Acquisition Finance

Contributing editors
Ryan Bekkerus, Alexandra Kaplan and Marisa Stavenas

2018

GETTING THE DEAL THROUGH

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This article was first published in April 2018
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Published by
Law Business Research Ltd
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London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

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First published 2013
Sixth edition
ISBN 978-1-912377-45-9

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Preface

Acquisition Finance 2018

Sixth edition

Getting the Deal Through is delighted to publish the sixth edition of *Acquisition Finance*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes Argentina, India and Nigeria.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Ryan Bekkerus, Alexandra Kaplan and Marisa Stavenas of Simpson Thacher & Bartlett LLP, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
April 2018

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Portugal

Pedro Cassiano Santos, Ricardo Seabra Moura, Catarina Pinho and Francisco Vasconcelos Pimentel

Vieira de Almeida

General structuring of financing

1 What territory's law typically governs the transaction agreements? Will courts in your jurisdiction recognise a choice of foreign law or a judgment from a foreign jurisdiction?

In general, Portuguese law is retained, certainly in all cases to govern the relevant security packages and any subordination aspects that may be associated with the relevant transactions; and use of Portuguese law may be considered well-established practice. Bilateral loan agreements may also, in some cases, be governed by the laws of the lender's jurisdiction. However, in larger syndicated loan transactions, English law has been more likely to be the law chosen to govern the respective loan and intercreditor agreements, although Brexit inevitably raises a series of doubts and concerns that have not been seen previously.

New York law has been used to govern loan debt operations provided by US lenders. High-yield bond documents are usually also governed by New York law.

As regards security documents, these are governed by the law of the jurisdiction where the assets are located, with the exception of security over claims habitually governed by the debtor's law.

According to Regulation (EC) No. 593/2008 (Rome I) on the law applicable to contractual obligations, Portuguese courts must accept the parties' choice of law, subject to certain exceptions. Also, judgments from other EU member states are enforceable in Portugal in line with (recast) Regulation (EU) No. 1215/2012 (Brussels I). According to the Lugano Convention, in addition to the enforceability of judgments from other EU member states, judgments from Iceland, Switzerland and Norway are also enforceable.

Judgments issued in countries not mentioned above are not enforceable in Portugal; nevertheless, Portuguese courts will consider these foreign rulings when requested to render a judgment in line with that previous judgment, without substantive re-examination or relitigation on the merits of the case in question.

2 Does the legal and regulatory regime in your jurisdiction restrict acquisitions by foreign entities? Are there any restrictions on cross-border lending?

There are no restrictions applicable to the acquisition of Portuguese companies by foreign entities and cross-border lending is also relatively common, Portugal operating on a free-movement-of-capital basis like any other EU jurisdiction. Portuguese law does not impose specific restrictions on cross-border financing into Portugal for the acquisition of Portuguese companies.

For regulated activities (and particularly for banks, financial intermediaries and insurance companies) the relevant regulators and particularly the Bank of Portugal, the Portuguese Securities Market Commission and the Insurance and Pension Funds Supervisory Authority may intervene in this process if the acquisitions exceed certain thresholds and if the companies involved are subject to financial supervision. Rules governing the acquisition of relevant participations in listed entities (including the duty to launch a compulsory full takeover offer if control of a listed company is acquired) and disclosure announcements also apply when listed entities are at stake.

Under the Regulation (EC) No. 139/2004 (EC Merger Regulation) and the Portuguese Securities Code, specific merger control rules may apply.

Additionally, under Directive 2011/61/EU (Alternative Investment Fund Managers Directive), as transposed to Portuguese law, the competent authorities of the home EU member state must be notified whenever a manager of an alternative investment fund acquires, disposes of, or holds shares of a non-listed company above or below certain thresholds, as well as the respective proportion of the shares held and voting rights held.

3 What are the typical debt components of acquisition financing in your jurisdiction? Does acquisition financing typically include subordinated debt or just senior debt?

Typically, both senior debt and subordinated debt are included in acquisition finance in Portugal. Junior debt may be provided by mezzanine lenders or by sponsors through quasi equity-like loans that are legally subordinated or by a mixture comprising both equity (in Portugal, corporate laws also provide for a special type of additional instalments of capital, on top of real capital) and these special types of subordinated instruments loans.

