proceedings related to the registration or validity of patents.

In addition, a waiver of immunity is also recognised and enforceable in Portugal. Although there is no specific national act or international convention entered into by Portugal in this regard, Portuguese law gives immunity from jurisdiction of the Portuguese courts to sovereign states (and to other public entities) by virtue of a general principle of customary international law. State immunity is, however, given a strict extent and it is limited to acts involving the exercise of sovereign authority.

15 International Arbitration

15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?

Major project contracts typically provide that the parties shall resort to arbitration for the resolution of disputes. Where international contractors are involved, the parties often choose to apply the rules of international centres such as the ICC, the LCIA, as well as the UNCITRAL Arbitration Rules.

International arbitration clauses are widely recognised by Portuguese courts irrespective of the choice of the parties to locate the seat of the arbitration in Portugal or abroad. At the enforcement stage, the decree of enforceability of an arbitral award is likely to vary greatly depending on the applicable legal regime. An international arbitral award rendered in Portugal is immediately enforceable in Portuguese territory under the rules of the Portuguese Arbitration Act and of the Portuguese Code of Civil Procedure. Foreign arbitral awards are recognised and enforced in Portugal under the applicable international treaty or bilateral agreement (see answer to question 15.2 below), generally under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention").

Foreign arbitral awards that are not covered by any of these international treaties may still be recognised and enforced in Portugal under the general provisions of the Portuguese Arbitration Act, which were greatly influenced by the UNCITRAL Model Law and by the New York Convention.

15.2 Is Portugal a contracting state to the New York Convention or other prominent dispute resolution conventions?

In the context of international arbitration, Portugal is a party to the following international conventions:

(i) the Geneva Protocol on Arbitration Clauses of 1923;

(ii) the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927;

(iii) the New York Convention, entered into force in Portugal on 16 January 1995;

(iv) the Inter-American Convention on International Commercial Arbitration, adopted in Panama on 30 January 1975; and

(v) the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force in Portugal on 1 August 1984.

On a bilateral level, Portugal has signed Judiciary Cooperation Agreements with the Republic of Guinea-Bissau, Mozambique, Angola, São Tomé e Príncipe, the Special Administrative Region of Macao (People's Republic of China) and Cape Verde. These bilateral agreements entered into between Portugal and other Portuguese-speaking countries equate arbitral awards to national courts' judgments and subject both decisions to the same legal regime.

15.3 Are any types of disputes not arbitrable under local law?

Unless the subject matter is subject to the exclusive jurisdiction of national courts or to compulsory arbitration, any dispute involving an economic interest is arbitrable. Portuguese law also extends arbitrability to non-pecuniary rights under which the parties can enter into agreements.

Only a few types of disputes, namely some disputes related to insolvency proceedings, are subject to the exclusive jurisdiction of national courts and thus considered not to be arbitrable.

15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

Disputes concerning intellectual property rights related to medicines, collective labour rights and sports regulation are subject to mandatory domestic arbitration.

16 Change of Law / Political Risk

16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

Although it is common in project finance deals to have direct agreements with the government (in particular in its capacity as grantor in a Concession Contract), those agreements are normally designed to address step-in rights of financial institutions and do not provide for any particular political risk protections.

Change in law risk is normally addressed by contract in standard terms for international project finance deals.

17 Tax

17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Under certain circumstances (e.g. interest paid to financial institutions), withholding tax on interest payments may be waived.

Under the EU Interest and Royalties Directive and since 1 July 2013, no withholding tax is due on interest payments made by resident companies, provided the following conditions are met: (i) the paying and beneficiary entities are subject to (and not exempt from) corporate tax and take one of the legal forms listed in the annex of this directive; (ii) both entities have to be considered as EU residents for double tax treaty purposes; (iii) a direct 25% shareholding must be held by one of the companies in the other's capital, or both are sister companies (i.e., are both held, in at least 25%, by the same direct shareholder), and in either case the shareholding must be held for at least a two-year period; and (iv) the entity receiving the interest payment should be its effective beneficiary. Under the provisions of the double tax treaties signed by Portugal, the domestic withholding tax rates foreseen for interest payments can be reduced to rates ranging from 5% to 15% (no withholding applies, in the case of long-term loans extended by US banks or financial institutions).

Withholding tax may apply depending on the taxable construction of the claim under the guarantee.

17.2 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Portugal has tax regimes applicable until 2020 aimed at fostering investment, particularly foreign investment. These comprise tax incentives to investment made in Portugal in specific business sectors (e.g. mining and the manufacturing industry), such as (i) Corporate Income Tax deductions or tax credits, and (ii) exemptions or reductions of Real Estate Tax, Real Estate Transfer Tax and stamp duty.

The tax exposure of a foreign investment in Portugal will depend on how such investment is structured (e.g. if it involves a direct presence in Portugal or not). For instance, if such foreign investment is made through a local subsidiary, this affiliate will be subject to the taxes which are typically applicable to national companies, namely (among others) CIT, VAT, stamp duty and property taxes.

Loans, mortgages and other security documents may be subject to stamp duty in Portugal, at rates that vary between 0.04% per month, or fractions thereof, up to 0.6% (one-off), depending on the maturity of the loan or the term of the guarantee, as applicable. The current Stamp Duty Code provides for exemptions applicable to certain loans (e.g. shareholder loans, under certain conditions) and guarantees (e.g. granted to financial or credit institutions, under certain conditions).

18 Other Matters

18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in Portugal?

In general, the most relevant issues have been addressed.

18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.

In general terms, bonds may only be issued by limited liability companies incorporated in Portugal whose share capital is paid up in full and which have been registered with the relevant Commercial Registry Office for at least one year.

A company may only issue bonds for a total subscription price up to twice the amount of its own funds. This limit does not apply to (i) companies listed on a regulated market, (ii) companies enjoying a credit rating attributed by a rating agency registered with the Portuguese securities regulator, or (iii) issuances the repayment of which is specially secured in favour of the bondholders.

19 Islamic Finance

19.1 Explain how *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in Portugal.

To the best of our knowledge there is no experience of Islamic project finance in Portugal, nor are there any finance instruments structured in accordance with Islamic law in the Portuguese financial sector.

19.2 In what circumstances may *Shari'ah* law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of *Shari'ah* or the conflict of *Shari'ah* and local law relevant to the finance sector?

See above.

19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in Portugal? If so, what steps could be taken to mitigate this risk?

The inclusion of interest payment obligations in a loan agreement is common practice and fully valid and enforceable in Portugal.

Although civil law foresees maximum rates for interest, those provisions are not applicable to loans provided by financial institutions in relation to which only very specific limitations (e.g. on consumer credit or surplus interest rate for overdue amounts) may apply.

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Ana is a Managing Associate in the Projects - Infrastructures, Energy & Natural Resources practice group.
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VdA is a Portuguese independent law firm with over 200 staff. We are proud to have been involved in many groundbreaking transactions in Portugal in the last 35 years, and to maintain privileged relations with some of the top international law firms around the world. We work as a team with our clients, making their objectives our own. Based on our experience, we strive to deliver innovative and solid solutions, under the highest standards of performance with only one aim in view: the client's success.

In addition to its sector-related expertise, the traditionally strong banking practice of the Firm has also provided a solid basis to understand the peculiarities of limited recourse funding in project financed transactions, in all that relates to cash flow dedications and management control mechanisms by lenders, the structuring of tailor-made security packages and the particular aspects of direct agreements.

The work of the Projects - Infrastructure, Energy & Natural Resources practice has been mainly focused on the power, road, rail, water and waste sectors. To date, the Firm has participated in the most relevant project financed transactions carried out in Portugal.

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