The International Capital Markets Review

Eighth Edition

Editor
Jeffrey Golden

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THE INTERNATIONAL CAPITAL MARKETS REVIEW

Eighth Edition

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Jeffrey Golden

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PREFACE

This book serves two purposes – one obvious, but the other possibly less so.

Quite obviously, and one reason for its continuing popularity, *The International Capital Markets Review* addresses the comparative law aspect of our readers' international capital markets (ICM) workload and equips them with a reference source. Globalisation and technological change mean that the transactional practice of a capital markets lawyer, wherever based, no longer enjoys the luxury – if ever it did – of focusing solely at home within the confines of a single jurisdiction. Globalisation means that fewer and fewer opportunities or challenges are truly local, and technology more and more permits a practitioner to tackle international issues.

Moreover, the client certainly may have multi-jurisdictional ambitions or, even if unintended, its activities often may risk multi-jurisdictional impact. In such cases, it would be a brave but possibly foolish counsel who assumed: 'The only law, regulation and jurisdiction that matter are my own!'

Ironically, the second purpose this book aims to serve is to equip its readers to do a better job as practitioners at home. In other words, reading the summaries of foreign lawyers, who can describe relevant foreign laws and practices, is perfectly consistent with and helpful when interpreting and giving advice about one's own law and practice.

As well as giving guidance for navigating a particular local, but, from the standpoint of the reader, foreign scene, the comparative perspectives presented by our authors present an agenda for thought, analysis and response about home jurisdiction laws and regulatory frameworks, thereby also giving lawyers, in-house compliance officers, regulators, law students and law teachers an opportunity to create a checklist of relevant considerations both in light of what is or may currently be required in their own jurisdiction but also as to where things there could, or should, best be headed (based on best practices of another jurisdiction) for the future.

Thus, an unfamiliar and still-changing legal jurisdiction abroad may raise awareness and stimulate discussion, which in turn may assist practitioners to revise concepts, practices and advice in both our domestic and international work. Why is this so important? The simple answer is that it cannot be avoided in today's ICM practice. Just as importantly, an ICM practitioner's clients would not wish us to have a more blinkered perspective.

Not long ago, I had the honour of sharing the platform with a United Kingdom Supreme Court Justice, a distinguished Queen's Counsel and three American academics. Our topic was 'Comparative Law as an Appropriate Topic for Courts'. The others concentrated their remarks, as might have been expected, on the context of matters of constitutional law, and that gave rise to a spirited debate. I attempted to take some of the more theoretical

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aspects of our discussion and ground them in the specific example of capital markets, and particularly the over-the-counter derivatives market.

Activity in that market, I said, could be characterised as truly global. More to the point, I posited, that, whereas you might get varied answers if you asked a country's citizens whether they considered it appropriate for a court to take account of the experiences of other jurisdictions when considering issues of constitutional law, in my view derivatives market participants would uniformly wish courts to at least be aware of and consider relevant financial market practice beyond their jurisdictional borders and comparative jurisprudence (especially from English and New York courts, which are most often called upon to adjudicate disputes about derivatives), even when traditional approaches to contract construction as between courts in different jurisdictions may have differed.

In such cases, with so much at stake given the volumes of financial market trading on standard terms and given the complexity and technicality of many of the products and the way in which they are traded and valued, there appears to me to be a growing interest in comparative law analysis and an almost insatiable appetite among judges to know at least how experienced courts have answered similar questions.

There is no reason to think that ICM practitioners are any differently situated in this regard, or less in need of or less benefited by a comparative view when facing up to the often technical and complex problems confronting them, than are judges. After all, it is only human nature to wish not to be embarrassed or disadvantaged by what you do not know.

Of course, it must be recognised that there is no substitute for actual and direct exchanges of information between lawyers from different jurisdictions. Ours should be an interdependent professional world. A world of shared issues and challenges, such as those posed by market regulation. A world of instant communication. A world of legal practices less constrained by jurisdictional borders. In that sense and to that end, the directory of experts and their law firms in the appendices to this book may help to identify local counterparts in potentially relevant jurisdictions (three new jurisdictions – China, the Netherlands and Switzerland – having been added this year). And, in that case, I hope that reading the content of this book may facilitate discussions with a relevant author.