4 Are there rules requiring certainty of financing for acquisitions of public companies? Have 'certain funds' provisions become market practice in other transactions where not required?

In acquisitions of publicly listed companies, Portuguese law requires that when a public tender is launched, the disclosure of any finance available to back the bid is contained in the applicable prospectus.

Moreover, upon registration of a takeover offer, when the consideration is in cash, then the offeror must deposit the applicable consideration in cash or issue a bank guarantee for the corresponding amount in order to ensure payment of the offer price.

Note that whenever compulsory takeover offers are at stake, a cash consideration shall necessarily have to be provided and also that there are special rules governing the allowed amount of that consideration.

While not a legal requirement in private acquisitions, 'certain funds' provisions have indeed been used in acquisition finance agreements and it is not uncommon for the seller to demand to be provided with evidence of the financial soundness behind the acquiring side.

5 Are there any restrictions on the borrower's use of proceeds from loans or debt securities?

As a general rule, one company may not provide financial support or assistance for any third party to acquire its own capital, as further detailed in question 15.

Additionally, the other restrictions usually applicable to the borrowers' use of proceeds are those agreed by the parties under the finance documents, notably through purpose clauses and other covenants. The parties usually agree on the purpose of the financing as being the payment of the acquisition purchase price or the repayment of the target's existing debt, and it is customary practice that this is covered by express provisions of the corresponding contractual documents.

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6 What are the licensing requirements for financial institutions to provide financing to a company organised in your jurisdiction?

According to the Capital Requirements Directive 2013/36/EU (CRD), lending is an ancillary banking activity that comprises the 'financing of commercial transactions (including forfeiting)'. EU member states are entitled to determine the various forms of lending and how these may (or may not) be carried out by entities not regulated as banks (credit institutions) or otherwise.

The European Economic Area (EEA) passporting framework established in the above Directive allows banks regulated by a member state to carry out all banking activities recognised under the CRD in other EEA member states. However, this passporting regime does not grant passporting rights to unregulated lenders or to investment firms intending to perform such activities on a cross-border basis.

The regulatory capital that financial institutions are obliged to allocate against their lending transactions has increased substantially under CRD IV (which includes CRD and Regulation (EU) No. 575/2013 (Capital Requirements).

A banking or financial licence is generally required when the financing activity is conducted on a professional basis (ie, the granting of finance is the relevant entity's business or there is a continued development of that business), involves regulated activities or advising on investment and does not include involvement in regulated mortgages or the consumer credit business.

7 Are principal or interest payments or other fees related to indebtedness subject to withholding tax? Is the borrower responsible for withholding tax? Must the borrower indemnify the lenders for such taxes?

Principal is not subject to withholding tax in Portugal. However, interest payments (including for late payments) are subject to a final Portuguese withholding tax rate of 25 per cent, which may be reduced under a double tax treaty (DTT) signed between Portugal and the other relevant contracting state.

The DTT signed between Portugal and the United States is an exception because it provides for a full withholding relief on long-term loans (of five or more years) when granted by resident US banks or financial institutions and other formalities are complied with.

EU and domestic tax legislation also provides withholding tax exemptions, as is the case of related companies within EU countries (provided other legal requirements and formalities are met) under Directive 2003/49/EC (Interest and Royalties Directive). According to domestic legislation, when the lender is a non-resident bank or financial institution, specific withholding tax exemptions are available, such as interest payments on loans made by Portuguese resident credit institutions and interest derived from long-term deposits in Portugal when paid to non-resident credit institutions. No withholding tax applies on interest payments to financial institutions resident in Portugal. In this context, and pursuant to European Court of Justice decision in *Brisal* (C-18/15) of 13 July 2016, member states are precluded from imposing withholding tax on interest paid to EU-resident financial institutions, unless those financial institutions can claim a deduction for their financing costs and other expenses. Apart from classic loans, interest payment made by Interbolsa to non-resident investors regarding bonds and securitisations transactions (when integrated in Interbolsa, Clearstream or Euroclear) are exempt from withholding tax under Decree Law No. 193/2005, of 7 November 2005, as amended.

