Banking Regulation

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Timor-Leste

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Introduction

East Timor's financial system is essentially centred around banking and currency exchange activities. In fact, according to data compiled by the Central Bank of East Timor[1] (*Banco Central de Timor-Leste*, hereinafter "BCTL"), the financial institutions currently operating in the Timorese territory are:

- four branches of foreign commercial banks:
  - BNU Timor – Grupo Caixa Geral de Depósitos (Portugal);
  - the Australian and New Zealand Bank ("ANZ") Banking Group – Timor-Leste Branch (Australia – New Zealand);
  - PT.Bank Mandiri (Persero) Tbk. Dili – Timor-Leste Branch (Indonesia); and
  - PT.Bank Rakyat Indonesia (Persero), Tbk, Timor-Leste Branch (also from Indonesia);
- one state-owned commercial bank – Banco Nacional de Comércio de Timor-Leste;
- three insurance companies:
  - National Insurance Timor-Leste, SA (locally established but from Singapore);
  - Sinarmas Insurance, SA (Indonesia); and
  - the Federal Insurance Timor, SA (originally from Samoa);
- two currency exchange bureaux;
- nine money transfer operators; and
- two microcredit institutions.

Only one of the eight main financial institutions operating in East Timor is originally Timorese, which serves as a good example of the melting pot of cultures found in the Timorese territory.[2]

One of the most obvious and persistent effects of East Timor's eventful history is, in fact, the influence of a broad range of different legal traditions seen in its current legal system. In addition to traditional Timorese customs, the Portuguese, Indonesian and United Nations legal systems continue to influence modern Timorese law.[3]

It is also worth mentioning that much of the legal framework currently in force in East Timor – including the key piece of legislation on banking law, UNTAET Regulation no. 2000/8, of 25 February 2000 – was enacted by the United Nations Transitional Administration in East Timor ("UNTAET"), which administered the Timorese territory from October 1999 until its independence on 20 May 2002. In addition to the UNTAET regulations, Indonesian laws

that have not been repealed also remain in force, even though the Constitution of East Timor and much of its statutory and regulatory law – such as the Timorese banking law – have been modelled on Portuguese law.[4]

Unlike other countries throughout the world, the 2008 global financial crisis did not have a significant impact on the Timorese economy and therefore no significant legislative proposals were presented in connection thereof, as there was no real need for proposals.

On a final note, we believe that certain recent developments in the Timorese law, such as the enactment of Law no. 13/2017 published on 5 June 2017, enacting the Special Regime for the Determination of Ownership of Real Property (commonly referred to as the "Land Law"), though not directly related to financial regulation, could have a positive impact on the country's banking and financial sector.

The Timorese financial system is slowly growing, but much remains to be done.

Regulatory architecture: Overview of banking regulators and key regulations

Established in 2011, replacing the Central Payments Office ("CPO") and the Banking and Payments Authority ("BPA"), BCTL is an independent and autonomous public entity that acts not only as central bank, but also as the entity responsible for the regulation, licensing and supervision of banks, insurance companies and others that carry out financial activities on the national territory. BCTL is also the sole responsible entity for the application of corrective measures and administrative sanctions to financial institutions.

Furthermore, BCTL is responsible for managing the country's payment system, as well as issuing national coins as sub-units of the US dollar[5] and safeguarding the monetary policy in line with the economic policy defined by the Timorese Government.

Unlike other legal systems, there is no clear distinction between prudential supervision and market conduct supervision.[6] BCTL's powers and responsibilities are set out in its Organic Law, approved by Law no. 5/2011, of 15 June 2011.

The licensing and supervision of banking activities are governed by UNTAET Regulation no. 2000/8, of 25 February 2000 (hereinafter, the "Banking Law"). In addition to the Banking Law, there is a vast number of CPO/BPA/BCTL regulations that should also be considered when analysing the Timorese banking framework, such as Instruction CPO/B-2000/2 on regulatory capital and Instruction CPO/B-2000/4 on qualifications of administrators, among others.

In accordance with the Banking Law, a "bank" means a legal person engaged in the business of accepting deposits from the public in East Timor and using these funds, either in whole or in part, to make extensions of credit or investments for the account and at the risk of the person carrying on the business. Under the Banking Law, no person shall engage in such business without an effective licence issued by BCTL. Furthermore, no bank organised outside East Timor shall be permitted to engage directly in any financial activity in East Timor unless the activity is undertaken through a branch office for which an effective licence has been issued by BCTL.