In conclusion, let me add that our authors are indeed the heroes of the stories told in the pages that follow. My admiration for our contributing experts, as I wrote in the preface to the last edition, continues. It remains, too, a distinct privilege to serve as their editor, and once again I shall be glad if their collective effort proves helpful to our readers when facing the challenges of their ICM practices amid the growing interdependence of our professional world.

Jeffrey Golden
P.R.I.M.E. Finance Foundation
The Hague
November 2018

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Chapter 20

PORTUGAL

José Pedro Fazenda Martins and Orlando Vogler Guiné[1]

I INTRODUCTION

The Portuguese economy has been recovering strongly since the end of the financial crisis and the successful conclusion of the Financial Assistance Programme, benefiting from healthy dynamics in the tourism sector and improved investment in various other sectors. The improving of leading indicators, the expansion of industrial production, the existence of low interest rates and a declining unemployment rate have been increasingly contributing to a boost in private consumption.

The Portuguese capital markets framework is substantially in line with European legislation, which has been responsible for increasing harmonisation within the European Union. Notwithstanding, specific domestic laws and regulations may apply to specific instruments, their form of representation and transactions. Regulations issued by the Portuguese Securities Market Commission (CMVM), the Portuguese central securities depository Interbolsa and Euronext Lisbon should also be considered, since these national regulatory authorities may condense, adapt and interpret European legislation with a certain level of discretion.

The Securities Code (enacted by Decree-Law 486/99, as amended) establishes the framework for financial instruments, offers, financial markets and financial intermediation, and has been the statute used to transpose a variety of important European Directives (including any amendments thereto) into national law, such as the Transparency Directive,[2] the Takeover Directive,[3] the Settlement Directives[4] and the MiFID II Directive[5] (replacing MiFID I). Other relevant statutes include the Companies Code (as enacted by Decree-Law 262/86, as amended; this governs the corporate rules on shares and bonds) and the Credit Institutions and Financial Companies Framework (enacted by Decree-Law 298/92, as amended, also heavily amended to transpose or adjust to EU legislation).

1 José Pedro Fazenda Martins is a partner and Orlando Vogler Guiné is a managing associate at Vieira de Almeida.
2 Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.
3 Directive 2004/25/EC on takeover bids.
4 Directive 98/26/EC on settlement finality in payment and securities settlement systems.
5 Directive 2014/65/EU on markets in financial instruments.

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A considerable number of new or revised regulatory frameworks affected the capital markets in Portugal during 2018, including:

a the MiFID II Directive and Regulation (EU) No. 600/2014 on markets in financial instruments (MiFIR). In respect of MiFID II, after months of delay, it has now been transposed into Portuguese law;

b the PRIIPs Regulation[6] became applicable, aiming to better protect retail investors by increasing the transparency and comparability of investment products; and

c Decree-Law 56/2018, which implemented MiFID II, has also modified the General Framework for Collective Investment Schemes (the RGOIC, set forth by Law 16/2015) and the Venture Capital and Social Entrepreneurship Regime (the Venture Capital Regime set forth by Law 18/2015). The RGOIC has been amended to accommodate the direct and indirect effects of MiFID II, especially in respect of ancillary services, thus harmonising, in general terms, the applicable regime to collective investment management companies. The Venture Capital Regime has also been reviewed for the first time since its entry into force, in an attempt to clarify and simplify the practical application of certain rules.

Regulations, notices and instructions issued by the CMVM or the Bank of Portugal may also be relevant. Bearing in mind the banking union that is currently being implemented and EU harmonisation developments, national banking laws are largely in line with EU rules.

The Portuguese capital markets framework still has a number of specificities (increasingly fewer, in light of the EU harmonisation) which should be taken into account.