Fees that are qualified as financial fees are not subject to Portuguese withholding tax (either to payments made to resident or non-resident entities). Otherwise, fees paid to non-resident entities are subject to a 25 per cent final withholding tax unless a DTT is applicable and the required formalities are met. Fees payments made between resident entities benefit from a withholding tax waiver. The primary responsibility for the payment of the non-withheld tax rests with the borrower, pursuant to the Tax Law. Therefore, if the borrower either fails to withhold or withholds the incorrect amount on interest or even non-financial fees' payments to non-resident entities, lenders shall only have secondary liability.

Additionally, stamp duty generally applies in Portugal on the granting of credit of any nature or form when granted or presented in the Portuguese territory for any legal purpose (although there are some exceptions to this rule). The stamp duty rate on credit granting instruments with a specific term is:

- 0.04 per cent per month or part of a month on guarantees with a maturity of less than 12 months;
- 0.5 per cent for a period between one and five years; and
- 0.6 per cent for a period equal to or exceeding five years or with no term.

Stamp duty of 4 per cent is due on interest and fees charged by financial institutions (and generally not triggering VAT).

8 Are there usury laws or other rules limiting the amount of interest that can be charged?

Under Portuguese law, usury is prohibited. A loan agreement is considered to be granted in usury when the annual interest rate exceeds the legal interest rate plus 3 or 5 per cent, depending on whether security interest was provided.

A penal clause that sets out as penalty for the non-payment of the loan for the delay period of 7 or 9 per cent over the legal interest rate, depending on whether security interest was provided, is also considered to be a usury agreement.

The consequence is the automatic reduction of the interest to the maximum amount set out above.

9 What kind of indemnities would customarily be provided by the borrower to lenders in connection with a financing?

Loan agreements typically include indemnities provided by the borrower to lenders for, among others:

- taxes;
- losses resulting from participation in the transaction or from the provision of funding;
- currency costs;
- expenses arising from the transaction; and
- the enforcement and preservation of security.

10 Can interests in debt be freely assigned among lenders?

Interests in debt can generally be assigned among lenders as a credit entitlement pertaining to such lenders, except when otherwise provided by those clauses as contained in the agreements concluded by the parties (who may set out more strict requirements for such assignment). However, it should be noted that some security interests can only be granted (and also assigned) in favour of certain parties qualifying as banking or financial entities (eg, financial pledges).

11 Do rules in your jurisdiction govern whether an entity can act as an administrative agent, trustee or collateral agent?

Portuguese law generally does not recognise trusts, without prejudice to the very limited exception under the laws governing Madeira's Free Trade Zone. Portuguese law tends to recognise legal ownership of the asset, resulting in the trustee or the legal owner being seen as the sole party participating in the structure. However, administrative agents, common representatives of bondholders and collateral or security agents may be recognised based on the existence of the legal figure of mandate or similar legal figures (for bond issuances there are express provisions in the law to govern the agent's functions, its responsibilities and entitlements).

12 May a borrower or financial sponsor conduct a debt buy-back?

Debt buy-back is not subject to legal restrictions, but contractual restrictions may apply in such circumstances.

Public bids or exchange offers associated to bonds may be subject to public bid rules and specific prospectus requirements, but they are nevertheless common in the Portuguese market, many times for issuers to take advantage of compressed prices at which their securities are trading.

13 Is it permissible in a buy-back to solicit a majority of lenders to agree to amend covenants in the outstanding debt agreements?

Portuguese law allows the inclusion of exit consents or similar clauses in loan agreements, subject to principles of good faith, reasonableness and fairness.

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Guarantees and collateral

14 Are there restrictions on the provision of related company guarantees? Are there any limitations on the ability of foreign-registered related companies to provide guarantees?

In addition to the general prohibition of financial assistance, the Portuguese Companies Code limits the ability of Portuguese companies to grant guarantees to other entities. As such, Portuguese companies are only able to provide guarantees in respect of their own debts, therefore, they may only grant guarantees for the benefit of third parties under limited and exceptional circumstances. Accordingly, in order to guarantee a third-party obligation, the guarantor must enjoy a justified self-interest in providing the guarantee, requiring, accordingly, an evaluation taking into account the separate and independent position of each company. The law also allows for the issuance of corporate guarantees in case the third party that benefits from the guarantee is in a control or group relationship with the guarantor.