Due to the relevance of currency exchange bureaux and money transfer operators in East Timor, we would also highlight UNTAET Regulation no. 2000/5, of 20 January 2000, and BCTL Instruction no. 1/2013 on the licensing and supervision of such activities.

Recent regulatory themes and key regulatory developments

Regulatory legislation is, as already mentioned, quite recent – dating from the first decade of

2000 – and the Timorese financial system is still relatively unsophisticated when compared with most of the worldwide nations, including the ones sharing the same geographical area, such as Indonesia or Philippines.

Also, the country has faced in recent years great political instability caused by frequent changes in government which has significantly contributed to a decrease in the number of legislative initiatives.

Without prejudice to the foregoing, there is a matter that has been progressively adjusted and is currently a hot regulatory topic in East Timor: anti-money laundering and terrorism financing prevention.

In fact, in 2017, BCTL issued an instruction – Instruction no. 5/2017 ("AML Instruction"), revoking the previously issued instruction on related matters – with a view, *inter alia*, to addressing concerns regarding the quality of the information on clients with established relationships with banks or clients looking to establish such relationships, as well as the source of the money being used by clients for bank operations.

The AML Instruction came to extend banks' duties and obligations when accepting new clients or when performing operations with existing clients, and imposed the creation of internal policies and procedures aimed at fulfilling the purpose of the AML Instruction, such as: identification and verification of clients' identity; client acceptance; monitoring and permanent control of high-risk bank accounts; notification of suspicious operations to the competent authorities; and document conservation. It also includes a form, to be completed by banks when complying with the obligation of notification of a suspicious operation.

We believe that this was the most relevant regulatory development in East Timor in the last year.

Nevertheless, there were other important innovations in legislation, not directly related to regulatory issues, but which could have a positive impact on the country's banking and finance sector.

Firstly, the Land Law, which will help clarify the legal status of land ownership by recognising the different types of private ownership rights.

The Land Law aims to define ownership of real property through the recognition and attribution of primary ownership rights over real property. It also establishes a National Land Registry, which will gather all official information on the legal status of immovable property.

The new Land Law could have a tremendous impact on the country's banking activity, considering that one of the major current issues is the proper constitution of *in rem* collaterals and its enforceability when needed, which offers banks greater security when lending to clients.

Another relevant development was the entry into force of Decree-Law no. 23/2017, of 12 July 2017, which created a Credit Guarantee System ("CGS") for Small and Medium-sized Enterprises ("SMEs").[7] This is a public programme, financed by the Timorese Annual Budget, which aims to facilitate the concession of credit in priority areas towards the diversification of the Timorese economy, through the sharing of the associated credit risk between the East Timorese State and banks, where the State covers up to 70% of the loan. In the event of default by a SME, the State is responsible to the creditors, in the proportion of the guarantee.

August 2017 saw the publication of Law no. 15/2017, of 23 August 2017, which approved the New Legal Regime for Private Investment in East Timor, revoking the previous regime

of 2011, and aiming, on one hand, to modernise the country's legal regime and to harmonise Timorese legislation with the guidelines issued by the Global Investment Agreement of the Association of South East Asian Nations, on the other hand.

This Law grants special benefits to investors, through either a declaration issued by the Timorese State defining the investor's benefits ("Statement of Benefits") or a special investment agreement, which can consist in the granting of five work visas to foreign workers hired as supervisors, directors or employees with technical functions suited to the investment project in question; the right of rental of real estate owned by the State, for an initial period of up to 50 years, renewable for 25 years up to a total of 100 years; and finally, fiscal and customs benefits for projects related to agriculture, livestock, forest, fishing and aquaculture, transforming industries, housing, and tourism activities.

Nevertheless, we note that investments made by the State and by public companies do not fall within the scope of this Law. In addition, investments by legal persons whose share capital is State-owned in more than 50% cannot take advantage of these tax and customs benefits.