The securities ownership regime is one of them. Under Portuguese law, legal ownership is not set immediately at the level of the accounts opened by the financial intermediaries at the local central securities depository (CSD), but rather at a second level in the chain of custody, namely at the level of the accounts opened by clients at the respective financial intermediaries. In practice, though, the system works well, and most international investors hold Portuguese securities through indirect custody chains, going through Euroclear and Clearstream or other global custodians.

Another example, with important practical implications, is that the Portuguese tender offers regime is significantly wider in scope when compared to the Takeover Directive, given that, in addition to equity securities, debt securities are also comprised in its scope of application (as is the case in some other jurisdictions). This means that for typical debt securities tender offers, they will normally be restricted to professional investors in Portugal, unless a securities takeover prospectus (in some cases, where the bonds are listed outside Portugal, a long form information memorandum translated into Portuguese and resembling a prospectus) is approved and disclosed.

The financial regulation system is composed of three pillars (following the same structure as the European supervisory system, and divided in accordance with the activities and matters at stake), which are supervised by three authorities:

a the Bank of Portugal (the country's central bank), which has a prudential function (in coordination with the European Central Bank, particularly for the largest Portuguese banks) and market conduct powers to supervise matters related to credit institutions and financial companies acting in Portugal;

6 Regulation (EU) No. 1286/2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs).

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b the CMVM, which is empowered to supervise the market conduct of financial markets, issuers of securities, and financial instruments and financial intermediaries (investment firms and credit institutions acting under MiFID II capacity; and
c the Portuguese Insurance and Pension Funds Authority (ASF), which supervises the national insurance system.

The Portuguese authorities may apply sanctions to entities that fail to comply with the applicable laws. In general, resulting fines depend on the type of entity and activities carried out, as well as the seriousness of the breach. A supervisory authority's decision may be contested and submitted to the decision of a special court that exclusively decides on competition, regulation and supervisory matters.

Since the financial crisis, and given the collapse of some important Portuguese economic conglomerates, the supervisory authorities have been much more active in sanctioning market players and, thus, the above-mentioned special court on regulatory matters was set up to enhance the capacity to respond to current regulatory demands. In recent years, authorities have imposed fines on several entities, including banking board members who were accused of hiding relevant accounting information.

II THE YEAR IN REVIEW

i Developments affecting debt and equity offerings

Tender offers

Given the relatively small size of the Portuguese market, with a reduced number of listed companies as compared with the capital markets of larger European economies, takeover bids, voluntary or compulsory, are not very common. The most important ones during the past year are described below.

On May 2018, the Chinese state-owned power company China Three Gorges (CTG) preliminarily announced a voluntary takeover bid for the remaining 76.7 per cent of EDP shares that it did not already own. Since EDP controls EDP-Renováveis, CTG would be required, in the event that its offer for EDP were successful, to launch a mandatory bid for EDP-Renováveis. Therefore, at the same time, CTG also announced a preliminary takeover bid for EDP-Renováveis, which, in practice, allowed CTG to freeze at that point the cut-off date for the six-month volume weighted average price of EDP-Renováveis shares, which serves to test the fairness of a mandatory bid price.

In light of CTG being a Chinese state-owned enterprise, the CMVM ended up issuing an opinion (which will serve as a precedent for the future), confirming that the neutrality or passivity rule generally applying to the board of a target that is subject to a takeover (i.e., not to take material actions against the offer, unless mandated by two-thirds of the shareholders) only applies in the case of reciprocity (i.e., if the offeror (ultimate controller) is subject to the same types of rules), and does not apply in these sorts of cases (state-owned entities or other, which in light of their own legal regime and specificities cannot be subject to a similar type of rule). In any case, this does not disapply other sets of rules, including securities and company law fiduciary duties, which can, in the end, lead to similar outcomes for a target's board.

