

Project Finance

Contributing editors

Phillip Fletcher and Aled Davies



2019

GETTING THE
DEAL THROUGH

GETTING THE
DEAL THROUGH 

Project Finance 2019

Contributing editors

Phillip Fletcher and Aled Davies

Milbank, Tweed, Hadley & McCloy LLP

Reproduced with permission from Law Business Research Ltd

This article was first published in August 2018

For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

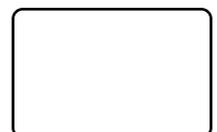


Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

© Law Business Research Ltd 2018
No photocopying without a CLA licence.
First published 2008
Twelfth edition
ISBN 978-1-78915-058-2

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between May and July 2018. Be advised that this is a developing area.

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



CONTENTS

Global overview	5	Kenya	82
Phillip Fletcher and Aled Davies Milbank, Tweed, Hadley & McCloy LLP		Christine AO Oseko and Gordon Abuja Ouma Oseko & Ouma Advocates LLP	
Angola	8	Korea	88
Catarina Levy Osório and Irina Neves Ferreira ALC Advogados		Michael Chang, Sang-Hyun Lee, Mikkeli Han, Seok Choi, Na Yu and Dennis Cho Shin & Kim	
Australia	14	Mexico	94
Ben Farnsworth and Michael Ryan Allens		Rogelio López-Velarde and Amanda Valdez Dentons Lopez Velarde SC	
Chile	20	Netherlands	101
José Miguel Carvajal and Myriam Barahona Morales & Besa Ltda		Marieke Driessen, Frédérique Jacobse and Andrea Chao Simmons & Simmons LLP	
Dominican Republic	25	Nigeria	108
Fabio J Guzmán Saladín, Alfredo A Guzmán Saladín and Alberto Reyes Báez Guzmán Ariza		Oluwatoyin Nathaniel and Okechukwu J Okoro G Elias & Co	
Ecuador	32	Panama	113
María Fernanda Saá-Jaramillo, Pedro José Freile and Alfredo Larrea Falcony Bustamante & Bustamante		Erika Villarreal Zorita Anzola Robles & Asociados	
England & Wales	38	Portugal	120
Mark Richards, Alexander Hadrill, Alfred Weightman and Helen Miller Bryan Cave Leighton Paisner LLP		Teresa Empis Falcão and Ana Luís de Sousa Vieira de Almeida	
Germany	49	Spain	125
Alexander M Wojtek, Henner M Puppel, Richard Happ and Tim Rauschnig Luther Rechtsanwaltsgesellschaft mbH		Gaspar Atienza and Raúl Suárez Garrigues	
India	54	Sweden	129
Santosh Janakiram and Ruchira Shroff Cyril Amarchand Mangaldas		Peter Dyer and Andreas Lindström Foyen Advokatfirma	
Indonesia	60	Switzerland	134
Emalia Achmadi, Robert Reid and Denia Isetianti Soemadipradja & Taher		Thiemo Sturny Walder Wyss Ltd	
Italy	70	United States	139
Eugenio Siragusa Nctm Studio Legale		Ivan E Mattei, Armando Rivera Jacobo and Victoria GJ Brown Debevoise & Plimpton LLP	
Japan	75	Vietnam	145
Naoaki Eguchi, Pierre Chiasson and Yasuhisa Takatori Baker & McKenzie (Gaikokuho Joint Enterprise)		Pham Ba Linh and Le Lien Huong Lexcomm Vietnam LLC	

Preface

Project Finance 2019

Twelfth edition

Getting the Deal Through is delighted to publish the twelfth edition of *Project 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 new chapters on Ecuador, Germany Kenya, Korea and Vietnam.

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, Phillip Fletcher and Aled Davies, of Milbank, Tweed, Hadley & McCloy LLP, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
July 2018

Portugal

Teresa Empis Falcão and Ana Luís de Sousa
Vieira de Almeida

Creating collateral security packages

1 What types of collateral and security interests are available?

Under Portuguese law, various types of security and collateral may be given to secure loans, notably mortgages on real estate and certain movable assets subject to registration (such as automobiles, ships and planes), and pledges on movable assets in general, including pledges on equipment, receivables, bank accounts, credits, deposits and shares (including new shares to be acquired). The law generally requires the secured assets to be determined (although security on future assets and credits may be permitted in specific situations). The concept of floating charge generally does not apply under Portuguese law.

