The Public-Private Partnership Law Review

Second Edition

Editors
Bruno Werneck and Mário Saadi

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EDITOR'S PREFACE

We are very pleased to present the second edition of *The Public-Private Partnership Law Review.* Notwithstanding the existence of articles in various law reviews on topics involving public-private partnerships (PPPs) and private finance initiatives (in areas such as projects and construction, real estate, mergers, transfers of concessionaires' corporate control, special purpose vehicles and government procurement, to name a few), we identified the need for a deeper understanding of the specifics of this topic in different countries. The first edition of the book was an initial effort to fulfil this need.

Brazil marked the 10th year of the publication of its first Public-Private Partnership Law (Federal Law No. 11,079/2004) in 2014. Our experience with this law is still developing, especially in comparison with other countries where discussions on PPP models and the need to attract private investment into large projects dates back to the 1980s and 1990s.

This is the case for countries such as the United Kingdom, the United States and Canada. PPPs have been used in the United States across a wide range of sectors in various forms for more than 30 years. From 1986–2012, approximately 700 PPP projects reached financial closure. The UK is widely known as one of the pioneers of PPP model; Margaret Thatcher's governments in the 1980s embarked on an extensive privatisation programme of publicly owned utilities, including telecoms, gas, electricity, water and waste, airports and railways. The Private Finance Initiative was launched in the UK in 1992 aiming to boost design–build–finance–operate projects. Canada has developed a sustained and robust market for the development of public infrastructure using the PPP model. Since the 1990s PPP procurement has significantly expanded to the extent that PPP projects are now procured in the federal, provincial and municipal levels of government across that country.

On the other hand, in developing countries with similarities with Brazil, PPP laws are more recent. Argentina was the first country in Latin America to enact a PPP Law (Decree No. 1299/2000, ratified by Law No. 25,414/2000). The PPP Law was designed to promote private investment in public infrastructure projects that could not be afforded exclusively by the state, especially in the areas of health, education,

justice, transportation, construction of airport facilities, highways and investments in local safety. In Mozambique, Law No. 15/2011 and Decree No. 16/2012 stipulated the Public-Private Partnerships (PPP) Law and other related PPP regulations, which establishes procedures for contracting, implementing and monitoring PPP projects. In Paraguay, a regulation establishing the PPP regime has recently been enacted (Law No. 5102) to promote public infrastructure and the expansion and improvement of goods and services provided by the state; this law has been in force since late 2013.

In view of the foregoing, we hope a comparative study covering practical aspects and different perspectives on public-private partnership issues will become an important tool for the strengthening of this model worldwide. We are certain this study will bring about a better dissemination of best practices implemented by private professionals and government authorities working on PPP projects around the globe.

With respect to Brazil, the experience evidenced abroad may lead to the strengthening of this model in the country. In this preface, we call your attention to one specific feature of the PPP law in Brazil – state guarantees. This feature permits payment obligations undertaken by the public party in PPP agreements be guaranteed by, among other mechanisms authorised by law: (1) a pledge of revenues; (2) creation or use of special funds; (3) purchase of guarantee from insurance companies that are not under public control; (4) guarantees granted by international organisations or financial institutions not controlled by any government authority; or (5) guarantees by guarantor funds or a state-owned company created especially for that purpose.

The state guarantee pursuant to PPP agreements is, without question, an important innovation in administrative agreements in Brazil; it assures payment obligations by the public partner and serves as a guarantee in the event of lawsuits and claims against the government. This tool is one of the main factors distinguishing the legal regimen of PPP agreements from ordinary administrative agreements or concessions, and is viewed as crucial for the success of PPPs, especially from the private investors' standpoint.

Nevertheless, the difficulty in implementing state guarantees on PPP projects has been one of the main issues in the execution of new PPP projects in the country. This point is made worse due to the history of government default in administrative contracts.