There was another interesting feature relating to the split of legal regimes applicable to the offer for EDP-Renováveis, given that it is listed on the Euronext Lisbon regulated market but is a Spanish law company. Accordingly, the offer price, the offer process, the information requirements, including the prospectus, are governed by Portuguese law and subject to the

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supervision of the CMVM, while other matters, such as the mandatory bid thresholds and derogations, neutrality or passivity rule, information to employees, are subject to Spanish law and to Spain's National Stock Market Commission.

In 2018, the takeover bid process relating to Grupo Media Capital, which had been preliminarily announced in 2017, ended with withdrawal of the offer. This takeover bid was subject, among other conditions, to the approval or non-opposition of the Portuguese Competition Authority and of the Portuguese Media Regulatory Authority. In light of the remedies communicated to the offeror, and the offeror's unwillingness to accept them, the CMVM acceded to the offer being withdrawn. This will set a precedent for the future, notably that the unfulfilment of regulatory launch conditions is, indeed, an acceptable reason for withdrawing an offer but it needs to be notified to the CMVM, by providing appropriate evidence from regulators.

Debt markets

Non-financial Portuguese companies have continued to seek recourse to the retail capital markets. Government bonds also continued to be placed under public offers, thus allowing retail investors to continue their exposure to this market segment, which had been previously restricted (as far as the primary market was concerned) to institutional investors. Private placements (both with and without listing) continued to play an important part in the diversification of financing routes for the Portuguese economy.

As regards the euro medium-term note (EMTN) programmes of Portuguese issuers, these have been undergoing adjustments to MiFID II and PRIIPs language requirements, in line with the path in other EU jurisdictions, and enabling the programmes to be ready for use in the international markets once the interest rate environment changes.

Liability management exercise – the PTIF Bonds case

An interesting case that spanned various aspects of the legal regime of public offers, is that of the retail notes issued by Portugal Telecom SGPS.

In brief, in 2012, Portugal Telecom SGPS used the Prospectus Directive[7] passporting mechanism to use the prospectus of its EMTN Programme in Portugal in a €400 million public offering of bonds with a par value of €1,000 per bond and maturity in 2016, to be placed with and subscribed to by retail investors. This was a public offer of securities, under the usual terms.

In 2014, owing to corporate and business events, the issuer launched a consent solicitation process (that is, the calling of a meeting of bondholders to consent to a set of matters), which resulted in the substitution of the original issuer with PT Portugal and the payment of a consent fee to bondholders. In addition, Oi (a company with its registered office in Brazil) became bound as the guarantor of these obligations. In light of the doubts that could arise, and in a process closely monitored by the CMVM, it was concluded that this type of proceeding did not trigger the public offer regime.

In 2015, in the context of the sale of PT Portugal by its shareholder, the then issuer PT Portugal launched a new consent solicitation process, under which it was replaced by a

7 Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading.

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new issuer, PTIF BV. The proceedings included the payment of a new consent fee and the creation of a sale option for investors (put option), with Oi (the parent company of PTIF BV) remaining as the guarantor. Again, this was not a public offering.

In June 2016, Oi filed a judicial recovery procedure in Rio de Janeiro, which was admitted, and PTIF BV defaulted on the due payment at maturity. The CMVM closely monitored this situation to safeguard the interests of retail investors in Portugal and to keep them informed of the process.

In 2017, Oi launched in Brazil a programme for small creditors, which allowed for an advance payment, in a first tranche (prior to the voting and approval of the judicial recovery plan of Oi), and the payment of a second tranche (following approval of the judicial recovery plan) to creditors up to the maximum limit of 50,000 reais (approximately €13,000). The programme was replicated in Portugal beginning in October 2017 and ending in early December. In this way, thousands of creditors in Portugal (who, unlike the small creditors in Brazil, were creditors of securities issued by PTIF BV and guaranteed by Oi) could enjoy the same benefit.

As mentioned above, this was a partial advance of the outstanding amount, followed by a second additional tranche of payment, which had as counterbalance the blocking (rather than the buying) of obligations. In this way, it was concluded, once again, that the public offer regime in Portugal was not to be applied.