Additionally, stamp duty applies in Portugal on guarantees of any nature or form when granted or presented in the Portuguese territory for any legal purpose or when the beneficiary of the guarantee (provided outside Portugal) is resident in the Portuguese territory. There is an exception on guarantees that are materially ancillary to a contract specifically taxed under the Stamp Tax General Table (such as the use of credit) and granted simultaneously (on the same day) with the creation of the secured obligations or when there is other specific exemption that is applicable. The stamp duty rate on guarantees is:

- 0.04 per cent per month or part of a month on guarantees with a maturity of less than 12 months;
- 0.5 per cent for a period between one to up to five years; and
- 0.6 per cent for a period equal to or exceeding five years or with no term.

The tax is levied on the secured obligations amount.

15 Are there specific restrictions on the target's provision of guarantees or collateral or financial assistance in an acquisition of its shares? What steps may be taken to permit such actions?

The Portuguese Companies Code establishes that a company limited by shares may not provide funds or guarantees to a third party for the acquisition of shares representing its own share capital.

Portuguese law is clear in determining the scope of financial assistance: finance or grant financial support to the acquisition of 'its own shares', not encompassing any other instruments or liabilities. Other elements of interpretation of the law may not be resorted to but confirm the limited scope of the wording set out in this chapter.

Financial assistance provisions do not expressly encompass acquisition of a parent company, whereby the granting of guarantees or security by a subsidiary for the funding of the purchase price of its parent company's own shares is interpreted as not falling within the scope of the legal prohibition. Portuguese law has not been modified to adapt to the softened rules legal framework governing financial assistance introduced by Directive 2012/30/EU, subsequently repealed by Directive 2017/1132/EU. However, Directive 2017/1132/EU is naturally an important element in the interpretation of financial assistance rules in Portugal.

16 What kinds of security are available? Are floating and fixed charges permitted? Can a blanket lien be granted on all assets of a company? What are the typical exceptions to an all-assets grant?

Under Portuguese law, the most common securities are security interests in rem, such as mortgages over immovable property, possessory pledges over shares, credit claims or bank accounts, but also non-possessory pledges. Portuguese law also allows personal guarantees.

Portuguese law does not recognise floating charges or blanket liens.

The requirements established by Portuguese law for the creation and perfection of a security right vary according to the asset subject to that security, therefore, requiring an agreement in relation to each security being given, even though they can be combined in a single security document.

17 Are there specific bodies of law governing the perfection of certain types of collateral? What kinds of notification or other steps must be taken to perfect a security interest against collateral?

Security interests are generically governed by the Portuguese Civil Code. However, certain registration requirements necessary for the perfection of such securities are governed by registration laws. For instance:

Pledge over shares

- The creation of security interest over quotas (the 'share' part of the share capital of a *sociedade por quotas*) must be made by means written agreement registered at the Commercial Registry Office.
- The creation of a pledge over shares depends on the whether the shares are represented by bearer shares represented by certificates, nominative shares represented by certificates or dematerialised shares. With regard to bearer shares, the pledge is perfected through the delivery of the share certificates; with nominative shares represented by certificates, a pledge declaration must be written in the certificate and the pledge in the issuer's share ledger book; and with dematerialised shares, the pledge will be recorded as an entry as to the creation of the pledge in the charger's bank account. Financial pledges, under Portuguese law, may only be created in respect of shares.

Real estate mortgages

- Agreements on the creation of mortgages over real estate must be executed by means of a notarial deed (or private document authenticated by a lawyer) and registered with the Land Register Office. Moreover, they must be registered, since failure to register a mortgage will result in its non-existence for legal purposes.

Pledge over receivables

- Under Portuguese law, pledges over receivables are deemed a pledge of credits. Therefore, following the pledge over receivables agreement, the pledgor's counterparty (ie, the debtor) must be served notice of the pledge and the pledgee must hold the documents that may be required in order to enforce the rights arising from the relevant contract directly against the pledgor's counterparty.
- Portuguese law does not allow a pledgee, upon enforcement of the pledge, to appropriate the pledged assets unless such pledge is made or characterised as a financial collateral arrangement enabling such appropriation in line with the Directive on Financial Collateral Arrangements, as transposed into Portuguese law.

