Portugal

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1. INTRODUCTION

In the context of a worldwide hold-up of financial markets, the successful completion of acquisition finance deals requires stronger and more confident investors, willing to face such market risk.

Though acquisition finance deals are not those which suffer most from the sub-prime crisis, the systemic effect the crisis has provoked, including the shortage of liquidity and the increase in lending costs, naturally brings into acquisition finance deals a certain level of concern on the setting up of these types of transactions. All in all and for the time being, Portugal seems to be coping with the current market trends but, as a small economy in the Eurozone much exposed to influences originating elsewhere, it is yet to be seen if the crisis has already arrived in full or if the Portuguese market is actually responding well, taking advantage of the flexibility which is inevitably inherent to smaller scale players.

It is in any case evident that in a more stressed scenario, the call for robust and appropriate legal features to be implemented is certainly greater and fully justified. Acquisition finance transactions are perfect examples where this pattern is witnessed. From experience in this type of transactions within the latest months, confirmation may be obtained that a more demanding environment is being followed in the structuring of international acquisition finance deals involving the Portuguese jurisdiction.

Portugal, following the European fashion on acquisition finance transactions, shares the same basic and general features of other European countries once defining the structure for an acquisition finance deal, notably by resorting to (i) the incorporation of special purpose vehicles ("SPVs") to act as borrowers/acquirers, (ii) solid finance documentation and (iii) exhaustive security packages. The gathering of these three features in one single transaction provides investors with stronger protection mechanisms towards insolvency of the borrower and/or enables the acquired asset/company to be retained as preferred collateral for reimbursement of the financing granted for acquisition purposes.

In fact, regulatory and insolvency matters are increasingly being questioned and tested on acquisition finance deals: on the one hand and although the traditional basic minimum capital requirements rules are still and continuously applied, new regulatory matters are brought to the regulators attention and present new challenges for the structuring of acquisition finance transactions and, on the other hand, insolvency rules do not always provide the answers (and, ultimately, award the appropriate protection) investors/financiers seek when entering into a new deal in a more turbulent and stressed market environment.

The challenge for the Portuguese market acting in transactions of this nature has essentially been that of adapting solutions designed in other jurisdictions to the local law environment, and providing for legal mechanisms and features which are able to accommodate the new solutions and requirements which international investors and financiers are putting forward in order to handle the current environment.

In the following lines, the authors attempt at describing the features in place in the Portuguese jurisdiction and the solutions commonly devised in order to enable international acquisition finance transactions to be contracted in the current market trends.

2. TYPICAL STRUCTURE OF A PORTUGUESE ACQUISITION FINANCE TRANSACTION – SPVS

Financed acquisitions in Portugal typically take the form of share deals made through special purpose vehicles ("SPVs") – usually Newcos – owned by one or more investors, incorporated in Portugal or in other friendly jurisdictions. Recourse to an SPV is usually perceived as an effective way to ring-fence the object of the acquisition transaction namely when it corresponds to a company, hereinafter called the Target (and including the remainder entities forming part of the Target's group) from general creditors, in order to safeguard the position of the financiers and to ensure an isolation of risks and rewards in terms favourably viewed by investors generally and lenders particularly.

Accordingly, investors rarely go for mere asset deals in Portugal and usually prefer to structure acquisition finance transactions by resorting to the incorporation of a new legal vehicle in which the asset(s) being acquired are placed.

This is so for a number of reasons, including the cumbersomeness of the consent/transfer requirements usually inherent to mere asset deals and the tax inefficiencies caused essentially by a 0.5% stamp duty levied on security interests granted over assets located in Portugal, as well as by the non-deductibility of goodwill usually associated to the mere acquisition of separate assets.

Portuguese SPVs may take the form of either limited liability companies (Sociedades por Quotas or "Lda.") or limited liability corporations (Sociedades Anónimas or "S.A."). Since in both cases investors limit their liability to the capital invested, both structures are useful for SPVs' incorporation purposes, although the S.A. is usually preferred by international investors as equity is represented by shares that are easily tradable instruments.

Shelf companies are seldom used in Portugal, since the incorporation of a NewCo may currently take place via the "on the spot firm" (*empresa na hora*) service, in virtually around one hour.

Shelf companies are however more popular when incorporated in the Madeira Free Trade Zone, since it may then enjoy from tax benefits– which include an exemption of stamp duty on the use of credit and provision of guarantees/security should the lenders be non-Portuguese residents, but this structure is nowadays less popular as it no longer allows for a complete tax neutrality to apply on the long range (current tax benefits only apply to 2011 and therefore interest in the Madeira Free Trade Zone is fading away).

The SPV may additionally be incorporated either as a regular operating company or as a holding company ("SGPS"). An SGPS is a specially regulated type of Lda. or S.A., the sole corporate purpose of which is to manage equity holdings in other companies and which benefits from a tax advantageous regime.