2 How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party? Is it necessary for the security agent and trustee to hold any licences to hold or enforce such security?

Immovable and movable assets

Mortgages are created by means of notarial deeds and must be registered as a condition for the validity (and not only perfection) thereof. Ranking of creditors is determined and evidenced by priority of registration of security at the relevant registry.

The law permits mortgages to cover fixtures (buildings, plants and machinery) not incorporated into the relevant property at the time of creation of security, a legal mechanism commonly used in the context of project financing of industrial premises (eg, factories, power stations).

Pledges are the form of security interest entitling the beneficiary to be paid from the proceeds of sale of movable (non-registered) assets or of credits. Pledges must generally be executed in writing and require the pledgor to make available to the beneficiary the relevant asset (transfer of possession, an exception being made to movable assets pledged in favour of banks under documents authenticated by a notary) or the documents enabling the beneficiary (or a relevant third party) to sell the asset or enforce the credit.

Receivables

A pledge over receivables qualifies as a pledge of credits under the law. Accordingly, in addition to the above-mentioned requirement, validity of this type of pledge requires that the counterparty of the pledgor (the credit of which has been granted in security to the pledgor financier) is served notice of the pledge.

A pledge of receivables covers all future payments to be made pursuant to the relevant contract. Save as otherwise provided by in the security agreement, the debtor will only be released from its obligations by making payments jointly to the pledgor and the pledgee. Pledge agreements generally permit payments to be made to the pledgor until enforcement of the secured debt.

Bank accounts

There may be a pledge over cash deposited in bank accounts, which also qualifies as a pledge of credits. This is typically achieved through

financial pledges (ie, those created in accordance with the financial collateral regime (Decree Law 105/2004, of 8 May, as amended, which implemented the Directive on Financial Collateral Arrangements into Portuguese law)), which allow the beneficiary to use and dispose of the deposited funds.

Shares

Security is created by means of a pledge, entailing a pledge declaration written by the chargor on the certificates and a request for registration on the share ledger book (nominative shares represented by certificates) or an entry as to the creation of the pledge in the bank account of the chargor (dematerialised shares). Share pledge agreements are also typically construed as financial pledges.

It is possible to create pledges on *quotas* (immaterial nominative representation of participations in the share capital of a company (a *sociedade por quotas*)). These pledges must be made in writing, require registration with the Commercial Registry Office of the head office of the company and are not construed by law as financial pledges.

It is common for security to be held by a security agent on behalf of project lenders. However, since the concept of trust is in general not recognised under Portuguese law, the security agent is generally the only entity empowered to enforce security. The agency mechanism, sometimes coupled with parallel debt-type and similar arrangements, has to date proved sufficient to establish the value of the debt in the security agent's books for purposes of enforcement as well as to make parties comfortable as regards segregation of the agent in a bankruptcy context (however, no insolvency of a project's security agent has happened to date, and, therefore, no such contractual arrangements have yet been tested).

Stamp duty is levied on security interests created in Portugal, at a rate applying on the secured amount under the relevant security interest (the amount of credit, the value of the asset or another agreed secured amount). Exemption of stamp duty applies when the security instruments are executed concurrently with the loan documentation and such loan has itself been subject to stamp duty.

3 How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

Regarding real estate and certain moveable assets (such as nominative shares), priority is established by means of registration, such registration becoming public record. As such, a creditor may receive information concerning all existing encumbrances, as well as their rank and amount.

With regard to assets not subject to registration, assurance over the absence of liens may only be obtained through possession or on the basis of representations and warranties by the pledgor.

4 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

If a project company breaches its obligations under a loan facility agreement, the creditors may issue a formal demand for full repayment of the loan and further enforce any security that has been granted in relation thereto.