Following the approval by creditors and the court of the judicial recovery plan in Brazil in December 2017, it has also been interesting to follow the additional steps which have been taken to consolidate this decision at the securities level, including election processes, consent solicitations and settlement processes, across various clearing systems, including the Depository Trust and Clearing Corporation, Euroclear and Clearstream and, as there were these PT ISIN[8] notes involved, also Interbolsa. None of these transactions amounted to public offers.

ii Developments affecting derivatives, securitisations and other structured products

Derivatives

After the big challenge of adjusting to 'variation margin' requirements for financial counterparties and non-financial counterparties above the clearing threshold (NFC+) and clearing requirements for certain interest rate derivatives and credit default swaps (under the EMIR (European Market Infrastructure Regulation) framework) in 2017, this year the task has been to tackle the MiFID II challenges. The MiFID II package includes, *inter alia*, obligations to trade certain classes of derivatives through trading venues and certain pre- and post-transaction information requirements.

Asset-backed securities

The securitisation market has been active during 2017 and 2018, and a variety of transactions have already been completed. These included transactions listed on the regulated market of Euronext Lisbon, both retained and placed in the market (at least some tranches of the transactions), with a variety of assets or receivables being securitised, including electricity receivables and traditional banking loans (for instance, mortgage-backed loans and consumer

8 International Securities Identification Number.

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loans – both performing and non-performing). The transaction structure is, in certain cases, becoming more complex, and we have seen again derivatives being used to hedge interest rate risk (but in the form of a cap rather than an ordinary swap).

Non-performing loans (NPLs) is still a hot topic in the Portuguese financial system, and securitisation has been playing a role in solving this, even though most of the transactions are still made in a whole loan sale format. In November 2017, Caixa Económica Montepio Geral having been successful in disposing to investors the mezzanine and junior tranches of its rated (and without government support) NPLs securitisation Évora, the senior €123 million tranche was successfully placed in the market in June 2018, and the notes were listed in Euronext Lisbon under the first NPLs listing prospectus in southern Europe. This type of structure, which is particularly complex, includes the need to incorporate in the structure a real estate asset manager company and a monitoring agent and servicing committee. However, it has now proven that it works and at competitive pricing, so we would expect this trend to continue and for other similar transactions to be structured and launched.

In respect of securitisation, and now more in relation to performing loans, the STS Regulation,[9] which establishes a general securitisation framework at the EU level that is already, and will continue to be, particularly relevant, and will become applicable to all securitisation products from 1 January 2019 onwards. Also to be noted is Regulation (EU) 2017/2401, amending Regulation (EU) 575/2013, which will make the capital treatment of securitisations for banks and investment firms more risk-sensitive and better suited to properly reflect the specific features of 'simple, transparent and standardised' securitisations.

Covered bonds

Covered bonds continue to play a part in the Portuguese capital markets, with some issuances on the banking side, including syndicate issuances, in 2017 and 2018. Pass-through covered bonds programmes have also been set up by Portuguese issuers. By the end of October 2017, the first issue of pass-through covered bonds (i.e., covered bonds which in certain events convert the redemption structure into a product more like asset-back securities) placed in the market by a Portuguese issuer had taken place.

The result of the work developed by the European Commission on a directive proposal for a common EU minimum covered bonds framework has accelerated. The proposed Directive is essentially designed to set a common legal ground (not so heavily based on rules as the market feared) and to legally acknowledge existing market practices (leveraging significantly on the work done by the European Covered Bonds Council). Some of the predicted changes include, *inter alia*, investors' access to information regarding the cover pool, the existence of a liquidity buffer, maturity extension requirements and the use of an European Covered Bonds Label. Given that the proposed Directive appears to be substantially aligned with Portuguese law and market practices, we would not expect it to materially affect the market.