SPVs created exclusively to hold equity stakes in the Target must be incorporated as an SGPS when they are deprived of other activities. This imposes a challenge on acquisition finance deals arising from a legal restriction that, save for a few exceptions, SGPSs may not transfer or encumber shareholdings held for less than one year but some solutions have been devised to handle this matter in a away that may often be seen as acceptable to the lender(s).

SPVs tend to be resident in Portugal (in some cases, in the Madeira Free Trade Zone) and subject to Portuguese Corporate Income Tax. The reason for this is that the Corporate Income Tax Group regime can be chosen as applicable for the acquirer when seen together with the Target and its group, provided at least 75% of the latter's share capital is acquired. If a Portuguese tax group is created, all member companies are taxed as a group instead of on an individual basis and intra-group transactions are adjusted to determine the group taxable base. The existence of a Portuguese tax group ruling allows for interest accrued on the financing documents to offset income generated by the Target, thus reducing Corporate Income Tax that would be due if the different companies elected to file their returns on an individual basis.

SPVs are typically funded through a mix of own funds and external facilities. The

capitalisation structure to be adopted for a given SPV naturally depends on a number of variables (e.g. the nature and structure of the arrangements between the investors, the capitalisation requirements imposed by lenders and tax considerations) but Portuguese law may be seen as rather flexible and capable of accommodating the parties' requirements in this respect. Other than pure equity (share capital), investors may also capitalise the SPV through alternative Tier 1 instruments all such instruments being rather popular in acquisition finance transactions.

If the SPV is an S.A., the incorporation or the increase of share capital is subject to stamp duty at a rate of 0,4% over the market value of any assets' contribution after deduction of the costs and expenses borne by the company as a consequence of such incorporation but SGPSs are exempt from this duty.

Subordinated shareholder loans, if granted for a maturity exceeding one year, are exempt from stamp duty and therefore safeguard the position of third party investors while, at the same time, allow for shareholder funds to be placed into the transaction on more flexible and tax advantageous ways. They are therefore a rather popular way to capitalise SPVs in the context of acquisition finance transactions.

The SPV's ability to upstream funds to service the acquisition debt is also a key issue in financed acquisitions. In light of the limitations arising from the financial assistance rules – which prevent the Target from supplying funds or granting security to finance the acquisition debt – the financial upstream from the Target typically takes place via the distribution of dividends or reserves. A Portuguese company can only distribute dividends or reserves if (i) the net asset value (situaçâo líquida) of the paying company is, and remains as a result of the distribution, equal to or higher than its share capital and reserves unavailable for distribution; (ii) research and development assets are fully amortised; (iii) the legal reserve is at least 20% of the Target's share capital or 5% of the financial year's net income is allocated to the legal reserve; and (iv) the financial year's net income which is required to cover accumulated losses is kept within the Target.

Distributions of dividends and/or reserves benefit all of the company's shareholders, which means that where the SPV does not hold the entire equity of the Target, financial upstream mechanisms are likely to create a degree of leakage of funds to the minority shareholders. For handling matters with minority shareholders, squeeze-out mechanisms are contemplated in Portuguese law, whereby the acquisition of a stake in excess of 90% of the Target's share capital enables the squeezing-out of the remaining shareholders (and the latter may also enjoy a put entitlement in case no squeezing-out takes place during the first semester following the controlling majority in excess of 90% is achieved).

As shall be seen below, the merger between the SPV and the Target is not perceived as risk-free from a financial assistance perspective especially if it takes place shortly after the acquisition. It may be devised as a manner to down stream the acquisition finance and for such reason tends to be used on a limited basis, hardly occurring in high profile deals.

3. NEW ACQUISITION FINANCE TRENDS IN PORTUGAL

In the context of a market crisis, one would expect market players and their advisors to move a step forward on thinking and implementing new and original methods on acquisition finance schemes. There have, in fact, been some curious new developments. The introduction of hybrid securities may be given as an example for structuring the raising of funds to finance acquisition deals once such instruments rank between the entitlements of bankers and other financiers and those of project sponsors and shareholders (and also offering remuneration between the usual rates for these two groups of stakeholders).

Hybrids are securities which generally combine debt and equity characteristics and enable, on the one side, the remuneration to be set at more attractive conditions (and this possibly also explains a part of the current popularity of the concept) without loosing (or sharing) vote and management control of the issuer making therefore the instrument a useful tool in times

where an extra incentive needs to be offered to attract investors.

Although these instruments do not correspond to traditional features of acquisition finance transactions, they nevertheless represent alternative financing means, especially and mostly by public listed companies and other large debtors existing in Portugal (taking the size of our market in consideration) to structure deals of this nature, since their credit quality is good enough to allow for instruments of this nature to be issued and usually provide a good deal of comfort to the financiers. Resort to this type of instruments further concurs to diversify the sources of finance, a particularly important feature in light of the current market conditions.