Pledge over machinery

- This is usually achieved through a factory mortgage whereby a security interests is created over industrial units and machinery, including land, equipment and movable assets encompassed within a factory's activity. It must be in writing and listed in the mortgage deed in the form of a specific inventory.

Pledge over chattels

- The general rule is that for the perfection of the pledge the chattel must be in the possession of the pledgee (which may be construed in different ways). Commercial pledges must be agreed in writing.

Pledge over intellectual property rights

- These must be agreed in writing and registered with the Portuguese Intellectual Property Institute.

18 Once a security interest is perfected, are there renewal procedures to keep the lien valid and recorded?

This is not usually required to maintain security. However, a pledge of future receivables may be created over future receivables, therefore, these may be updated. As such, the security document determining an undisclosed pledge should contain obligations whereby the pledgor regularly pledges its new receivable by means of short-form supplemental pledges and its registration.

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19 Are there 'works council' or other similar consents required to approve the provision of guarantees or security by a company?

From a Portuguese legal perspective, there is no obligation to obtain consents from a works council, trade union or from other employee-representative bodies for the provision of guarantees or securities by a Portuguese company, unless express agreements are in force with employee representative bodies.

20 Can security be granted to an agent for the benefit of all lenders or must collateral be granted to lenders individually and then amendments executed upon any assignment?

See question 11.

21 What protection is typically afforded to creditors before collateral can be released? Are there ways to structure around such protection?

The provision of such protection is not common in Portuguese law structures.

22 Describe the fraudulent transfer laws in your jurisdiction.

Fraudulent transactions (ie, those with fraudulent purpose or intention) are punishable under Portuguese law. More specifically, asset-stripping is classified as a crime, triggering severe penalties (including imprisonment) or, in situations of insolvency, possibly triggering additional penalties. Upon insolvency, see question 33.

Debt commitment letters and acquisition agreements

23 What documentation is typically used in your jurisdiction for acquisition financing? Are short form or long form debt commitment letters used and when is full documentation required?

Prior to any bid, a short-form debt commitment letter, together with a term sheet, may be used. For closing, however, full documentation is required. In the case of loan agreements, it will usually be based on the Loan Market Association standards.

As regards public-to-private acquisitions, negotiated and signed loan agreements are mandatory when the public bid is launched, therefore meeting fund requirements (see question 29).

24 What levels of commitment are given by parties in debt commitment letters and acquisition agreements in your jurisdiction? Fully underwritten, best efforts or other types of commitments?

Levels of commitment effectively depend on the transaction and parties involved. Intent letters for acquisition financing usually provide for underwritten debt.

25 What are the typical conditions precedent to funding contained in the commitment letter in your jurisdiction?

Typical conditions precedent contained in the commitment letter do not differ from other jurisdictions, thereby including, among others:

- technical, legal and tax due diligence and other reports;
- third-party approvals and regulatory consents;
- execution of the acquisition and financing documents and creation of the envisaged security package;
- delivery of the borrower's constitutional documents and resolutions of the relevant corporate bodies approving the relevant transactions and appointing the officials entitled to represent the participating companies;
- delivery of legal opinions to the borrower and the lender issued by both parties' counsel;
- verification of the correctness and accuracy of the representations and warranties;
- absence of any events of default, or of situations of market disruption or material adverse change; and
- certificates of compliance.

Furthermore, if a facility is disbursed in a segregated manner, as is general practice, the lenders may not be obliged to make the loan available unless, on each drawdown, new conditions precedent have been fulfilled, such as:

- accurate representations and warranties;
- no event of default having occurred; and
- the borrowers' financial conditions remaining unchanged.

The following specificities should be taken into account:

- acquisition and financing documents are usually not executed by means of a public deed. Notwithstanding, when the security package set up for the transaction includes security interest over real estate, it may demand the intervention of a public notary;
- when the execution of the transaction documentation involves signing by lawyers empowered by powers of attorney executed before a foreign entity, those powers of attorney should be legalised in advance by affixing an apostille pursuant to the 1961 Hague Convention and subsequently providing a certified translation of the documents; and
- legal opinions delivered by counsel for both parties usually cover matters on the capacity of the parties and the validity of the documentation, but may also include opinions on, inter alia, insolvency laws affecting creditors' rights.