Also in relation to this matter, on 21 February 2018 the East Timorese Government approved Government Decree no. 2/2018, which regulates certain points of the New Legal Regime for Private Investment. One of the most relevant provisions of this Decree regulates the minimum investment values that must be observed by investors to take advantage of the abovementioned special benefits. The public institute TradeInvest Timor-Leste, I.P. has the obligation to create and maintain up-to-date records of all investments that have been granted these benefits.

Decree-Law no. 34/2017, of 27 September 2007, was also introduced, establishing a new legal regime for the Licensing of Economic Activities whose main purpose is to simplify the licensing procedure applicable to such activities, notably by centralising the entire procedure to launch an economic activity in a single competent entity, the Department for Business Registry and Verification ("SERVE").

Bank governance and internal controls

The Timorese legislation includes several provisions on the governance requirements applicable to banks, notably provisions with respect to banks' administrative structure, the qualifications of their administrators and banks' internal control systems.

Section 16.1 of the Banking Law provides that each bank developing its business under Timorese law shall be administered by a Governing Board and shall have an Audit Committee. Furthermore, banks shall have a Risk Management Committee or, at least, separate committees for Credit and Asset and Liability Management.

Concerning the composition of the Governing Board, Section 16.1 establishes that this Board shall have an uneven number of members, between a minimum of three and a maximum of seven.

These Board members shall be appointed by the General Meeting of Shareholders and their mandate cannot exceed four years, without prejudice of an eventual re-appointment for subsequent periods.

Timorese banking legislation also includes provisions regarding the expertise and qualifications of members of the Governing Board, the Senior Management and the Audit Committee, notably in Section 17 of the Banking Law and in Instruction CPO/B-2000/4 of the CPO[8] ("Instruction 4/2000") on the qualifications of administrators.

Section 17 of the Banking Law sustains that every person elected or appointed as administrator of a bank must be a person of good repute and must comply with the criteria established by the CPO in supplementary regulation, regarding qualifications, experience and integrity.

Instruction 4/2000 details the requirements and necessary qualifications applicable to bank administrators, developing the provisions of Section 17 of the Banking Law. It further defines the concept of "administrator" and sets forth a set of criteria that these individuals must meet, which covers qualifications, experience and integrity.

Among others, the Instruction demands that bank administrators hold a University degree, and further states that should there be no evidence of, *inter alia*, any financial or administrative problems in their previous employment, nor of financial fraud, tax avoidance or default on indebtedness. The minimum years of experience required, depending on the specific role of the administrator,[9] is also addressed.

BCTL must approve all members of a bank's Governing Board. This process is started by the interested bank, which must submit, in writing, a certified copy of the decision of the General Meeting appointing the selected candidate, the candidate's identification and contacts, information on the candidate's business or professional activity and his/her *curriculum vitae*. It is also necessary to submit information on the candidate's relationship with other banks (whether as a shareholder or as an administrator) and his/her membership in other companies, partnerships, associations, and groups of persons acting together with a common purpose, whether organised as a formal business entity or not.

Alongside this application for approval, banks can also apply for the waiver of some of the requirements outlined above. This application should contain all relevant data of the proposed administrator, clearly identifying the criteria he/she does not meet and explaining why the bank is seeking a waiver of those requirements. Nevertheless, the following criteria cannot be waived under any circumstance by the BCTL: not having been deprived by law of the right to sit on the governing board of a legal entity; not currently serving, nor having served at any time during the immediately preceding 12-month period, as the Controller of the BCTL or on the management of the BCTL; never having been convicted of a crime; the BCTL not having determined that the proposed administrator was a party to a transaction that violates the Banking Law or any instruction issued under it; and not having been subject to an insolvency proceeding as a debtor.

Section 19 of the Banking Law states that each bank shall have an Audit Committee, defined in Instruction 4/2000 of the CPO as "*an independent committee of the bank which establishes and supervises compliance with appropriate accounting procedures and controls and which provides oversight of the bank's internal and external audit functions*". This committee shall be composed of three members, also appointed by the bank's General Meeting of Shareholders for a two-year mandate.

The Audit Committee is responsible for establishing adequate accounting procedures and controls for the bank, and for supervising compliance with such procedures. It is also expected to monitor compliance with banking rules and legislation and to deliver opinions on any matters submitted to it by the Governing Board or any others it may wish to address.

