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Project Finance 2020

A practical cross-border insight into project finance

Ninth Edition

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1 Overview

1.1 What are the main trends/significant developments in the project finance market in your jurisdiction?

In the past year we have continued to witness the main trend of refinancings with particular emphasis on the energy sector, with one of the major transactions of the past years being the multi-jurisdiction refinancing of the second largest renewable energy generator in Portugal.

In fact, refinancing of project debt transactions continues to be the drive of the project finance market, with an ever-growing interest in bonds issue financings, green loans and sustainable finance – with the so-called Taxonomy Regulation also likely to rise to prominence soon and leave an imprint on future financings. The market has proven its ability to recover from past mishaps and has been showing greater liquidity and growing investor confidence.

There continues to be significant activity in the secondary market, with construction companies and other original shareholders seeking to free up capital to invest in other geographies, or to focus on their core businesses by enhancing trade in market sales of participations in project companies in both the road, ports, water and energy sectors. Investment funds have become increasingly more active in the market, demonstrating and cementing the confidence of investors in both brownfield and greenfield projects, and replacing to a certain extent the traditional banking groups and investors.

A new wave of greenfield project financing could be forthcoming, with a growing interest from investors in green loans and sustainable finance, as well as a result of several market shifts which are expected to impact the coming years, notably the solar capacity auctions which headlined 2019, with 1150 MW of capacity awarded and to be developed in the next couple of years and new capacity auctions expected to be launched in the first semester of 2020, as well as concessions entering the later stages of their respective terms. Mobility projects are also expected to kickstart a new trend and bring about new financing opportunities.

1.2 What are the most significant project financings that have taken place in your jurisdiction in recent years?

The most relevant deals which have taken place in Portugal in recent years include greenfield and brownfield transactions, among which we would highlight the following:

- 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 322 MW windfarm portfolio owned by the purchaser – one of the most significant international groups operating in the energy sector.
- The project finance by issuance of two sets of bonds in the aggregate amount of €340,000,000 for the acquisition and refinancing of major companies operating in the gas sector.
- The refinancing by an international syndicate of commercial banks of a windfarm portfolio, by means of the introduction of changes to an existing bond issuance, in the amount of €579,900,000.
- The acquisition and refinancing of a windfarm portfolio to be implemented through the issuance of bonds in the amount of €210,000,000.
- 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 of an innovative biomass energy production project, including all relevant phases, from construction to operation and maintenance, comprising two biomass powerplants in the north of Portugal with a combined installed capacity of 30 MW, under a project finance regime.
- The refinancing by an international syndicate of commercial banks and the European Investment Bank of six ports concessionaires held by Grupo Yildirim, in the amount of €279,806,000.
- The financing of a 25 MW 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 project finance of the first offshore floating windfarm project in Portugal (25 MW) financed by the European Investment Bank in the amount of €60,000,000.
- The financing by Banco BPI (CaixaBank) of a portfolio of 40 small-generation solar projects owned by the same sponsor.
- The financing by EIB and Banco BPI (CaixaBank) of a windfarm portfolio with 96MW of installed capacity and benefitting from a feed-in tariff.
- The refinancing of the Finerge group debt and operations in excess of €700,000,000, one of the largest wind financings in Europe, and the longest tenor renewables deal and largest green loan deal in Portugal.

2 Security

2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

The concept of a fixed charge is the only form of security interest generally admissible in Portugal and the terms and formalities required for security creation vary depending on the type of assets at stake.

Even though the "floating charge" concept is not recognised under Portuguese law, there is the possibility of creating security over different assets through a single security agreement.

As an exception to the above principles, Portuguese law on financial collateral (which implemented the Directive on Financial Collateral Arrangements) allows for pledges similar to floating charges on money and securities in bank accounts.

2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

Security on immovable assets or rights relating thereto, or on movable assets subject to registration (such as automobiles, ships and planes), is created by means of mortgages, executed through notarial deeds and subject to registration as a condition for validity.

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", which 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.

Pledges may be created over movable (non-registered) assets or credits and shall be effected by written agreement. For this purpose, the transfer of possession over such assets to the pledgee or to a third party is required. There are, however, certain exceptions to this transfer of possession requirement, notably for the creation of a pledge having as its beneficiary a credit institution authorised to carry out business in Portugal, in which case-specific rules apply, and in what concerns the creation of financial pledges under the legislation for financial collateral arrangements.