26 Are flex provisions used in commitment letters in your jurisdiction? Which provisions are usually subject to such flex?

Flex provisions, other than on margin and tenor, are not very common under Portuguese law.

27 Are securities demands a key feature in acquisition financing in your jurisdiction? Give details of the notable features of securities demands in your jurisdiction.

Securities demands are not a common feature in acquisition financing in Portugal. Nevertheless, transactions governed by New York law may include these commitments by the borrower and there is no legal restriction for them to apply.

28 What are the key elements in the acquisition agreement that are relevant to the lenders in your jurisdiction? What liability protections are typically afforded to lenders in the acquisition agreement?

The key element considered in an acquisition agreement for a lender in Portugal will be the adverse change clause, control negotiated by the borrower. The lender will wish to benefit from this clause. Moreover, lenders will typically require control of the purchaser's ability to amend or waive specific conditions on the acquisition agreement or assign any rights thereunder.

Lenders may also seek security over contractual rights in the acquisition agreement that enable the purchaser to seek recourse against the seller and, additionally, disclosure of that agreement to other lenders, if a syndication is foreseen.

Liability protections typically afforded to lenders in an acquisition agreement are realised through a declaration whereby specific information satisfies and protects the lenders' interests.

29 Are commitment letters and acquisition agreements publicly filed in your jurisdiction? At what point in the process are the commitment papers made public?

Portuguese law does not provide for mandatory disclosure requirements for the acquisition of private companies, neither commitment letters nor acquisition agreements. The acquisition of relevant participations in public companies requires specific disclosure.

Update and trends

New corporate restructuring procedures have been adopted, but are not yet in force, which may alter the dynamics of the insolvency market in Portugal. These aim at providing mechanisms for the recovery of companies outside formal (in-court) insolvency procedures, while also providing certain benefits achieved by both debtors and creditors in formal procedures (eg, tax benefits). These include, inter alia, the Extrajudicial Regime for the recovery of companies.

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In any case, if antitrust clearance is required and obtained, the acquisition may become public, although its details may remain private when so determined by the relevant competition authority.

Enforcement of claims and insolvency

30 What restrictions are there on the ability of lenders to enforce against collateral?

As a general rule, under Portuguese law, collateral can only be enforced upon default in the payment of the secured obligation. Moreover, certain types of collateral can be enforced only if properly perfected beforehand; notably, mortgages must be registered to be perfected.

Moreover, and under Portuguese insolvency law, the principle is that once insolvency is declared, no enforcement proceedings can be initiated and those that had already commenced will be stayed and annexed to the insolvency proceedings. This same general rule is applicable even if insolvency has not been declared, provided that the debtor has notified the relevant court that it is in the process of negotiation with its creditors, and this court has decided on the recovery plan and appointed a provisional judicial administrator.

31 Does your jurisdiction allow for debtor-in-possession (DIP) financing?

Portuguese insolvency law allows DIP financing. A number of legal requirements must be fulfilled to achieve DIP financing. These requirements include, among other things, the request by the debtor and an insolvency plan that entails the maintenance of the company as a going concern.

A debtor's powers in such cases are, however, limited. Any debt incurred in DIP is ultimately controlled by the insolvency administrator. The debtor may:

- for current management acts: not enter into a new obligation if the administrator opposes it; and
- for extraordinary management acts: only contract new obligations with the administrator's consent.

It should, in any case, be noted that in both cases, the contracted obligations will be considered valid and effective.

32 During an insolvency proceeding is there a general stay enforceable against creditors? Is there a concept of adequate protection for existing lien holders who become subject to superior claims?

See question 30.

33 In the course of an insolvency, describe preference periods or other reasons for which a court or other authority could claw back previous payments to lenders? What are the rules for such clawbacks and what period is covered?

Under Portuguese law, as a general rule, acts detrimental to the insolvency estate carried out within two years prior to the declaration of insolvency can be clawed back; however, the third party must have fraudulent intention. This fraudulent intention is legally presumed, in which case the third party must prove there was no such intention.