In any case, it would be important for it to be made clear that the regime on pass-through covered bonds does not include soft-bullet structures (where the bullet payment at maturity is automatically postponed to a later specified date if at maturity the issuer has not repaid),

9 Regulation (EU) 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation.

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which are used by Portuguese issuers for rating reasons, instead of hard-bullet structures, which is the preferred route for German issuers, for instance, and who benefit from a much more favourable sovereign rating ceiling.

Own-funds regulations and senior non-preferred instruments

After the first Additional Tier 1 capital instruments issuance placed in the market (€500 million by Caixa Geral de Depósitos) in 2017 – with a write-down (and up) feature, rather than conversion – later that year and in 2018, the banks have started to issue Tier 2 capital instruments to the market, with Banco Comercial Portugues, Caixa Geral de Depósitos and Novo Banco having successfully approached the market.

The next important step will be the issuance of 'senior non-preferred securities' (i.e., debt instruments that rank below other senior liabilities but above Tier 2 instruments, and eligible for the minimum requirement for own funds and eligible liabilities and total loss absorbing capacity (MREL/TLAC) requirements). In this context, Directive 2017/2399[10] is to be transposed into national law before the end of the year, for the express purpose of creating a new asset class of 'non-preferred' senior debt that ranks in insolvency above own-funds instruments and subordinated liabilities that do not qualify as own funds, but below other senior liabilities, including deposits. The aim is to enable institutions to use the less costly ordinary senior debt for their funding or other operational reasons and issue new non-preferred debt to obtain additional funding, while complying with the MREL/TLAC requirements. Although the Directive has not been transposed into national law yet, it is already possible to issue this type of liability on a contractual basis, as the Portuguese insolvency law would uphold similar subordination clauses; however, no actual issuance has yet been made.

MiFID II

The MiFID II/MiFIR legislative package entered into force in 2018. Whereas MiFIR was directly applicable in Portugal, MiFID II was, after months of delay in the legislative process, finally transposed into Portuguese law, by means of Law 35/2018 of 20 July, which entered into force on 1 August 2018. This law has amended various legal regimes that form the basis of the organisation and functioning of Portuguese financial markets, among which is the Securities Code.

The aim of this new regulatory package is to ensure greater transparency for all market participants, while also increasing market safety, efficiency and fairness, implementing enhanced governance for trading venues, on-exchange trading of standardised derivatives, more intensive regulation of commodity derivatives and greater consolidation of market data.

Investor protection has been stepped up through the introduction of new requirements on product governance and intervention and independent investment advice, improved pre- and post-trade transparency, the extension of existing rules on structured deposits and an improvement in requirements in a variety of areas, such as the responsibilities of management bodies, cross-selling, staff remuneration, inducement and information, more extensive transaction reporting, conflicts of interests and complaints handling. For independent discretionary portfolio management and investment advice segments, for instance, this

10 See Directive (EU) 2017/2399 as regards the ranking of unsecured debt instruments in insolvency hierarchy.

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implies revisiting the fee structures and arrangements that have been in place up to now, and a global review of their procedures and documentation. Product governance has also been a very significant challenge.

The PRIIPs Regulation

According to the PRIIPs Regulation, a 'packaged retail and insurance-based investment product' constitutes any investment where, regardless of legal form, the amount (re)payable to the retail investor is subject to fluctuations because of exposure to reference values or to the performance of one or more assets that are not directly purchased by the retail investor.

The PRIIPs Regulation pursues the objective of increasing the transparency and comparability of investment products through the issue of a standardised short-form disclosure document – the PRIIPs key information document (KID) – thereby making it easier for retail investors to understand and compare the key features, risks and costs of different products within the PRIIPs scope.

Law 35/2018 has been the instrument used for adapting the PRIIPs Regulation to the internal legal order in Portugal. The new regime defines, *inter alia*:

a the competent supervisory authorities, depending on the nature of the investment product in question (the CMVM, the Bank of Portugal or the ASF);

b a prohibition on the advertising of PRIIPs without the prior approval of the competent supervisory authority;

c a prohibition on making the execution of deposit contracts dependent upon the acquisition of financial instruments, insurance contracts or of other financial savings and investment products that do not ensure the invested capital at all times; and

d the obligation to notify the competent supervisory authority of the PRIIP-related KID prior to the date it will become available to the public or modified.