In other jurisdictions, however, state guarantees are not a rule. On the contrary, unlike PPP projects in developing countries, government solvency has not historically been a serious consideration. That is the case in countries such as Australia, Canada, France, Ireland, Japan, the United Kingdom and the United States.

We expect that the consolidation of PPPs and the strengthening of the government in Brazil may lead to a similar model, enabling private investments in areas where the country lacks them most.

In the first edition, our contributors were drawn from the most renowned firms working in the PPP field in their jurisdictions, including Argentina (M&M Bomchil), Australia (Allens), Belgium (Liedekerke), Canada (Fasken Martineau), China (Jun He Law Offices), France (White & Case), Ireland (Maples and Calder), Japan (Mori Hamada & Matsumoto), Mozambique (TPLA), Paraguay (Parquet & Asociados), Philippines (SyCip Salazar Hernandez & Gatmaitan), Turkey (Paksoy), the United Kingdom (Herbert Smith Freehills) and the United States (Kilpatrick Townsend &

Stockton LLP). We would like to thank all of them and our new contributors for their support in producing *The Public-Private Partnership Law Review* and in helping in the collective construction of a broad study on the main aspects of PPP projects.

We strongly believe that PPPs are an important tool for generating investments (and development) in infrastructure projects and creating efficiency not only in infrastructure, but also in the provision of public services, such as education and health, as well as public lighting services and prisons. PPPs are also an important means of combating corruption, which is common in the old and inefficient model of direct state procurement of projects.

We hope you enjoy this second edition of *The Public-Private Partnership Law Review* and we sincerely hope that this book will consolidate a comprehensive international guide to the anatomy of PPPs.

We also look forward to hearing your thoughts on this edition and particularly your comments and suggestions for improving future editions of this work.

Bruno Werneck and Mário Saadi
Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados
São Paulo
March 2016

Chapter 18

PORTUGAL

Manuel Protásio and Frederico Quintela[1]

I OVERVIEW

During the 1990s and onwards the Portuguese public authorities launched and widely used the public-private partnership (PPP) model in order to provide the country with modern infrastructure and services. PPP contracts were deployed particularly in the road infrastructure sector, as well as in the health sector, with the innovative feature of placing clinical National Health Service (NHS) hospitals under private management with an aggressive risk services in allocation to the private sector. Such PPP activity was boosted further after the international financial crisis of 2008, with the purpose of enhancing the Portuguese economy's poor performance.

As a consequence of the sovereign debt crisis of 2011 and in the context of the bailout advanced by the European Union (EU) and the International Monetary Fund (IMF), the Portuguese government was forced to introduce an austerity programme. As a consequence, the public funding for investing in public infrastructure was materially reduced and the government endeavoured to reduce the significant payments to be made by the Portuguese state under PPP contracts.

Having this effort in mind, the Portuguese government started a negotiation process with PPP concessionaires in January 2013. In several roads PPPs such negotiation process was successful and agreements were reached.

During this period, companies have also experienced difficult conditions mainly owing to liquidity constraints and to the slowdown of the Portuguese PPP and construction markets in connection with the economic crisis, leading many of those companies to search for new opportunities in foreign markets, in particular in the Portuguese-speaking countries in Africa.

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1 Manuel Protásio is a partner and Frederico Quintela is a managing associate at Vieira de Almeida & Associados, Sociedade de Advogados, RL.

In early 2014, the Portuguese government approved the Strategic Plan for Transports and Infrastructure, which selects some infrastructure projects that could bring positive economic impact to Portugal within the time frame 2014–2020. The priority projects include the modernisation of the Portuguese rail freight sector, the development and increase in capacity of major Portuguese ports, a few projects in the road sector deemed essential to complete the road network, as well as the increase of cargo capacity at the Lisbon airport.

Such investments – in a global amount exceeding €6 billion – and the improved performance of the Portuguese economy, are expected to give rise to many opportunities in the coming years. In line with the above-mentioned Strategic Plan for Transports and Infrastructure for the time frame 2014–2020 and taking into account the limitations of the new European funds framework, some of the infrastructure projects in the pipeline are likely to be launched and executed under a PPP model.