4. MAIN TARGET-RELATED ISSUES

4.1 MERGER AS A LEVERAGING STRATEGY

Under the Portuguese Companies' Code, it is unlawful (except in limited cases expressly allowed by law, such as in respect of the implementation of stock option schemes) for an S.A. to grant loans, issue guarantees or to provide any type of financial assistance for the purchase of its own shares. Any transaction that does not comply with this rule is sanctioned with nullity, the corresponding contracts and other documents being void and the directors may even become personally liable for damages resulting from implementing schemes breaching this rule.

As a result, leveraged acquisitions of the share capital of a Portuguese S.A. are generally not permitted and the structure of any transaction entailing the acquisition of such type of company needs to take this matter in due consideration.

Additionally, it should be noted that the Portuguese Securities Commission (Comissão do Mercado de Valores Mobiliários or "CMVM") published on March 21, 2008 a "General Statement of Opinion on Duties relating to Conduct while Takeover Bids are Pending" in which the financial assistance issue is approached so as to offer guidance on the rules governing theses matters. According to CMVM's broad understanding, the "target company in a takeover bid is not permitted to directly or indirectly finance, even partially, or by any way to bear the cost of the granting of finance in relation to competing bids."

Accordingly, considering the outcome of a merger – pushing the debt incurred by the company acquiring the Target down to the Target's estate – and even bearing in mind that it would occur after the completion of the transaction, the risk of a reverse merger being considered to breach the financial assistance restriction cannot be completely ruled out.

This rule is grounded on the intention to offer the creditors of the Target sufficient protection and aims therefore at preventing that the estate available to meet their claims is also made responsible for meeting the debt resulting from the very acquisition thereof. Proper care needs therefore to be devoted to these matters as we are in this respect treating a legally sensible ground.

Also adding up to the possible legal risks involved in this request is the circumstance that, typically the company performing the acquisition finance transaction is a company with no significant activity (and often with recent legal existence corresponding to an SPV as mentioned), which usually renders it very difficult to produce a sound economical justification for the merger that clears doubts as to the reverse merger being financial assistance-driven. Please further note that besides the financial assistance matter the merger may also involve a corporate benefit concern on Target's side and this may be hard to justify to the extent that the merger in such cases may mainly be aimed at transferring the debt from the company performing the acquisition finance to the Target.

Naturally, all of the above risks are increased in the event the merger involves high profile companies (such as listed companies), in respect of which the level of public scrutiny and visibility are rather high.

With the above in mind, we believe there may however be certain circumstances that may mitigate the highlighted risks in order for transactions including mergers of this nature to be completed. First, the fact that the merger is generally to occur in a context where there are

no minority shareholders in Target (namely as a result of the post-tender offer squeeze out mechanism that was mentioned before) and where therefore the concerns which underlie the financial assistance restrictions are somehow less stringent. Second, the circumstance of creditor entitlements existing in respect of the Target being duly accounted for in a manner where all creditors of the Target are assured of their positions (we note in this respect that for mergers to be completed the creditors of the merging entities shall enjoy a period of opposition before any announced merger may legally be completed, and therefore the safeguarding of the positions of creditors of the various sorts existing in respect of Target is certainly vital in all circumstances). Third, the reverse merger may only occur once a significant period of time from the tender offer has lapsed (usually 18 to 24 months), so as to allow not only the delisting of the Target, but also to avoid completing the merger when the Target is still "in the spotlight".

4.2 LISTED TARGETS

The acquisition of a listed company raises particular issues, since it must take place via a public tender offer. The deal's financing must therefore be factored around those issues, particularly the fact that prior to the registration of the offer (and, thus, prior to its completion), the full amount of the consideration being required must either be deposited in a bank account or secured by a bank guarantee in order to ensure timely delivery of the funds required to complete the transaction.

The structuring of an acquisition transaction involving a listed Target presents many other challenges most of which result from the transparency requirements that generally apply to this type of entities and entailing namely the need to put together (and to have approved by the market supervision authority) a prospectus covering the generality of the terms and conditions applicable to the offer. The documentation of a transaction of this nature follows a pattern that is typically unique for deals of this nature. In any case and also bearing in mind the level of harmonisation achieved in Europe following the enactment of the Prospectus Directive, Portuguese deals of this nature may be seen as akin to those occurring in other European jurisdictions.

4.3 SPECIALLY REGULATED TARGETS AND OTHER GENERIC CONCERNS

Of importance is naturally also to signal those cases on which Targets are subject to special supervision rules and licensing requirements. This is obviously the case for the banking and financial industries but concerns in this respect also apply to companies operating in a wide variety of other sectors including insurance, telecommunications, air transportation, healthcare.