2.3 Can security be taken over receivables where the chargor is free to collect the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?

A pledge over receivables qualifies as a pledge of credits. The validity of a pledge of credits is subject to (i) the pledgor's counterparty being served notice thereof, and (ii) the pledgee coming into possession of the documents required to enforce the rights arising from the relevant contract directly against the pledgor's counterparty.

A pledge of credits covers all payments to be made under the contractual relationship underlying such credits. After the debtor is notified, such payments must nevertheless be made jointly to the pledgor and the pledgee. As a means of circumventing practical difficulties arising from the joint payment requirement, it is common for the pledgee to authorise the third-party debtor to continue to carry out the relevant payments to the pledgor until notice to the contrary, and/or to construe the relevant pledge agreement as a financial collateral arrangement, in accordance with the Directive on Financial Collateral Arrangements.

2.4 Can security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

A pledge over cash deposited in bank accounts is deemed a pledge of credits (see above). Generally, the taking of security over bank accounts by financial institutions is made through financial pledges allowing the beneficiary to use and dispose of the deposited funds.

2.5 Can security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Briefly, what is the procedure?

In companies, the capital of which is represented by immaterial nominative participations ("quotas"), creation of security requires a written agreement and registration of the same with the relevant Commercial Registry Office.

On the other hand, when share capital is represented by shares, security is created by means of a pledge over such shares by means of an endorsement, whether as a written pledge declaration written by the charger on the certificates and inscription in the issuer's share ledger book, as is the case for nominative share certificates, or by means of an entry as to the creation of the pledge in the relevant securities account, as is the case with dematerialised shares.

It is common practice to have a written contract governing the terms of the relevant pledge.

2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?

The creation of security interests over assets located in Portugal (including share pledges) attracts Stamp Duty, levied on the secured amount. There are certain exemptions, notably when the creation of security is simultaneous and ancillary to a loan, provided that the loan has already been subject to a similar taxation (no duplication of tax applies), or when the beneficiary of such security is an entity benefitting from a subjective exemption (e.g. European Investment Bank).

2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

The registration before the local Registry Offices of the creation of pledges over quotas will involve a cost of €100 per quota, and for the creation of mortgages there will be a cost of €250 per request plus a further €50 for every additional mortgaged item in each request. The mortgage urgency fee is the same amount as the respective request.

As for the time involved, the registration of pledges over quotas generally takes one business day to be completed, and that of mortgages up to 10 business days (or, if an urgency fee is paid, one business day).

2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground), etc.?

The creation of security over assets which are in the private domain does not, in general, require any regulatory or similar consents.

However, the creation of security over public domain assets is prohibited and some restrictions in respect of the creation of security over concession/regulated assets may be imposed, notably through specific regulations or the relevant concession contracts.

3 Security Trustee

3.1 Regardless of whether your jurisdiction recognises the concept of a "trust", will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?

Trusteeship is generally not recognised by Portuguese law. Thus, even if the relevant agreements indicate that the security agent holds security for the benefit of a given lending syndicate, unless all lenders 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 the context of the enforcement procedures, the security agent may be required to prove before a court that it holds title to the secured obligations.

3.2 If a security trust is not recognised in your jurisdiction, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

The only *prima facie* way to have all the lenders recognised as beneficiaries of a given security is to name 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 and registration, if applicable) each time the lenders assign, buy or sell part of the loans, which is not a practical solution. For this reason, attempts have been made to set up alternatives and to put in place less burdensome solutions, as is the case where the security agent is made the registered beneficiary of the security and either benefits from a joint and several creditor status or a parallel debt or is made contractually bound to assign the secured obligations to all the lenders prior to enforcement of the security.

4 Enforcement of Security

4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/liquidator), or (b) (in respect of regulated assets) regulatory consents?

The enforcement of mortgages consists of a sale of the relevant assets through court proceedings. The sale of pledged assets may be made through court or out-of-court proceedings.

Appropriation or foreclosure of the asset is generally not available to the beneficiaries of mortgages or pledges other than in the case of financial pledges or pledges granted by a business entity or person in security of a commercial obligation.

Court procedures usually take several months or even more than a year if the complexity of the legal arguments at stake leads to court appeals.