Additionally, banks are required to create a Risk Management Committee, which should comprise three members of the Governing Board. This Committee is responsible, *inter alia*, for establishing and monitoring the implementation of procedures for credit appraisal, asset and liability management. It is also accountable for monitoring compliance with the legislation applicable to credit and other risks, reporting to the Governing Board thereon.

As to the remuneration of the members of the Governing Board, Section 16.4 of the Banking Law and Instruction CPO/B-2001/9 of the CPO ("Instruction 9/2001") on Remuneration of Members of the Governing Board and of Senior Management of newly licensed banks determine that said remuneration is freely established by the General Meeting of Shareholders. Nevertheless, for the first three years of operations, the remuneration of the members of the Governing Board and of the Senior Management must be approved by BCTL.

This process of approval is part of the application submitted for a banking licence, and the request must be accompanied by a certified copy of the decision of the General Meeting of Shareholders or of the Governing Board, respectively, on the remuneration of the Governing Board or of the Senior Management.

BCTL shall decline a proposal on remuneration if, for instance, such proposed remuneration is expected to adversely affect the bank's future earnings prospects or financial condition.

Any changes made to the remuneration as presented in the application for a banking licence shall require the written approval of BCTL prior to their implementation.

As regards banks' internal control systems, the CPO issued Instruction CPO/B-2001/5 ("Instruction 5/2001") on Bank's Internal Control Systems, which demands the establishment, by the banks, of a "*sound internal control process, for the purposes of preventing losses, maintaining reliable financial and managerial reporting, enhancing the prudent operation of banks, and promoting stability in the financial system of East Timor*".

Banks shall also, according to Section 32 of the Banking Law, appoint an independent external auditor, recommended by the Audit Committee and approved by BCTL, who shall, among other duties, assist in maintaining proper accounts and records; prepare an annual report on whether the financial statements present a full and fair view of the financial condition of the bank, in accordance with the banking legislation; and inform BCTL, with respect to any bank or any of its subsidiaries, of any fraudulent acts or any irregularity or deficiency in the administration.

Finally, Instruction 5/2001 establishes that banks must ensure an appropriate segregation of duties in operational functions, and that bank employees should not be given conflicting responsibilities. Banks shall pay special attention to areas of "*potential conflicts of interest*" and shall identify, minimise and subject these to "*careful and independent monitoring*".

Bank capital requirements

In what concerns capital requirements, Section 4 of the Banking Law states that BCTL currently has sole competence and responsibility for defining the minimum capital for newly licensed banks, which may not be less than the equivalent of US$2,000,000.

Section 4 of the Banking Law further stipulates that the amount of capital allocated to a bank determines the financial activities which it will be permitted to engage in. In fact, Section 24 of the Banking Law further details the range of financial activities that banks can perform, based on their amount of capital (minimum capital, twice the minimum capital and three times the minimum capital). For example, banks with the minimum capital can only receive deposits, bearing interest or not, in one currency; buy and sell for a bank's own account certain types of debt securities; extend credit, including consumer and mortgage credit; carry out factoring with or without recourse; provide payment and collection services; issue and administer means of payment; buy and sell foreign exchange for cash for the account of a customer; and provide for the safekeeping of securities and other valuables.

Instruction CPO/B-2000/2 ("Instruction 2/2000") on Regulatory Capital develops the capital requirements applicable to banks and branches of foreign banks operating in East Timor and lays down the concepts of regulatory, tier one and tier two capital, and their form of calculation.

Instruction 2/2000 also establishes a capital adequacy ratio that must be of, at least, 12%, based on a comparison of banks' regulatory capital and their assets and off-balance sheet exposures, according to a predetermined risk weight.

In accordance with Section 49(f) of the Banking Law and Chapter IV of Instruction 2/2000, banks also face limitations in respect of the distribution of dividends, in the sense that such distribution is not allowed if it leads to a situation where the bank fails to comply with the minimum required amount of regulatory capital or the minimum capital adequacy ratio.

Additionally, there is also a CPO Instruction – Instruction CPO/B-2000/3 ("Instruction 3/2000") – that establishes the liquidity requirements for banks licensed in East Timor, developing on several provisions of the Banking Law. The purpose of the Instruction is "*to provide for an adequate balance between a bank invested funds (assets) and its financial resources (liabilities) and to ensure that a bank is at all times able to fund its operations under any conditions and at a reasonable cost*".