In all such cases it is important for the acquisition transaction to be structured and documented in a manner that allows for the licences existing in respect of the relevant Target to be mentioned and fully operational. This is usually achieved by means of structuring the corresponding transaction in two stages (conditions precedent and completion): the first being the crystallisation of the economic and legal features of the transaction and the second the actual implementation of the transaction. In Portugal, presumably like in other jurisdictions, it is common practice for the supervisory authorities of the relevant market to be contacted in advance of the deal being executed and usually an informal consultation period proves a viable strategy to be followed.

A first side remark simply to mention that in acquisition transactions merger control matters must naturally be well accounted for as these transactions may trigger the need for merger control authorities to be notified (and to approve the corresponding transaction).

A second side remark to mention that under Portuguese Corporate tax law the ability to defer tax losses and to use them to compensate for future taxable profits in loss in case there is a change in the shareholding structure greater than 50% of the shares and vote entitlements

on the Target. Although a special permission from the Minister of Finance of Portugal may be obtained for such ability to defer tax losses to be kept in spite of the change in the shareholding structure, this issue is certainly important to keep in mind when structuring acquisition finance transactions as special permissions of this nature may only be given when proper justification exists for the tax position to be kept unchanged, the Minister retaining full discretionary authority in this respect.

5. MAIN ISSUES OF THE FINANCE DOCUMENTATION

In Portugal, acquisition finance transactions are, as a general rule, bounded by a set of terms and conditions contained in documentation which increasingly tends to be very similar to that used in other European jurisdictions for documenting similar transactions. The type of clauses which normally form part of acquisition finance documentation pays therefore a good deal of resemblance to that originating in other jurisdictions even in cases where no legal system other than the Portuguese is involved. This same pattern is applicable to the procedures which form the path ahead to execution of the transaction.

5.1 SIGNING AND CLOSING

As mentioned, the execution of acquisition finance transactions in Portugal usually takes place in two steps, namely signing and closing, but these steps may also take place only in one moment, when signing and closing occur simultaneously. On signing, the transaction documents are signed by the legal representatives of the parties to the transaction; additionally, depending on the type of document at stake, some other formalities may be required, such as notarisation thereof or mere certification of the capacity, power and identity of the signatories. On closing, the conditions precedent set out for the transaction must be complied with or waived, if and when the finance documentation provides for such conditions, usually including the same conditions that are also applicable to the deal being financed itself.

5.2 CONDITIONS PRECEDENT

In Portugal, conditions precedent for drawdown of the loan by the financiers are quite similar to those found in other jurisdictions.

Conditions precedent generally include: (i) conclusion and delivery of technical, legal and tax due diligence and other reports; (ii) valid execution of the acquisition and financing documents and proper creation of the envisaged security package; (iii) delivery of constitutional documents of the borrower and of the relevant corporate bodies resolutions approving the relevant transactions and appointing the officials entitled to represent the participating companies; (iv) delivery of legal opinions from both counsel to the borrower and the lender sides; (v) verification of the correctness and accuracy of the representations and warranties; (vi) absence of events of default, market disruption or material adverse change situations; and (vi) certificates as to compliance.

Since the loan is generally secured and depending on the collateral, the conditions precedent may also include (vii) evidence of good title to the relevant assets and evidence that the asset which is being provided as collateral is free from other liens and encumbrances, (viii) registration of title to the asset and perfection of the security (as described below) and (ix) notice of assignment of contracts.

Additionally, if the facility is disbursed in separate tranches then, in line with what generally occurs in other jurisdictions, the lenders may not be obliged to make the loan available unless, at the time each drawdown request for the loan is executed by the borrower, new conditions precedent have been complied with, as follows: (a) the representations and warranties are true on an up-dated basis, (b) no event of default or event which with giving of notice, lapse of time or other conditions would constitute an event of default has occurred and (c) no material adverse change in the borrower's financial conditions has taken place.

There are, however, some particularities identified below.

(i) Acquisition and financing documents are not generally formalised into public deeds. Nevertheless, when (as is generally the case whenever real estate is involved) the security package set up for the transaction involves the granting of guarantees and/or securities which require, for perfection thereof, the intervention of a Public notary some of the financing documents are formalised into public deeds;

(ii) When execution of the documents involves the signing of those same documents by attorneys empowered to do so through powers of attorney executed before a foreign entity and to the extent those documents are required for purposes of execution of a public deed or any relevant registration in a public office, such powers of attorney must be legalised in advance by affixing an Apostille pursuant to the Hague Convention of 1961 and subsequently providing for a certified translation of the document at stake;

(iii) In accordance with Portuguese law, pledge of the shares requires register of such transfer in the correspondent shares' registration book on closing of the transaction. If, on the other hand, the relevant company was incorporated under the form of a sociedade anónima then the pledge of the "quota" is to be registered with the relevant Commercial Registry Office; and

(iv) Legal opinions delivered by the lenders' and borrowers' counsel usually cover the matters on the validity of the documentation. Such legal opinions may also provide for the effects of insolvency, moratorium or similar laws affecting creditors' rights and generally include qualifications in connection with factual matters not under the responsibility or control of the corresponding lawyers and sometimes also include reservations as to the matters associated with financial assistance (as discussed before).