Mortgages are enforced by means of a sale of the relevant assets (normally by an auction system) within specific court proceedings,

while a private (out of court) sale is permitted for enforcement of pledges. Appropriation or foreclosure as an enforcement mechanism is generally not permitted under Portuguese law, save in the context of financial collateral or (as recently authorised by the enactment of Decree-Law 75/2017, of 26 June) of pledges securing commercial obligations provided that the beneficiary of the guarantee shall reimburse to the guarantor the amount corresponding to the difference between the value of the pledged assets (valuated in accordance with the criteria set out in the relevant agreement) and the amount of the obligation guaranteed.

5 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral? Are there any preference periods, clawback rights or other preferential creditors' rights (eg, tax debts, employees' claims) with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

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

The insolvency order from the court has the effect of suspending outstanding executory proceedings directed at the attachment or seizure of the insolvent's assets and preventing the enforcement of security (and any new executory proceedings) against the insolvent estate. Accordingly, once initiated, all creditors must claim their credits (and provide evidence of any security as collateral therefor) within the bankruptcy proceedings.

The law qualifies certain transactions as detrimental to the insolvent estate and to creditors' rights. Project lenders typically tend to establish arrangements leading to creation of security preferably at the outset of a project, in general tending to avoid security arrangements that lead to the creation of security interests during the project company life, that is, within what they consider to be probable repudiation or claw back periods (in order to avoid discussions as to eligibility of security).

After payment of the insolvency procedure costs, creditors shall be paid in the following order: secured claims shall have priority over any other claims, followed by those deemed as preferential claims, and lastly any unsecured and subordinated claims.

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

No different rules apply to domestic or foreign creditors.

Foreign exchange and withholding tax issues

6 What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange?

There are no restrictions to foreign currency exchange, save those resulting from applicable EU money laundering controls and reporting obligations to the Bank of Portugal in the context of transactions.

No specific taxes apply to foreign exchange transactions, although general taxes – corporate income tax on income arising therefrom and stamp duty on banks' commissions do apply.

7 What are the restrictions, controls, fees and taxes on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?

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

Withholding tax can be waived or reduced under the EU Interest and Royalties Directive, the EU Parent-Subsidiary Directive or under bilateral double tax treaties to which Portugal is a party.

A participation exemption regime for dividends (and capital gains) also applies under Portuguese law. This has extended the cases in which dividends paid to entities in other jurisdictions are not subject to withholding tax.

8 Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

There are no restrictions on the remittance of profits or investments abroad – in local or foreign currencies available in the market – and no such requirements for repatriation arise from Portuguese law.

9 May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

Yes.

Foreign investment issues

10 What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

Under Portuguese law, certain activities may only be exercised by private entities – whether national or foreign – pursuant to licencing or concessions granted by the state (as is the case of certain activities within the energy, water, waste management, postal services, telecoms, railways, commercial aviation and financial services sectors). Portugal abides by the Law on Money Laundering and the Financing of Terrorism, which transposed the EU Money Laundering Regulations into Portuguese law, which may entail further restrictions to both national and foreign investors. There may also be temporary embargo situations applying to persons or entities from non-EU states.

There is no distinction regarding foreign investors or creditors in the context of foreclosure on a project and related companies.

11 What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

There are no restrictions on insurance policies being provided or guaranteed by foreign insurance companies and no specific taxes or charges apply in connection thereto.

12 What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

The employment of workers from non-EU countries requires them to obtain a work visa (including residence permit) to live and work in Portugal.

13 What restrictions exist on the importation of project equipment?

There are no restrictions on imports, the import of goods being in general a taxable event for the purposes of VAT and customs duties, applying at the time the goods pass customs.

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

Private property is a constitutional right, nationalisation or expropriation being only permitted on the grounds of public interest and subject to payment of compensation to private entities.

There is a specific legal framework setting out the terms for the expropriation process and calculation of indemnification payable in relation to immovable assets. No similar legal framework exists for nationalisation processes.

Fiscal treatment of foreign investment

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

Portugal has implemented tax regimes directed at the promotion of foreign investment, comprising tax incentives to investment in specific business sectors (eg, the mining and manufacturing industry), under the form of corporate income tax deductions and exemptions or reductions in real estate tax, real estate transfer tax and stamp duty.

Foreign investment made in Portugal through a subsidiary or other form of local permanent representation will make the affiliate subject to the taxes generally applying to Portuguese companies and corporate activities.