This Instruction further establishes a set of principles, contained in Publication no. 69, of February 2000, of the Bank for International Settlements Basel Committee on Banking Supervision, which can be summarised as follows:

(i) development of a structure for liquidity management;

(ii) measurement and monitoring of net funding requirements;

(iii) management of market access, with a periodic review of its efforts in the establishment and maintenance of relationships with liability holders;

(iv) existence of contingency plans addressing the strategy for handling liquidity crises;

(v) management of banks' foreign currency liquidity;

(vi) existence of an adequate system of internal controls over banks' liquidity risk management process; and

(vii) existence of a mechanism for ensuring that an adequate level of disclosure of information about the bank exists, for the management of public perception of the banks' organisation and soundness.

According to Instruction 3/2000, banks' liquidity ratio shall be of at least 15%, calculated by dividing banks' highly liquid assets by banks' total liabilities (not including equity).

Finally, banks shall report to BCTL, at each month-end and in the prescribed format annexed to Instructions 2/2000 and 3/2000, their calculation of regulatory capital, risk-weighted assets, capital adequacy ratio and short-term liquidity ratio.

Rules governing banks' relationships with their customers and other third parties

Bank/customer relationships have always been on the legislators' and regulators' radars across the globe and East Timor is not an exception.

The main provisions governing these relationships can be found on the Banking Law and further regulations issued by BCTL.

Firstly, Section 28 of the Banking Law establishes that banks have the obligation to notify their customers (not distinguishing between retail customers, professional clients or more

substantial counterparties) of the precise nature of their business and of the terms and conditions associated with the deposits made and credits received by them, including the compound annual rate of interest.

Instruction CPO/B-2001/3 ("Instruction 3/2001") sets out further regulation on this matter, establishing that, as regards the nature of a bank's business, a certified copy of its licence shall be made public, as well as the financial activities it is authorised to perform. Instruction 3/2001 also states that the types, terms and conditions of deposits and credits offered by the bank at any given moment shall also be publicly disclosed to customers.

Further, this Instruction specifies, in relation to deposits and credits, special requirements of information to be provided to customers, *inter alia*, the types of deposits and credits available, the interest rates, collateral requirements and service charges or fees associated.

In what specifically concerns deposit-taking activities, BPA[10] Instruction no. 9/2003 regulates the opening and maintenance of deposit accounts, establishing requirements that banks must comply with when performing these activities. This Instruction also clarifies banks' duties in the closing of a customer's deposit account.

Additionally, Section 2.5 of the Banking Law forbids any person to "make a misstatement of material or fact or false representation or do anything to create a false appearance or engage in any manipulative device or practice in relation to taking of deposit".

Regarding credit and lending, Instruction CPO/B-2001/8 ("Instruction 8/2001") on credit documentation establishes a set of requirements that must be complied with by banks, notably the maintenance at the bank's head office in East Timor of adequate documentation on each credit, "*based on the type of the credit, the complexity of the credit transaction, and the extent of the borrower's credit relationship with the bank*", and further explains the minimum credit documentation that shall be included.

East Timor recently issued a Law on consumer protection – Law no. 8/2016, of July 8th, 2016, ("Consumer Protection Law") establishing a framework on the protection of consumers' rights and encouraging the improvement of the quality of the services provided by Timorese companies to their clients.

This is a general framework, which applies to all goods and services provided by companies in East Timor, including banking and financial products.

The Consumer Protection Law sets forth a comprehensive set of rights from which consumers should benefit, notably the right to be provided with detailed information regarding products and services being commercialised, and the right to effective juridical protection, while imposing a set of new obligations on suppliers, with non-compliance resulting in fines or even the revocation of the authorisation to conduct business activity.

BCTL currently has a procedures manual to deal with non-compliance by financial institutions, which allows for the initiation of proceedings against a non-compliant financial institution.

In the first place, banks must provide a response to the person who filed a complaint. If the client remains unsatisfied with the bank's response or if the violation of regulation was severe, BCTL will adopt a more active role in this process.

Customers also have at their disposal a form, available on BCTL's website, through which they can address complaints directly to this entity.

BCTL is considering the implementation of more accessible and cost-effective means to solve disputes between banks and customers, such as establishing a financial ombudsman or embracing alternative dispute resolution.