5.3 APPLICATION OF PROCEEDS

In general terms, there is no specific rule in the Portuguese legal framework which determines the requirement for the lenders to control of the proceeds arising under an acquisition finance transaction. However, one should bear in mind that loans may not be granted as a means to achieve an unlawful purpose as may be the case of loans contrary to prohibited financial assistance by the company for the purposes of acquiring its own shares or loans to pay dividends which are unlawful because the borrower is insolvent or is incapable of paying them.

In any case and also for protection of the lenders' position, the loan agreement will, as a general rule, include provisions covering the application of proceeds, determining that the borrower should apply the money for the intended purposes and usually requiring borrowers to produce evidence of such purposes being accomplished.

5.4 PREPAYMENT AND REPAYMENT

Prepayment options and ordinary repayment clauses are very similar to those found in other jurisdictions.

However, financial assistance rules prevent the Target from prepaying any acquisition loan. In addition, it is generally understood that the rules applicable on financial assistance matters imply that refinancing of acquisition loans cannot be made through other loans repaid with another loan provided to the SPV or to the Target that are secured with the Target's assets.

The transaction documents normally provide for several mandatory total or partial prepayment provisions that are triggered by events such as a change of control, the sale or transfer of all or a substantial part of the assets of the target and breach of representations and warranties.

5.5 REPRESENTATIONS AND WARRANTIES

Representations and warranties in Portuguese acquisition finance documents bear great resemblance to what is standard in other jurisdictions and may be distinguished between legal warranties, i.e. those which basically deal with the legal validity and enforceability of the finance documents, due incorporation and existence of both the SPV and the Target, perfection of security, compliance with applicable laws and regulations, permits, licenses and authorisations, ownership of real estate and commercial warranties, i.e. those which deal with the borrower's financial condition and credit standing or other more commercial matters applicable in relation to the borrowers' business including financial statements disclosed regarding the SPV and the Target, absence of non-permitted liens or encumbrances over the assets of the SPV and Target and absence of events of default. These are thus highly standardised clauses which facilitate the recourse by Portuguese investors to loans arising from international banks and syndicates.

The Portuguese Civil Code rules on misrepresentation and mistake may also apply to acquisition finance loan agreements in the same way as they apply to any other contract, providing for remedies to the non defaulting party which may include remedies for damages and rescission.

5.6 POSITIVE AND NEGATIVE COVENANTS. FINANCIAL COVENANTS

Portuguese acquisition finance documents contain standard positive and negative covenants, similar to those also found in other European jurisdictions. The main purpose of these covenants is to provide creditor protection and to confirm evidence of accomplishment of prudent lending requirements.

Nevertheless, the traditional pari passu covenant has to pay close attention to some local peculiarities. By requiring the equal ranking of unsecured claims on a forced distribution of available assets to unsecured creditors, primarily on insolvency, this clause must admit the exceptions that compulsory apply under Portuguese law, not only of any permitted guarantees, but also of those claims that have priority by operation of law, such as certain credits of the state and tax authorities and the credits of employees for their unpaid salaries. Pursuant to Portuguese Insolvency Law, security interests give a priority to senior lenders limited to the proceeds obtained from the enforcement of the security and any remaining unpaid senior debt will be considered an ordinary claim and will rank together with other unsecured ordinary claims.

5.7 EVENTS OF DEFAULT

The regulation of events of default in Portuguese finance documents follows the path of finance documents drafted in other European jurisdictions. These commonly have four main contractual effects, all related with the lenders' entitlements in the context of the transaction: (i) accelerate outstanding loans, (ii) cancel obligations to lend further loans, (iii) suspend further loans under the "conditions precedent" clause and (iv) trigger a cross-default under other credit agreements of the borrower.

It should additionally be noted that pursuant to the Portuguese Insolvency Law the declaration of insolvency of the borrower does not entitle the lenders to terminate the facility agreement and any provision allowing the lenders to terminate the facility agreement would be unenforceable as a general rule. As a result of this restriction, lenders usually include certain pre-insolvency situations as events of default, so as to enable them to monitor the situation on a permanent basis and, if this ever becomes necessary, to terminate the facility agreement some time before the debtors' formal declaration of insolvency.

6. GUARANTEES AND SECURITY

6.1 COMMON ISSUES RELATING TO PERSONAL GUARANTEES AND SECURITY INTERESTS

Under Portuguese law the basic principle is that the assets of a given debtor constitute the general guarantee for performance of all obligations undertaken by said debtor. The main purpose of guarantees and security interests is to have protection against insolvency of the debtor by placing the beneficiaries thereof in a position that outranks the debtor's common creditors – a defence which is of outmost importance when setting up an acquisition finance transaction.