II THE YEAR IN REVIEW

The PPP business in Portugal has been quiet for the last years in what concerns new deals coming to the market. During the past year, PPP activity was mainly focused on concluding the renegotiation process of the existing road PPP contracts whose process had already been initiated in previous years, in order to meet the conditions of the EU–IMF financial assistance programme and following the feasibility assessment of major PPP projects.

In a significant number of road concessions, the renegotiation process was almost completed in 2014, although lenders' approval and the formal amendment of the concession contracts were still pending.

The amendments to the concession contracts, taken together, represent a substantial modification to the original risk allocation between the contracting authority and the road project companies. In fact, some development projects were reduced in scope, permitting savings not only in the construction works and associated capital and financing costs, but also in operation and maintenance spending in the future.

In relation to the projects already completed, the renegotiation process covered the reduction of service requirements and availability payments. In one specific case, the parties agreed replacement of availability payments with a traffic risk-based regime together with a minimum revenue assured by the contracting authority to the extent required to service debt under the financing contracts. Renegotiated contracts will also contemplate a set-off mechanism against toll revenues for the benefit of the concessionaires and an upside-sharing mechanism to encourage concessionaires to promote traffic in their concessions.

The Portuguese government has also appointed negotiation commissions to renegotiate the urban rail PPP contracts and the port terminal concession contracts. However, amendments to the existing concession agreements have not yet been approved.

Greenfield projects on a PPP scheme were almost entirely suspended in the context of the effort to materially reduce public expenditure.

III GENERAL FRAMEWORK

i Types of public-private partnership

Decree Law 111/2012, of 23 May 2012, revoked Decree Law 86/2003, of 26 April 2003, and establishes the general rules applicable to any PPP launched by the Portuguese state.

It introduces several amendments to the previous PPP regime, in particular regarding the preparation, launching, execution and modification of PPP.

Both institutional and contractual PPP structures are available in Portugal. However, institutional PPP structures are not commonly used. In fact, most part of the PPP projects closed to date in Portugal are based on project finance contractual structures and typically follow a Build-Operate-Transfer/Design-build-finance-operate model.

The underlying contractual framework of a PPP transaction in Portugal traditionally includes a concession contract giving the project company the right to carry out the project or the relevant activity, a shareholders' agreement to regulate the relationship between the sponsors or project company's shareholders and an equity subscription agreement, a set of finance documents and certain major commercial contracts. Among the major commercial contracts, there is typically a construction contract and an operation and maintenance contract in infrastructure PPP projects. Supply agreements or sales agreements or both may also be entered into in connection with the project.

In the vast majority of the Portuguese PPP transactions closed to date, the concession-based construction contracts used do not follow any standard form, such as those issued by the International Federation of Consulting Engineers, the Joint Contracts Tribunal, or the Institution of Civil Engineers. Hence, the form of construction contract used in each case has varied depending on the sector of industry at stake or the sponsors involved.

In relation to the infrastructure projects closed in Portugal in the 1990s and early 2000s, it was generally accepted that, given the need to adapt the legal structure of the facility agreements to international syndication, the whole financing package other than the security documents had to be governed by English law, while the project documents, notably the concession contract, were subject to Portuguese law. That ceased to be the case from the mid-2000s onwards, at which point the project financiers active in Portugal had become sufficiently comfortable with the Portuguese law and, therefore, most finance documents executed thereafter are governed by Portuguese law, notwithstanding closely following the structure of a typical English law project finance documentation package.