Up to now, the PRIIPs Regulation, read in conjunction with Law 35/2018, shall be the sole applicable instrument on this matter until further supervisory authority regulations are issued.

iii Cases and dispute settlement

Besides derivatives litigation and a prospectus case, discussed below, we would highlight that the application of the resolution measure to Banco Espírito Santo (and to Banif) entailed a significant amount of litigation, for various reasons and involving different stakeholders, but this did not prevent the sale process of Novo Banco being concluded in October 2017. We expect to report on the outcomes of these disputes in the coming years. Nevertheless, in an important case in the United Kingdom, *Goldman Sachs International v. Novo Banco SA*, it was confirmed that litigation regarding this particular resolution measure, including regarding English law contracts, should be decided by the Portuguese courts. It was decided that it was not for the court to interfere in the exercise of resolution powers by the Bank of Portugal (the national resolution authority) and thus that were no grounds to pursue the case in the English courts.

Highlighted case law

As a context on derivatives, banks operating in the Portuguese market have been contracting swaps with clients during the past decade as follows: under master agreements governed by Portuguese law, based on the International Swaps and Derivatives Association (ISDA) master agreement principles, but shorter and less complex; and under standard ISDA master

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agreements. The latter alternative has been typically adopted by larger corporations (or public sector entities, as mentioned above) with wider experience in the financial markets, while the former has been more frequently used for smaller clients and by small and medium-sized enterprises (SMEs) that are relatively less experienced in the financial markets and more tempted to sue banks when an underlying asset evolves negatively.

During the past few years, several cases involving interest rate swap agreements have been analysed and decided by the Portuguese Supreme Court of Justice (STJ), essentially those related to disputes with SMEs.

In 2013, the STJ acknowledged the validity of derivative contracts and the applicability of a swap termination because of an abnormal change in circumstances, and also highlighted the importance of securing a balanced contract.

Following this decision, in 2015, two cases proved noteworthy in clarifying a range of issues that had been extensively discussed within the legal community, as reported in this chapter in the 2016 edition. The STJ affirmed the standing of derivatives as legally valid financial instruments, recognised as such under EU and national law, and thus not qualifying swaps as gambling or betting contracts. This represented a clear contribution to the stability of the financial system.

Case law has also addressed choice of forum clauses, having decided that choice of jurisdiction based on the applicable EU civil procedure rules (notably, Regulation (EU) No. 1215/2012) prevails over Portuguese domestic law, therefore acknowledging the validity of clauses attributing jurisdiction to the courts of England.

In another judicial decision, the Lisbon Court of Appeals ruled that not only shareholders that have decided to tender their shares to a bidder in a takeover are protected by prospectus liability. Any investor, either buyer or seller, that relied on the information inserted by the bidder in the prospectus may claim for damages against the bidder.

iv Relevant tax and insolvency law

Tax considerations

The relevant tax issues will naturally depend on the kind of transaction at stake.

In particular in respect of corporate finance-type transactions, it is important to remember that, whenever some sort of financing with links to Portugal is contemplated, certain tax contingencies must be considered. In particular, account should be taken of any withholding tax on interest payments (as a general rule, 28 per cent for natural persons and 25 per cent for legal persons), including for non-residents (i.e., individuals, companies and even financial institutions). Another important aspect is the possible application of stamp duty when some sort of financing is granted (up to 0.6 per cent of the capital, depending on the maturity) and when paying interest (4 per cent of each payment).