Transactions made without a local presence will generally trigger payment of withholding tax on income and dividends (see question 7).

Foreign loans and security instruments will be subject to the transaction taxes generally applying in Portugal, in particular stamp duty at rates varying (typically 0.5 or 0.6 per cent depending on the maturity of the loan or the term of the security). As mentioned above, stamp duty will be levied on the value of the loan or the secured amount under the collateral instrument, and exemptions may be available for security created concurrently with taxable loans as well as in respect of, for example, shareholders' loans and certain guarantees (eg, collateral granted to financial institutions).

Government authorities

16 What are the relevant government agencies or departments with authority over projects in the typical project sectors? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

The ministers entrusted with the supervision of the relevant sectors (energy, infrastructure, transport, health) are in general responsible for the initiative as well as for the licensing and regulation of projects in the sectors under their supervision. This may be done by the specific departments or agencies functioning under the relevant ministries (eg, the Directorate General for Energy and Geology; the Transport and Mobility Institute; the Regional Health Administration; and the Portuguese Environment Agency). The involvement of the Minister of Finance is also required for the launch of any PPP project.

In addition to the governmental authorities, the independent regulatory authorities for each specific sector (eg, the Energy Services Regulator Authority (ERSE), the National Telecommunications Authority (ANACOM), Water and Waste Regulatory Authority (ERSAR) and the Transport and Mobility Authority (AMT)) are invested with regulatory and supervisory powers over the respective sectors, notably responsible for enforcing the applicable rules and regulations and monitoring the development of each respective sector, both in dealing with private companies acting therein and with consumers.

With regard to ownership and authorisation to carry out certain activities, see question 17.

Regulation of natural resources

17 Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

Mineral resources, as well as water, are generally in the public domain and may not be appropriated by private entities (whether national or foreign), although their economic use may be granted by means of concession or similar type of right of use that does not entail the transfer of property of the relevant assets or resources. It should be noted that by 'water' it is meant not only the actual resource but all of the sea (within the boundaries of the Portuguese international jurisdiction), the river beds and other bodies of water, as well as the corresponding margins and shores.

With the exception of the above cases, land and other assets may generally be owned by private entities, no distinction generally existing between national and foreign entities in this respect.

18 What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

The extraction of oil (but not of natural gas) is subject to a specific taxation regime, also including the payment of fees on prospecting, research and production oil concessions, calculated by reference to the relevant concession area.

Excise duties also apply on the supply of petroleum and energy products to final consumers, in line with EU legislation.

With regard to mining resources, there are no general rules concerning royalties payable to the Portuguese state. Royalties are, nevertheless, typically negotiated and included in prospecting and exploitation agreements, and they may be either excise- or profit-based.

The extraction or export of natural resources may also be subject to the general taxes applicable within the Portuguese tax system; namely corporate income tax and value added tax.

19 What restrictions, fees or taxes exist on the export of natural resources?

See question 18.

Legal issues of general application

20 What government approvals are required for typical project finance transactions? What fees and other charges apply?

Project finance transactions pertaining to agreements entered into with governmental authorities typically require the intervention of the relevant governmental body. In certain cases, sector-specific government approvals or authorisations may be necessary, as is the case with transactions within regulated areas (such as energy).

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

In this respect, reference should be made to the Technical Unit for PPPs (UTAP), an administrative agency under the supervision of the Ministry of Finance, created for the launch and follow-up of PPP projects.

Moreover, certain mergers, acquisitions or joint ventures may be subject to either EU merger control rules or Portuguese merger control rules, in the latter case requiring the non-opposition of the Portuguese Competition Authority.

No fees or charges are typically applicable as a direct result of such transactions, without prejudice to amounts that may be contractually due under concession agreements as consideration for the rights granted thereunder.

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

Save for the references above in the context of registration of security, project documents are generally valid and enforceable without any need for registration, authentication or filing with any governmental authority. We note, however, that powers of attorney and other notarial instruments executed abroad are required to be authenticated with an apostille (Hague Convention) or similar formality to be accepted by the equivalent Portuguese authorities.