PPP major projects in the health sector have also some particularities in Portugal. The specific framework for PPPs in health sector, set out in Decree Law 185/2002, of 20 August 2002, is still in place. That piece of legislation, as amended, governs the development of PPPs for the construction, financing, operation and maintenance of health-care units forming part of the NHS. An important feature of these PPPs is that they may envisage the private partner not only managing the hospital facilities but also providing clinical services as part of the NHS. When both managing facilities and clinical services provision are foreseen, two separate project companies must be incorporated. In such case, both project companies are bound to comply with their own obligations under a sole concession agreement, and one concessionaire is liable before the other provided that the non-compliance of its own obligations may give cause

to the other concessionaire's infringement under the concession agreement. The health sector concession agreements set out different contractual periods for each concessionaire (10 years for the clinical services providers – which may be extended for additional 10-year periods until a maximum of 30 years – and 30 years for the concessionaires responsible for the design, construction and operation of the hospital buildings).

In the road sector, different solutions were put in place regarding the concessionaires' payment mechanism and risk matrices. Shadow toll systems were introduced in some road projects during the 90s and onwards but in all those projects such payment systems were replaced by road availability payments and real toll payment systems. Exception is made in Madeira and Azores, where the regional political authorities chose to maintain the shadow toll systems previously adopted in their respective road projects. More recently, real toll payment mechanisms were also substituted by road availability solutions under the recent renegotiation process on the PPP projects of the road sector. Such renegotiation process also brought some specific solutions, including a set-off mechanism against toll revenues for the benefit of the concessionaires and an upside-sharing mechanism to encourage concessionaires to promote traffic in their concessions.

It also should be noted that Decree Law 90/2009, of 9 April 2009, and Decree Law 194/2009, of 20 August 2009, as amended, established the rules applicable to PPP in connection with municipal water supplies and water and wastewater treatment, which are still in force.

ii The authorities

In general terms, the line ministries (energy, infrastructure, transports, health, etc., and (when applicable) environment) are responsible for the launching, licensing and major regulation of the projects, either directly or through their governmental departments: e.g., Direção Geral de Energia e Geologia (energy), Instituto da Mobilidade e dos Transportes, IP (roads), Administração Regional de Saúde (health).

The approval of the Ministry of Finance is also required when the project involves public investment or, more generally, where the PPP legal framework applies.

Decree Law 111/2012 introduced several amendments to the previous legal regime, in particular regarding the preparation, launching, execution and modification of PPP.

The main purpose of this new legal framework is to reinforce supervision, scrutiny and consistency of the decisions of the public partner and contemplates the creation of the Technical Unit for Monitoring Projects (Unidade Técnica de Acompanhamento de Projetos) which centralises and executes all main tasks related to preparation and execution of PPP contracts.

Other PPP projects at a municipal or regional level are prepared and executed by the respective public structures and such projects are not subject to the Technical Unit for Monitoring Projects control.

iii General requirements for PPP contracts

The legal framework applicable to the PPP projects expressly foresee the need to accommodate the type of expenditure within budgetary regulations and requires the

preparation of economic and financial surveys to confirm the figures for the public sector comparator, as well as establishes general procedure rules applied to any type of PPP contracts.

Projects that require a global public cost above €10 million and an investment not higher than €25 million for the entire contractual period are not subject to the legal regime of the Decree Law 111/2012, of 23 May 2012.

Since the previous PPP Decree Law dated 2003 (Decree Law 86/2003, of 26 April 2003), procurement procedures may only be launched and awarded after approval of the relevant environmental impact declaration and once the relevant environmental and urban planning licenses and permits have been obtained, in order to ensure an effective transfer of execution risks to the private partner.

The regime concerning environmental impact assessment for each project was approved by Decree Law 151-B/2013, of 31 October 2013 as amended, pursuant to which any application for an environmental approval must enclose a detailed environmental impact study, the procedure for granting the relevant environmental impact decision implying a coordinated effort between a different array of entities for better assessment of the environmental risks associated with each project.

Depending on the sector of industry in question, a project may also be subject to environmental licensing under the new integrated pollution prevention and control legal framework, approved by Decree Law 127/2013, of 30 August 2013. 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 plant, although simplified licensing procedures may be in place in accordance with the scope of the activities carried out.