Through a bond issue, these taxes may not apply or be applied to a lesser extent. Under Decree-Law No. 193/2005 of 7 November, there is an exemption from withholding tax on interest payments to be made to non-residents, if the requirements and formalities therein are met, including being registered in a CSD recognised by law (such as Interbolsa). On the other hand, and since bonds are a capital market instrument, stamp duty is not applicable to bond financing or to applicable interest payments, since that would restrict the free movement of capital within the European Union. In any case, it should be borne in mind that in the case of secured financing and if no stamp duty is levied on the financing, stamp duty may be payable on the security package.

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Outline of the Portuguese insolvency regime

The Portuguese Insolvency and Companies Recovery Code, which was established under Decree-Law 53/2004, has been amended and updated regularly and contains provisions similar to those that can found in the insolvency regimes of most jurisdictions, aimed at tackling the usual concerns arising in insolvency cases. Besides regulating insolvency proceedings, the Code also sets forth a special recovery proceeding, the aim of which is to promote the rehabilitation of debtors facing financial difficulties but prove to still be economically viable, by providing a moratorium on any creditor action while a recovery plan is being agreed. This special recovery proceeding constitutes a stand-alone urgent judicial proceeding, based on out-of-court negotiations that are later confirmed by a court.

As usual, the law provides for 'hardening periods' (which are backwards counting periods from the insolvency proceeding and in respect of which legal contracts may be resolved or terminated with retroactive effect), which notably depend on the date of contracting and the particular circumstances under which the relevant legal contracts were entered into; this includes a 60-day hardening period in respect of security provided with the relevant financing commitment (if these are after the financing, the period is six months). Financial collateral arrangements are excluded from the scope of the Code.

There have been recent legal amendments and additional statutes to enhance the recovery prospects of viable companies, and which should be analysed in the context of potential restructurings.

v Role of exchanges, central counterparties and rating agencies

The Target 2 Securities system has entered into force and is already applicable. For this purpose, Interbolsa published Regulation 2/2016. Interbolsa also became eligible as a securities settlement system for the purposes of the STEP/Step Label,[11] the aim of which is to enhance the market and collateral prospects for Portuguese commercial paper issuers.

vi Other strategic considerations

Certain negative developments in the market during the past few years underline the importance for systemic entities and listed companies of having robust compliance and risk management systems in place. The increased public pressure on official institutions has resulted in more intense scrutiny by the supervisory authorities, including the CMVM, regarding:

a prospectus review and approval, but there is now a relevant trend at the CMVM focused on quicker and more predictable reviews and calendar planning;
b complex financial products placement and relevant documentation;
c rules of conduct; and
d corporate governance.

The internal governance arrangements of listed firms and financial institutions, and the assessment of the suitability of those who hold positions in credit institutions and corporate bodies, increasingly tend to be on the regulators' radar.

11 Short-Term European Paper. Short-term paper programmes must fulfil certain criteria to be STEP compliant, and therefore eligible to apply for a Step Label.

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Investor activism and securities law litigation have also increased in recent years, as mentioned above. As noted above, always bear in mind that in Portuguese corporate finance transactions there may be relevant tax issues to be taken into account, and the bond route may be a way to overcome the hurdles encountered.

III OUTLOOK AND CONCLUSIONS

The current economic environment in Portugal seems to be increasingly positive, with the healthy dynamics and current spike in the tourism sector and improved investment in various other sectors.

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Appendix 1

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Orlando Vogler Guiné has a law and a business law master's degree from the Coimbra Faculty of Law, and a postgraduate degree in securities and business law from the Lisbon Faculty of Law. He joined Vieira de Almeida in 2006 after an internship with the Portuguese Securities Market Commission (CMVM). He has been actively involved in capital market transactions there since, including takeovers, liability managements, asset-backed securities, debt, hybrid and share issues, including initial public offerings and accelerated bookbuilds, bank recapitalisations and resolutions, undertakings for collective investment and derivatives, assisting some leading institutions in the financial and non-financial sectors. Besides his professional work, he has been a guest lecturer on postgraduate and master's courses, and at several conferences, and has published works on securities and company law. He is a member of the Business Law Institute (IDET – Coimbra Faculty of Law) and of the think tank Governance Lab.

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