In order to ensure a swift enforcement of a private agreement acknowledging a payment obligation, or the appropriation of a commercial pledge created pursuant to the recently enacted Decree Law 75/2017, it is advisable to have the same authenticated by a notary.

22 How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

International arbitration clauses are generally recognised by Portuguese courts, irrespective of the rules applying – Portuguese arbitration law or the commonly chosen rules of international centres such as the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and the Rules of Arbitration of the United Nations Commission on International Trade Law (UNCITRAL)

– or of the seat of arbitration. Foreign arbitral awards are recognised and enforced in Portugal under the applicable international treaty (see below) or generally under the New York Convention.

Portugal is a party to the following international conventions:

- the Geneva Protocol on Arbitration Clauses of 1923;
- the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927;
- the New York Convention, which entered into force in Portugal on 16 January 1995;
- the Inter-American Convention on International Commercial Arbitration, adopted in Panama on 30 January 1975; and
- the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force in Portugal on 1 August 1984.

The enforcement of foreign awards not covered by any of these international treaties will be carried out via the general provisions of the Portuguese Arbitration Act, which closely follow the principles of the UNCITRAL Model Law and the New York Convention.

On a bilateral level, Portugal has a number of bilateral agreements with Portuguese-speaking countries that are directed at equating arbitral awards to judgments by the national courts. There are treaties in force with Guinea-Bissau, Mozambique, Angola, São Tomé and Príncipe, the Special Administrative Region of Macao (People's Republic of China) and Cabo Verde.

23 Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

Other than in the case of concession contracts and certain project agreements entered into with public entities – which are normally required to be governed by Portuguese law – parties are in general free to choose the governing law of contracts.

Project and finance documents for projects in Portugal are typically governed by Portuguese law, although finance documents in international syndicated loans were in the past sometimes required (by lenders) to be governed by English law, with the associated security documents being commonly governed by Portuguese law. Irrespective of the governing law of the contract, mandatory Portuguese rules apply to the creation and enforcement of security instruments, to insolvency and to certain company arrangements (for instance, in the context of shareholder agreements of Portuguese companies).

24 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?

The parties may freely choose to submit any disputes to a foreign jurisdiction.

Environmental, health and safety laws

25 What laws or regulations apply to typical project sectors? What regulatory bodies administer those laws?

There is specific legislation for PPPs in the health sector (Decree Law 185/2002, of 20 August, which was heavily amended by Decree Law 111/2012). See question 27.

With regard to environmental law in Portugal, the main authority is the Portuguese Environmental Agency (APA), which oversees and monitors the public policies for the environment, with a scope of intervention ranging across the water, waste and chemicals sectors. The APA is also in charge of environmental assessments and interventions, which are typically and transversally required in all sectors.

With regard to health and safety, projects being carried out in Portugal must comply with the general rules set out in Portuguese legislation, also being subject to routine inspections and assessments by the Authority for Work Conditions, a governmental body whose mission is to enforce the relevant regulations and ensure that they are being complied with concerning employment terms and health and safety measures.

See question 16.

Update and trends

The project finance market in Portugal is picking up, with a significant number of transactions having reached financial close in recent years. The increasing liquidity in the financing market has created the perfect environment for the refinancing of project debt transactions, some of which are in the context of acquisition deals. Many of the financing deals have been concluded with recourse to bond issues by Portuguese issuers and registered with the Portuguese clearing and settlement house. This type of structure has been favoured by both sponsors and lenders, as it has proved very efficient not only from a contractual perspective but also from a tax point of view.

As in previous years, the secondary market for participations in project companies, in the road, ports, water, energy and health sectors, maintained its growth. International investment funds continue to enhance their position in the market, offering attractive alternatives to traditional investors and financing.

With respect to greenfield projects, the infrastructure investors have been looking closely at the ports sector and, following the launch of the tender for a new PPP hospital in Lisbon in December 2017, paying special attention to health PPPs. Furthermore, the energy sector continues to show signs of increasing confidence of investors with the upsurge of merchant solar power projects, which are changing the contractual landscape of renewables, until now developed under a feed-in-tariff umbrella.

Project companies

26 What are the principal business structures of project companies? What are the principal sources of financing available to project companies?