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

Other industrial and construction licences and permits may be required depending on the type and specific conditions of each project to be implemented.

Finally, it should be noted that compliance with all legal conditions and procedures is subject to validation by the Court of Auditors. After the execution of a PPP agreement by any public entity, the Court of Auditors will verify and confirm whether all legal requirements are fulfilled and payments under those contracts can only be made further to such validation.

IV BIDDING AND AWARD PROCEDURE

The Public Contracts Code (the PCC) was published on 29 January 2008 by means of Decree Law 18/2008 and revoked, among other pieces of legislation, Decree Law 59/99, of 2 March 1999, which applied to public works and to public works concessions. Such statute implemented the public procurement Directives 2004/17/EC and 2004/18/EC of 31 March 2004.

The PCC applies to every public tender procedure launched by a public authority. Such piece of legislation sets out different procedures for the procurement process applicable to administrative contracts, including those to be entered into in connection

with PPP projects: the direct agreement, the public tender, the limited tender by pre-qualification, the negotiation procedure and the competitive dialogue. Unsolicited bid mechanisms are not foreseen under the Portuguese applicable law. Differently from the former legal framework for public procurement, the PCC does not automatically require a public tender for public works concessions or public services concessions, the awarding entity being entitled to choose between the launch of a public tender, limited tender by pre-qualification or a negotiated procedure.

In each procedure allowed by the PCC, administrative principles of equal treatment, legality, transparency and competition are duly reflected in the respective regulation. Moreover, such principles are directly applicable to each procedure and may be invoked by any interested party. If an interested party considers that an act under the procurement procedure does not comply with applicable regulation and principles, it may claim directly to the awarding entity but also to a court. In such case, the interested party may ask the court to declare the suspension of all subsequent acts in the procurement procedure by means of a temporary injunction, in order to ensure that its rights are not irreversibly threatened.

Substantive provisions dealing with public works and the public services concessions are included in the PCC, some of which are mandatory in nature. These mandatory provisions refer to relevant features of a PPP, such as termination by the contracting authority and sequestration/step in. Other substantive provisions of the PCC will only apply in the absence of express provision in the relevant contract.

The granting of the approval by the Court of Auditors is a condition for the contracting authority to make any payments under the contract; the contract may, however, enter into force prior to the validation and all rights and obligations contained therein may be performed, except for public payments.

In February 2014, the European Parliament and the Council adopted the Directive 2014/25/EU (procurement in the water, energy, transport and postal services sectors), the Directive 2014/24/EU (public works, supply and service contracts) and the Directive 2014/23/EU (concession contracts).

The recent economic crisis in Europe has made it necessary to reform public procurement rules, firstly to make them simpler and more efficient for public purchasers and companies and secondly to provide the best value for money for public purchases, while respecting the principles of transparency and competition. Said Directives comprise major changes to the European public procurement regime with the aim of:

a promoting environmental policies, as well as those governing social integration and innovation;

b improving the access of small and medium-sized businesses to public procurement markets;

c implementing stronger measures preventing conflicts of interest and corruption; and

d new simplified arrangements for social, cultural and health services listed in the Directives.

Member States have until April 2016 to incorporate the referred new rules into their national law (except with regard to e-procurement, where the deadline is September 2018) which will imply major amendments to the PCC (especially in what concerns concession contracts).

V THE CONTRACT

i Payment

Remuneration mechanisms diverge considering the different sectors of activity and the different PPP projects.

In the road sector, different solutions were put in place regarding the concessionaires' payment mechanism. Real toll systems and shadow toll systems coexisted under different projects but the shadow toll systems were generally replaced by road availability payments and real toll payment systems. In addition, some real toll payment mechanisms were substituted by road availability solutions under the recent renegotiation process on the PPP projects of the road sector. Upside-sharing mechanisms were set out thereunder to encourage concessionaires to promote traffic in their concessions.