Concerning inbound cross-border activities, Section 2.4 of the Banking Law determines that no bank incorporated under foreign legislation may operate directly in the Timorese financial system, unless this activity is undertaken through a branch for which an effective licence has been issued by BCTL.

Any foreign bank must apply for a licence on the same terms as a national bank, under Section 5 of the Banking Law, and follow the procedure detailed in CPO Instruction no. 1/2000 on applications for bank licences. This application must be accompanied by a set of information contained in several CPO/BPA/BCTL Instructions.

Finally, as regards anti-money laundering, East Timor has relatively well-developed legislation.

Firstly, Section 21 of the Banking Law states that banks are prohibited from "*conceal[ing], convert[ing], or transfer[ing] cash or other property, knowing that such property is derived from criminal activity*", and that they must inform the authorities "*responsible for combating money laundering of the evidence that property is derived from criminal activity and provide, at the authorities' request, any additional related information*".

Additionally, there are several other legal instruments regulating this matter, among which we highlight Law no. 17/2011 (as amended) and the AML Instruction, already referred to above.

Each of these regulations impose duties and obligations on banks when contracting with clients, whether on the basis of an ongoing business relationship or the occasional transaction.

These duties include, firstly, the proper identification of customers (based on their legal documents) and verification of that same identification. These duties are to be reinforced if the bank is dealing with high-risk clients, such as clients with a high net property, clients who are politically exposed, and non-residents, especially if they reside in countries with no anti-money laundering regulation.

Also, banks are expected to maintain records of every transaction performed and of their client information, as well as to develop an internal programme for anti-money laundering and terrorism financing prevention, to be used in the training of their employees.

Furthermore, banks must report every operation performed in cash of an amount equal to or higher than US$ 10,000, whether consisting in a single operation or in several operations connected with each other.

In addition, banks have a duty to immediately report any suspicious operation to the Financial Information Unit. Once this report has been submitted, banks must refuse the performance of any further operations when the risk of money laundering and terrorism financing identified cannot be reduced or eliminated.

Failure to comply with these provisions will lead to misdemeanour proceedings and the bank in question will be faced with a fine of between US$5,000.00 and US$500,000.00.

* * *

Acknowledgment – Carolina Tita Maurício

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Endnotes

1. Available at https://www.bancocentral.tl/ (accessed on 28 February 2018).
2. CÂMARA, Paulo *et al. – A Governação de Bancos nos Sistemas Jurídicos Lusófonos* [Bank Governance in Portuguese Language Legal Systems] (Coleção Governance Lab, Almedina, 2016), pp. 475–476.
3. 'Introduction to the Laws of Timor-Leste: Legal History and the Rule of Law in Timor-Leste' (USAID, The Asia Foundation & Timor-Leste Education Project, Stanford Law School, 2012), available at https://web.stanford.edu/group/tllep/cgi-bin/wordpress/wp-content/uploads/2013/09/Legal-History-and-the-Rule-of-Law-in-Timor-Leste.pdf (accessed on 27 February 2018), p. 20.
4. *Loc. cit.*
5. The US dollar is the legal tender in East Timor. All denominations of US banknotes and coins circulate in the country.
6. CÂMARA, Paulo – *A Governação de Bancos*, *op. cit*., p. 489.
7. This system will only be at the disposal of entities who are self-employed entrepreneurs or commercial companies incorporated under Timorese law and where at least 75% of the shares with voting rights are owned, directly or indirectly, by East Timorese nationals.
8. As previously mentioned, this entity no longer exists and has been replaced by BCTL. Nevertheless, instructions and notices issued by the CPO are still in force.
9. Depending on whether the administrator is a member of the Governing Board, a member of the Audit Committee, belongs to the Senior Management of a bank or holds the position of Chief Accountant.
10. As previously mentioned, this entity no longer exists and has been replaced by BCTL. Nevertheless, instructions and notices issued by the BPA are still in force.

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Nuno previously worked in London for eight years in the International Capital Markets department of Allen & Overy LLP, where he focused on financing transactions (equity and debt), including debt programmes, issuances of Senior Notes, Regulatory Capital, and Asset-Backed Securities. Nuno was also involved in liability management transactions, and advised on banking regulatory issues.

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