Under an SPV structure, by claiming the debt in a newly incorporated entity, free from legal and factual contingencies, the first layer of protection is achieved once the SPV insulates the financiers from both the creditors of the Target and the shareholders, thereby awarding protection for their insolvency scenarios; the SPV is therefore the issuer of the security interests in these structures.

This basic principle is complemented by the legal provisions which allow creditors to, contractually, place their credits in a privileged position (when compared to the other creditors) by obtaining a special guarantee and statutory provisions creating a legal preference in terms of ranking for certain types of credits – legal guarantees.

Special guarantees may either be (i) personal guarantees ("garantias pessoais"), which entitle the beneficiary, in the event of default, to be paid from the assets of third parties, further to the assets of the debtor or (ii) security ("garantias reais"), which entitle the beneficiary to be paid from the value or revenues of certain and specified property or assets of the debtor or third parties. The main difference between personal guarantees and security is that the former are by definition provided by a third party rather then by the debtor and the latter may be provided either by the debtor itself or by a third party.

Additionally, both personal guarantees and security are materially ancillary to the secured obligation and therefore they exist only to reinforce chances of performance of such obligations and automatically cease to be in place upon termination (by performance or otherwise) of the secured obligation.

6.2 LEGAL RESTRICTIONS TO UPSTREAM AND/OR CROSS STREAM GUARANTEES/SECURITY

Besides the issues surrounding financial assistance, Portuguese companies are prevented from providing guarantees or creating security in respect of shareholder loans (which, may not be secured by the borrower and are, by definition, subordinated).

As a general rule, Portuguese companies are required to issue guarantees and to create security interests only in respect of their own debts and may therefore only create them to secure third party debts in limited circumstances and on exceptional terms.

The first requirement to allow the creation of security interests in respect of the performance of third party debts is for the provider of such security interests to enjoy a justified self interest in doing so, requiring therefore the matter to be evaluated having regard to the separate and independent position of each company. The law does not state nor implies what is to be seen as justified self interest, entrusting the matter to each company and its management. The usual procedure in this respect is for such justified self interest to be duly recognised to exist at board level and to be evidenced by a board resolution duly recorded in official minutes and also to be confirmed to exist at a shareholder level by means of causing a shareholders' meeting to be convened and to confirm the board's views in this respect.

In addition, the law provides that the issuance of security interests in respect of third party obligations is also admissible in case such third parties are in a control or group relationship and experience in the market is in fact for this route to the used to a considerable extent, allowing therefore for the matter of corporate benefit to be seen on a group level and not just on a mere individual basis. This requires in any case that appropriate evidence and

recognition of verification of the legal requirements for the third party guarantee to be properly checked and confirmed to exist.

6.3 ABILITY TO USE A TRUSTEE/SECURITY AGENT

Save for a very limited exception (the foreign trust recognized by Portuguese law solely in the context of the Madeira Free Trade Zone), trusteeship is not recognised by Portuguese law and we would tend either to look only at the corresponding beneficial owner or to consider that the trustee enjoys the corresponding entitlement on its own and therefore to see it as the sole legitimate party participating on the structure.

Thus, even if the relevant agreements indicate that the security agent holds both the secured obligations and the security for the benefit of a given lending syndicate, unless all syndicates are disclosed as holders thereof, the security agent shall appear as the sole beneficiary of the security entitlements and shall be the sole entity with authority to file enforcement procedures in respect thereof.

Hence, in a context of enforcement procedures being initiated, the security agent may be required to prove before a court that it holds title to the secured obligations. Since, under Portuguese law security is materially ancillary to the secured obligations, the security agent may have to be assigned all of the secured obligations for the purpose of enforcement of the relevant security in order to enjoy a proper and legitimate claim in respect of the entirety of the secured debts.

The only *prima facie* way to have all the lenders recognised as beneficiaries of a given security is therefore to name all of them as holders of the secured obligations and corresponding security. However, this entails the need to amend the relevant agreement (or execute a new notarial deed) each time the lenders assign, buy or sell part of the loans, which, in our view, is not a practical solution. For this reason attempts have been made to install alternatives and to put in place a more lender-friendly solution.

To a certain extent, this has been achieved by having the security agent as the registered beneficiary of the security and either to have it benefiting from a parallel debt covered by the (non-Portuguese) loan documentation or to have it contractually bound to assign the secured obligations to all of the lenders at some moment prior to the enforcement of the security.

Other alternatives correspond to having the entire lending syndicate registered at once as benefiting from the relevant security interests but to have in place proper intercreditor agreements (allocating contractually the proceeds from security enforcements as they made be perceived) and/or syndicate agreements (to set the rules under which all members of the syndicate undertake to act).

6.4 FLOATING SECURITY AND SECURITY OVER FUTURE ASSETS

The concept of fixed charge (meaning security over predetermined assets and covering certain pre-determined obligations) is the only form of security interests generally admissible in Portugal, where the creation of security is also restricted by a numerus clausus principle, i.e., only certain assets/rights may be encumbered provided this is made under specific legal forms and formalities.