Payments due under the PPP projects in the health sector are linked to the clinical services provided in accordance with a list of medical acts and complexity levels, and also to the availability of the hospital facilities. Both concessionaires are subject to payment deductions if any contractual requirements are not totally fulfilled, and additional revenues can be obtained through the performance in the hospital facilities of other related activities (the revenues of which are to be shared with the awarding entity).

Water supply concessions are remunerated in accordance with the water consumption and the applicable tariff as determined in accordance with the concession agreement.

ii State guarantees

The law establishes a type of sovereign guarantee (*Aval do Estado*) which may be granted by the Portuguese government to secure payments by the State and related parties, such as state-owned companies or government departments. The maximum amount of the guarantees which may be provided in any given year must be approved and set out in the relevant state budget. However, PPP projects in Portugal usually do not include any type of sovereign guarantee to secure payments from the government or other public entities.

iii Distribution of risk

According to the Decree Law 111/2012, of 23 May 2012, project risks are to be shared between the public and private partners according to their capacity to manage such risks. Moreover, a PPP project should imply an effective and significant transfer of risks to the private partner. The concession contract allocates the relevant project risks between the contracting authority and the project company. The risks which remain with the contracting authority are usually covered by the financial rebalance mechanism which is a key concept in all concession-based transactions in Portugal.

Typical financial balance events include unilateral variations by the contracting authority, force majeure events, specific change of law and construction delays caused by the contracting authority.

Traditionally, archaeological and ground risks were borne by the public partner. That was however not the case in the PPP1 Poceirão-Caia high-speed rail project closed in May 2010, (which was cancelled, as part as the austerity-led review of PPP projects) and in the PPP hospital projects, where that risk was partially assumed by the project company and transferred by the latter to the contractor.

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. Public interest may also constitute grounds for termination of the concession contract by the contracting authority, in which case the contracting authority shall compensate the project company for all the damages caused (which may include loss of profit). Some concession contracts set out the method for calculating the damages incurred by the project company in case of termination by reason of public interest. Such calculation usually takes into account the status of construction.

Other political risks, such as war, civil disturbance or strikes may be considered as events of force majeure and, therefore, the project company shall be relieved from its obligations under the concession contract to the extent affected by the relevant event of force majeure. Force majeure events may trigger the financial balance mechanism and, hence, the project company (and consequently, the construction contractor) shall be compensated. In case of prolonged force majeure or if the restoration of the financial balance of the concession proves too onerous, the concession contract may be terminated.

Changes in law may also be treated as a political risk. Only a specific change in law entitles the project company to financial rebalance. The risk of change in general law is typically assumed by the project company.

In water concession projects additional events may give cause to apply the financial rebalance mechanism, as it is the case of water consumption levels below certain limits or additional infrastructure investment requirements.

The project company generally passes on to the contractor all design and construction obligations, liabilities and risks under a construction contract which is fully back-to-back with the concession contract.

The contractor usually undertakes to perform the design and construction obligations on a turnkey and fixed-price basis and, hence, it bears the risk of price escalation of the material, equipment or workers. In some cases, the contractor is allowed to revise the price annually to reflect inflation.

Other risks that are transferred by the project company to the contractor under a classic concession-based construction contract include the delay in the completion of the works, approval risk, the risk of damage to the works and defects during the defects liability period.

The risks generally covered by the financial balance under the concession contract do not entitle the contractor to suspend the works or in any way relieve the contractor of its obligations under the construction contract. The contractor shall, however, be entitled to compensation in accordance with the 'back-to-back, if and when' principle, (i.e., the contractor will only receive compensation for any of the relevant events to the extent the project company is compensated for those same events under the concession contract).

In what concerns to limitation of liability, under general Portuguese law, any party is liable before the other for the breach of its obligations under the relevant contract. All damages caused by such breach must be compensated, including all direct damages and loss of profit but excluding indirect or consequential damages. Portuguese law expressly forbids prior general waivers of the right to compensation, although specific waivers after the occurrence of the fact giving rise to the right to compensation are permitted. It is possible, however, for the parties to agree an amount of liquidated damages for breach of obligations, provided that it represents a reasonable estimate of the damages that may result from such breach. Caps on liability are also generally admitted by most Portuguese scholars.