Project companies are usually established as special purpose vehicles (SPVs) for a single project, which then subcontract works (namely operation and maintenance or construction works) for the development of the project. Such SPVs typically secure financing primarily through national or international lending syndicates, but capital markets and EU-level or state subsidies may also be important sources of financing.

Public-private partnership legislation

27 Has PPP-enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?

Portugal has enacted PPP legislation with a broad national scope. Decree Law 111/2012, of 23 May, as amended, sets out the main principles applicable concerning the relationship between public and private entities, public procurement, risk sharing and transparency. There is also specific legislation for PPPs in the health sector (Decree Law 185/2002, of 20 August, which was heavily amended by Decree Law 111/2012).

Nonetheless, each individual project (and in light of any specifications thereof) remains subject to compliance with the regulatory framework that may be applicable.

PPP – limitations

28 What, if any, are the practical and legal limitations on PPP transactions?

The principles and procedures set out in the above-mentioned Decree Law No. 111/2012 shall govern the relationship of the state with the private sector in these agreements.

Moreover, with regard to contracts between the state and private entities, the rules of public procurement set out in the Public Procurement Code must be complied with, PPP contracts being typically awarded pursuant to public tender procedures.

It should also be noted that these agreements are normally required to be subject to the prior audit of the Audit Court for purposes of approval of the associated public expenditure. Furthermore, any amendments to these agreements that may involve an increase in costs or obligations of the state or state-owned entities must also be subject to such audit.

PPP – transactions**29 What have been the most significant PPP transactions completed to date in your jurisdiction?**

The most relevant PPP or PPP or project-related deals completed last year (2016/2017) that are worth mentioning (both by size and relevance in this context) were:

- the refinancing by an international syndicate of banks (including commercial banks and EIB) of the debt of six port operators, owned by the same shareholder, in the amount of approximately €240 million;
- the sale of the shareholding stakes of the concessionaires of road shadow toll concessions in Madeira, financed under a project finance regime;
- the acquisition of the shareholding stakes of the concessionaires and operating companies of Beira Interior and Transmontana road shadow toll concessions, financed under a project finance regime;
- the sale of the shareholding stakes of a water and sewage concessionaire financed under a project finance regime;
- the financing of a 25MW photovoltaic project, based on a 'corporate PPA' logic. It was the first bank financing of a renewable energy project in the Iberian Peninsula with no guaranteed remuneration (feed-in tariff);
- the acquisition of the share capital of a Portuguese company, granted with a concession of 30 years for the management of the infrastructure of one the biggest hospitals in the Lisbon area. This company also laterally operates the concession for the provision of medical services at the facility that was granted to another Portuguese company;
- the financing of the construction of a new university campus in Lisbon under a project finance regime. This is an innovative project as far as project finance structures in Portugal are concerned, since the borrower is a private law foundation and part of the financial flows financing the project arises from donations to be made to the borrower;
- the financing (arranged under Portuguese law and secured by Portuguese law and Luxemburg law collateral) regarding the acquisition of the share capital of a significant Portuguese road concessionaire by a Portuguese subsidiary of a dominant company incorporated under the laws of Luxembourg;
- the financing of an innovative biomass energy production project, including all relevant phases, from construction to operation and maintenance, comprising two biomass power plants in the north of Portugal with a combined installed capacity of 30MW, under a project finance regime;
- the acquisition and refinancing of a wind farm portfolio to be implemented through the issuance of bonds to the amount of €210 million;
- the acquisition of part of the former ENEOP portfolio (which had resulted from the ENEOP Split of Assets in 2015) and the subsequent refinancing, under a project finance structure, of the current 322MW windfarm portfolio owned by the purchaser – one of the most significant international groups operating in the energy sector; and
- the project finance by issuance of two sets of bonds in an aggregate amount of €340 million for the acquisition and refinancing of major companies operating in the gas sector.



Teresa Empis Falcão
Ana Luís de Sousa

tef@vda.pt
als@vda.pt

Rua Dom Luís I, 28
1200-151 Lisbon
Portugal

Tel: +351 21 311 3400
Fax: +351 21 311 3406
www.vda.pt

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes

Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans

Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com