Accordingly, there is no "floating charge" or similar concept under Portuguese law, without prejudice to the possibility of executing promissory agreements in respect of such assets and of having in place contractual undertakings to cover an agreed security structure whereby all assets, entitlements and revenues belong to a given company or project and from sweeping up automatically assets which are not caught by fixed security created on day one.

Additionally, the creation of security interests over assets which have not yet been acquired by the chargor is not fully effective under Portuguese law, and it is rather construed as a promissory agreement where the chargor undertakes to create security interests over the relevant assets whenever they become its property.

The solution which is usually put in place to handle situations of this nature is for one such

promissory agreement to exist and to submit it to a remedy of specific performance which may be specifically enforced by the courts ("execução específica") should the chargor fail to effectively create the charge.

Some additional contractual mechanisms to minimise the effects of such legal restriction are available, namely the recourse to "progressive execution agreements".

It should in any case be noted that both promissory agreements and these other contractual mechanisms are effective inter partes only.

Irrevocable powers of attorney enabling the security beneficiary to conduct the relevant acts for proper creation of the envisaged security interests may be in place to foster the level of protection but even these are mere contractual arrangements, thus not full proof.

6.5 OVER-COLLATERALISATION

There is no general legal limitation on the value of the assets charged vis a vis the amount of the secured obligations. For example, a mortgage over land in the value of 100 may perfectly secure a debt of only 5 but it is not lawful under Portuguese law to prohibit the grantor of the security interests (and particularly the mortgagor) from creating further lower ranking charges in respect of the assets under security.

Please note in any case that, due to the fixed nature of security interests created under Portuguese law, the secured amount must be identified when the security is created and the security interests will in all cases only cover the specified secured amount.

6.6 GOVERNING LAW

Guarantees may generally be governed by the law chosen by the parties thereto, provided that the choice of law observes the requirements set out in Portuguese law or in the applicable international conventions.

The creation of security interests over assets which are located in Portugal is, according to the applicable conflict of laws rules, mandatorily governed by Portuguese law, Portugal taking thus a lex rei situs approach in this respect.

6.7 SECURITY PACKAGE

Two types of security interests which may be created under Portuguese law are: (i) the mortgage, which is created over immovable assets (such as land) or rights relating thereto or of movable assets subject to registration (such as automobiles, ships, planes); and (ii) the pledge, which is created over other moveable assets or credits.

6.8 CREATION AND PERFECTION

6.8.1 SHARES

For those companies incorporated as "Lda.", the share capital of this type of company is represented by nominative participations ("quotas") which are not securities but correspond to ideal participations in the relevant entity's share capital. Creation of security over such "quotas" requires a written agreement and registration of the same with the relevant Commercial Registry Office.

On the other hand, the sociedade anónima is a type of limited liability company whose corporate name contains the expression "S.A.". The share capital of this type of company is represented by shares which may be (i) bearer shares represented by certificates, (ii) nominative shares represented by certificates or (iii) dematerialised shares. The creation of a pledge over shares depends on their type, as follows:

(i) Bearer shares represented by certificates: Delivery of the share certificates (for the sake of certainty plus a written contract governing the terms of the relevant pledge);
(ii) Nominative shares represented by certificates: Pledge declaration written by the chargor on the certificates and request for registration of the pledge in the issuer's share ledger book (also for the sake of certainty a written contract governing the terms of the

relevant pledge); and

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

In case the voting rights are attributed to the beneficiary, transfer of the shares to the beneficiary's account (with a statement whereby the shares shall be registered therein pursuant to a pledge agreement).

The same certainty sake requires generally a written pledge agreement to be executed.

6.8.2 LAND

The security which may be created over land is a mortgage. Mortgages are created by means of a notarial deed, which is basically a contract prepared, testified by and executed before, a notary.

Registration of the mortgage is a condition for the validity of a mortgage and, accordingly, lack of registration causes it to be non existent for all legal purposes.

A duly registered mortgage remains valid and enforceable for an indefinite period of time unless any of the following occurs:

the obligation secured is fully settled;

the mortgaged property is transferred to a third party, in which case termination of the mortgage will occur twenty years after registration of the transfer of title and five years after the final maturity of the secured obligation; and

in the event of cancellation authorised by the mortgagee.

6.8.3 RECEIVABLES AND BANK ACCOUNTS

Under Portuguese law, a pledge over receivables qualifies as a pledge of credits.

The main requirements for a valid pledge of credits (further to the signature of a pledge agreement) to be created are the following:

(i) the pledgor's counterparty must be served notice thereof;

(ii) in addition, the pledgee must come into possession of the documents that may be required in order to enforce the rights arising from the relevant contract directly against the Pledgor's counterparty.