Portuguese project concessionaires usually have unlimited liability under the respective contracts. In recent years, the subcontracts executed by concessionaires with construction and operation and maintenance contractors set out liability caps in line with the commercial practices in other countries.

In contracts where a liability cap is foreseen, the same is often equivalent to the contract price and, since no restrictions are made to the type of damages that are considered for compensation purposes, the relevant legal provisions will apply. In recent projects, contractors have successfully demanded the introduction of tighter liability caps and the exclusion of loss of profit suffered by the project company.

iv Adjustment and revision

The risks that remain with the contracting authority are usually covered by the above mentioned financial rebalance mechanism. If a financial balance event arises causing a deterioration in the levels of the project ratios, the contracting authority agrees to compensate the project company with a view to restoring the financial balance of the concession.

In general, any amendments to the PPP concession contracts should be subject to the procedures set out in Decree Law 111/2012, of 23 May 2012. Such procedures include the creation of a negotiation committee to prepare and execute the negotiations with the private partner in order to reach a new agreement, which will be subject to a final report and approval process by the relevant government members.

Other adjustment mechanisms not focused particularly on the payments are also set out, as it is the case of the geographic area the clinical services should encompass under the hospital PPP projects. In fact, subject to certain constrains, the public health authority can modify the reference area for each type of medical treatment merely by a decision to be notified to the private partner.

v Ownership of underlying assets

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

However, the exercise of a specific economic activity by 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).

It is usual to set out that the private partner should deliver any assets at the term of the contract, even though such assets are owned by the private partner, provided that the same are required to perform the relevant activity under the agreement.

vi Early termination

Concession agreements may be terminated by either party owing to the infringement of the other party's obligations. Also, concession agreements usually foresee the possibility of redemption or early termination on grounds of public interest.

Some concession contracts set out the method for calculating the damages incurred by the project company in such situations, which calculation usually takes into account the status of construction and in some circumstances the financing agreements entered into between the private partner for the purposes of implementing the project.

Termination owing to one party's failure to comply with its obligations usually does not entitle the non-compliant party to any compensation rights. However, in some PPP projects – as it is the case of the hospital PPP projects – compensation may be due in such situations taking into consideration the significant investments made by the private partner that should revert to the public partner.

VI FINANCE

Most the PPP projects in Portugal are financed pursuant to the project finance structure. The use of project bonds or monoline structures to finance projects is not common practice and the bond refinancing of SCUT do Algarve shadow toll road project, in 2001, is the only known successful precedent.

The finance package usually comprises a commercial bank credit agreement (as well as an European Investment Bank (EIB) credit agreement and an intercreditor agreement whenever the EIB is also providing finance to the project), an accounts agreement, a forecasting agreement, security documents and direct agreements between the lenders and the contracting authority aor the major project parties, all in a form consistent with international market standards.

The two main types of security that can be created under Portuguese law are mortgages and pledges. Mortgages will entitle the beneficiary, in the event of a default, to be paid with preference to non-secured creditors from the proceeds of the sale of immoveable assets or rights relating thereto or of moveable assets subject to registration (such as automobiles, ships or planes). Pledges will confer similar rights to those created by the mortgages, but are created in respect of moveable (non-registered) assets or credits. Portuguese law does not recognise the concept of a floating charge. Also it does not permit the creation of security over future assets and, therefore, promissory agreements and assignments in security are entered into to overcome this hurdle. However, since Portuguese law does not recognise the concept of assignment by way of security as existing in most (if not all) common law jurisdictions, the instrument used is a true assignment of rights, with the occurrence of an event of default being either a condition precedent or a termination event, depending on the bargaining power of the borrower and sponsors (as applicable).