Any act or transaction will be presumed to be detrimental, without admitting evidence to the contrary, inter alia:

- if it has been executed without consideration;
- if it involves payment of unsecured debts, the maturity of which was to take place after the beginning of the insolvency proceedings (this latter if within six months prior to the commencement of the insolvency proceedings); and
- the granting of security covering pre-existing obligations, or of new obligations substituting pre-existing ones, within six months prior to the commencement of the insolvency proceedings.

34 In an insolvency, are creditors ranked? What votes are required to approve a plan of reorganisation?

Under Portuguese insolvency law, the ladder of priority on payments upon insolvency will generally be the following:

- insolvency estate debts (ie, the costs and expenses of the insolvency proceedings and management and administration of the estate);
- claims of especial prior ranking over real property creditors;
- claims of secured creditors to be paid with the proceeds of the sale of the relevant secured asset in accordance with the priority of the secured creditor (ie, ranking of security interest rights under Portuguese law in respect of the same asset is determined based on the moment of perfection of the security interest);
- claims of other prior ranking creditors;
- unsecured claims;
- subordinated claims (eg, credit claims held by persons with a special relationship with the debtor, or credit claims whose subordination has been negotiated between the parties); and
- equity holders (to the extent still possible with remaining assets in the insolvency estate).

Portuguese insolvency law sets out three types of reorganisation procedures:

- the special recovery proceeding;
- out-of-court agreements; and
- the insolvency plan.

The special recovery proceeding enables the debtor and creditors to enter into an agreement allowing for a recovery of the debtor in a pre-insolvency moment. The plan can be approved unanimously or by majority of the votes. In the latter case the plan is considered to have been approved by a majority if:

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- voted favourably by at least one-third of creditors whose credit claims are recognised and is approved by the favourable vote of over two-thirds of the total of issued votes and more than half of the issued votes correspond to non-subordinated claims, not counting abstentions; or
- voted favourably by creditors whose credit claims represent more than half of the listed credit claims with voting rights, and more than half of those votes are non-subordinated credits, not counting abstentions.

After the plan's approval, it must be sanctioned by a court that is entitled to refuse to sanction any plan, even if approved by the creditors. The court's decision is binding on all creditors, even those who have not participated in the negotiations.

Portuguese insolvency law also includes a provision whereby the court can sanction an out-of-court agreement. This agreement must be approved by the majority of the creditors with voting rights. For this purpose, a majority is achieved if at least creditors whose credit claims represent one-third of the total of claims with voting rights attend the meeting, and the plan is approved by a majority of two-thirds of the total of issued votes and more than half of the issued votes are not subordinated credits.

Generally, claims that are not modified by the plan or subordinated credits of a certain degree (if the plan decrees the write-off of all hierarchal inferior claims and does not attribute any economic value to the debtor, shareholders, associates or members). The court can then sanction the plan, or not. The court's decision is binding on all creditors.

If the debtor has already been rendered insolvent, an insolvency plan may be set forth and aim to reorganise the debtor. This must be approved by a majority. For this purpose, a majority is achieved if at least creditors whose credit claims represent one-third of the total of credits with voting rights attend the meeting, and the plan is approved by a majority of two-thirds of the total of issued votes, where more than half of the issued votes are not subordinated credits. The court can refuse to sanction the plan only on certain legal grounds.

35 Will courts recognise contractual agreements between creditors providing for lien subordination or otherwise addressing lien priorities?

Portuguese insolvency law expressly recognises contractual subordination of credit claims.

36 How is the claim of an original issue discount (OID) or discount debt instrument treated in an insolvency proceeding in your jurisdiction?

If an obligation was not yet due and payable at the moment when the insolvency was declared, such debt will become due and payable at that moment. Portuguese insolvency law provides that in such cases, since no interest is payable on the obligation, the amount of such obligation will be reduced. Such obligation will be considered reduced to the amount that would correspond to the amount of the said obligation, if interest were increased at the legal interest rate on that same amount.

37 Discuss potential liabilities for a secured creditor that enforces against collateral.

Generally, no liabilities should be expected to arise from the enforcement of collateral by a secured creditor if such enforcement complies with all legal proceedings and rules.

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ISBN 978-1-912377-45-9

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