Since notice to the pledgor's counterparty (in the receivable-generating contracts) is a perfection requirement, a specific listing of each contract under which receivables are due is required in order to perfect a pledge there over.

Furthermore, the creation of a pledge of credits in respect of contracts which do not exist at the date the pledge agreement is entered into (and for the same reasons as the ones mentioned in relation to a floating charge) is not valid under Portuguese law, unless it is construed as a promissory agreement.

Additionally, a pledge of credits covers all payments which would be made in connection with the contractual relationship underlying such credits. Once the pledge is effective (i.e., when the debtor is notified thereof), such payments must, however, be made jointly to the pledgor and the pledgee or to the credit of a bank account held jointly by them.

As the requirement that payment of the pledged credits is made to the pledgor and pledgee together raises some practical difficulties, it is usual for the pledgee to authorise the third party debtor to continue to carry out the relevant payments to the pledgor until a notice to the contrary is issued by the pledgee.

Finally, it should be stressed that since the general Portuguese Civil Code rule prevents the beneficiary of the pledge to, on enforcement of the pledge, appropriate pledged assets (pacto comissório) the relevant pledge agreement is to be built as a financial collateral arrangement in order to make such appropriation possible, in accordance with the Directive on Financial Collateral Arrangements also implemented in the Portuguese legal framework.

6.8.4 PLANT AND MACHINERY

The creation of security interests over plant and machinery may be made by means of a specific type of mortgage which is called a "factory mortgage".

This type of mortgage covers the factory's land, as well as the equipment and movable assets used in the factory's activity identified in an inventory attached to the mortgage deed.

6.8.5 INVENTORY

The creation of a pledge over moveable assets (such as inventory) is effected by written agreement and requires the transfer of possession over such assets to the pledgee or to a third party.

The only exception to this transfer of possession requirement is the creation of a pledge having as beneficiary a credit institution authorised to carry out business in Portugal, in which case specific rules apply.

6.8.6 GOODWILL/INTELLECTUAL PROPERTY RIGHTS

The creation of security interests over intellectual property rights registered in Portugal is effected through a pledge agreement and subsequent registration thereof with the Portuguese Intellectual Property Institute.

7. ACQUISITION FINANCE & INSOLVENCY

Under the Portuguese Insolvency Code, which also applies in the context of acquisition finance transaction, in case an insolvency scenario of the relevant debtor/grantor of security interests occurs, the following acts executed by a Company declared insolvent may be revoked, with retrospective effects:

(i) Acts performed by the debtor without consideration in the two years preceding the commencement of the insolvency proceedings;

(ii) Constitution, by the debtor, of rights in rem in respect of pre-existing obligations or of other obligations that replace such pre-existing obligations, in the six months preceding the commencement of the insolvency proceedings;

(iii) Surety, sub-surety, guarantee and credit mandates, provided they were issued by the insolvent entity in the six months preceding the commencement of the insolvency proceedings and do not relate to transactions with real interest to it;

(iv) Constitution, by the debtor, of rights in rem simultaneously with the creation of guaranteed obligations, in the 60 days preceding the commencement of insolvency proceedings;

(v) Execution of payments or of other acts that perform obligations (including set-off) the maturity date of which was subsequent to the commencement of the insolvency proceedings, if such payments or other acts to perform outstanding obligations took place up to six months preceding the commencement of the insolvency proceedings and before the obligations' maturity;

(vi) Execution of payments or of other acts that terminate obligations (including set-off) in the six months preceding the commencement of the insolvency proceedings which were conducted in terms inconsistent with the commonly accepted commercial practices and which could not be demanded by the corresponding creditor;

(vii) Acts performed by the insolvent entity against a given consideration in the year preceding the commencement of the insolvency proceedings if the obligations it undertakes exceed significantly those of its counterparty;

(viii)Reimbursement of shareholder loans, if made in the year that precedes the commencements of the insolvency proceedings.

In addition, under the same Insolvency Code, acts that were executed or that failed to be executed by a Company that was subsequently declared insolvent may be revoked with retrospective effects if they are deemed detrimental to the insolvent estate and were executed

or omitted within the four years preceding the commencement of the relevant insolvency proceedings.

Acts shall be deemed detrimental to the insolvent estate if they reduce, hinder, harden, risk or delay fulfilment of claims of the insolvency creditors.

Revoking these acts is however subject to the third party acting in bad faith. Bad faith is presumed in respect of acts which execution or lack of execution took place in the two years before the commencement of insolvency proceedings and in respect of which such third party participated or if such act resulted in a benefit to a person or entity especially connected to the insolvent company, even if a special relationship did not exist on that date.

Bad faith is defined as knowledge of any of the following circumstances on the date of the relevant act: (i) that the debtor was insolvent, i.e., unable to fulfil its obligations as they fall due; (ii) that the act was of a detrimental nature and that the debtor was in a situation of imminent insolvency; or that (iii) insolvency proceedings had commenced.