Also, Portuguese law does not allow for remedies other than outright sale, other than in the case of financial pledges where appropriation of financial collateral is permitted on enforcement of the pledge, provided that the parties have agreed a commercially reasonable mechanism for evaluating the price. Financial pledges may be granted over cash on bank accounts or financial instruments (including shares but not quotas in Portuguese limited liability companies) and, more recently, credits over third parties.

Portuguese project finance documentation generally includes direct agreements between the lenders and the contracting authority and the lenders and any major contractors. All direct agreements contemplate step-in rights in favour of lenders, which may be exercised upon the occurrence of certain events: default of the concessionaire under the underlying contracts and, in certain cases, default of the concessionaire under the finance documents.

Shareholders are generally required to provide on-demand bank guarantees in order to guarantee their equity subscription and other funding obligations. Standby equity commitments to fund general investment, operational costs overruns or loss of revenues are often also supported by on-demand bank guarantees.

In health sector PPPs, the shareholders have been requested to provide a corporate guarantee to guarantee, in the proportion of their shareholding in each project company (the ClinicCo and the InfraCo) and up to a certain amount, any lack of funds in the project and breach of the obligations of the project company.

VI RECENT DECISIONS

No significant dispute under the existing PPP procurement procedures has been registered recently. However, some relevant disputes arose from the performance of those contracts. The main reasons evoked by the concessionaires included the variations imposed by the contracting authorities which were not settled by negotiation under the financial rebalance mechanism. There is one dispute that has not yet been decided related to the impact of the international financial crisis and the applicability of change of circumstances legal provisions in that context. In Portugal, PPP concession agreements frequently set out arbitration as the applicable dispute resolution mechanism.

VII OUTLOOK

The Portuguese economy is recovering, despite the three-year EU-IMF adjustment programme has been concluded not long ago. There is also political willingness that may anticipate new opportunities for the PPP activity and construction sector in the following years. Particularly, several infrastructure projects – mainly in the freight rail and port sectors – as stated in the Strategic Plan for Transports and Infrastructure 2104–2020, are expected to have a significant positive impact on the Portuguese economy and create many business opportunities for all stakeholders in the relevant sectors.

Other opportunities may arise from the recent focus of the Portuguese government in developing the Green Economy and Green Growth in Portugal, in relevant areas such as climate and energy, water and waste management, biodiversity and sustainable cities.

Appendix 1

ABOUT THE AUTHORS

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Manuel Protásio was born in Lisbon and graduated in law in 1984 from College of Law of the Portuguese Catholic University in Lisbon.

He worked on secondment at Deutsche Bank investment bank subsidiary in Lisbon for approximately one year and has been involved in project finance matters since 1992.

He joined Vieira de Almeida & Associados in 1991 and is currently one of the partners in charge of the projects – infrastructure, energy and natural resources practice group. In such capacity he has participated and/or led the teams involved in the most relevant transactions carried out in Portugal to date on the power (including the renewable energies), oil and gas, road, transport, water and wastes sectors. He has also been actively working in regulation and public procurement procedures of those sectors.

Manuel Protásio is admitted to the Portuguese Bar Association.

FREDERICO QUINTELA

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Frederico Quintela was born in Lisbon and graduated in law in 2001 from the College of Law of Lisbon University.

He became a postgraduate in corporate law in 2004 from the College of Law of the Portuguese Catholic University in Lisbon, and in 2012 he completed an LLM in international business law at the Global School of Law of the Portuguese Catholic University, in Lisbon.

He joined Vieira de Almeida & Associados as a trainee in September 2001 and currently he is a managing associate in the oil and gas and projects – infrastructure, energy and natural resources practice groups. At Vieira de Almeida & Associados, he has been

actively involved in or led several transactions, mainly focused on the infrastructure, healthcare or energy sectors and acting either as legal adviser to the grantor, the sponsors or the lenders. Between 2012 and 2013 he was seconded to Pinheiro Neto Advogados, in Brazil.

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