Please refer to section 5 below for restrictions concerning insolvency/bankruptcy and restructuring proceedings.

4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?

No different rules apply to domestic or foreign investors in this respect.

5 Bankruptcy and Restructuring Proceedings

5.1 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 security?

Upon the opening of bankruptcy proceedings, all security other than financial collateral over the insolvent'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.

Furthermore, the insolvency order delivered by the court suspends any outstanding executory proceedings having as an object the attachment or seizure of the insolvent's assets, and prevents the bringing of any new executory proceedings or the enforcement of any security against the insolvent entity. Any lawsuits related to such assets are attached to the bankruptcy proceedings.

In addition, all claims from creditors of the insolvent entity must be lodged within the insolvency proceedings. Therein the creditor shall mention the amount of its claim as well as any security from which it may benefit over the assets of the insolvent entity.

5.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g. tax debts, employees' claims) with respect to the security?

The insolvency administrator is entitled to terminate agreements which may be qualified as detrimental to the insolvent estate by notice to the relevant counterparty. The counterparty may either accept termination of the contract and return the consideration received to the insolvency estate or, alternatively, challenge the termination of the contract in court.

There are certain acts and transactions which are legally deemed to be detrimental to the insolvent company's estate. Other than these, acts performed within two years prior to the opening of the corporate bankruptcy proceedings that generally diminish, jeopardise or delay the rights of the debtor's creditors may be qualified as detrimental to the insolvent estate, provided bad faith of the relevant parties is proven. Bad faith is presumed by law in the case that the counterparty or the beneficiary of the act is related to the insolvent entity.

Upon payment of the insolvency procedure costs (which must be settled prior to all other claims), claims shall be paid in the following order:

(a) employees' claims over the specific company premises where they carry out their activity;

(b) property taxes;
(c) secured claims (those with security over assets which are part of the insolvent estate up to the value of those assets);
(d) preferential claims, including:
  i. general creditors' preferential claims over the assets in the insolvent estate up to the value of the assets over which such preferential claims exist and where the claims are not extinguished in consequence of the declaration of insolvency;
  ii. certain debts to the tax and social security authorities;
  iii. claims by creditors which have provided capital to finance the insolvent's activity during the PER procedure (see question 5.5 below) over all movable assets of the insolvent; and
  iv. claims by the party that applied for the opening of the insolvency proceedings;
(e) unsecured claims; and
(f) subordinated claims (e.g. the credits of related parties).

5.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Bankruptcy proceedings are generally applicable to all persons or legal entities, except for the Republic of Portugal and public/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).

5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?

A creditor may, without filing a judicial proceeding, retain possession of the assets pertaining to a certain entity if it is in the possession of such assets and if the claim arises from expenses or damages caused by such assets.

Creditors may also enforce security over assets of the project company outside the court, provided such security was granted under the Directive on Financial Collateral Arrangements.

5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cramdown of dissenting creditors?

The Portuguese insolvency law provides for a special recovery proceeding which aims to promote the rehabilitation of debtors facing financial difficulties (*Processo Especial de Revitalização* – "PER"). These proceedings are available to a debtor who finds themselves in a situation of financial distress and who is not technically insolvent yet.

The plan approved within a PER is binding on all creditors, including those who did not take part in the negotiations. Therefore, when a plan is approved by the legally-prescribed majority of creditors and further confirmed by the judge, the provisions contained therein are enforceable against non-voting or dissident creditors.

Moreover, the plan approved by the majority of the creditors and confirmed by the judge by a definitive order allows the debtor and its creditors to benefit from a specific and more favourable tax regime set forth in sections 268 to 270 of the Portuguese Insolvency Code.

Portuguese law further provides for an out-of-court procedure (*Regime Extrajudicial de Recuperação de Empresas* – "RERE"), which entered into force on 3 March 2018. RERE corresponds to a non-judicial procedure that aims to obtain a settlement between a company in financial distress or in an imminent insolvency situation and its creditors. It involves a voluntary arrangement between the company and all or part of its creditors, whose content is freely established by the parties and is typically confidential.

The effects of the RERE are restricted to the participating creditors and their claims, and securities may be only modified to the extent therein agreed; therefore, and contrary to what happens in respect of a plan approved and confirmed within a PER, there is no cramdown on dissident creditors.

Should the parties to the agreement expressly decide to deposit the agreement with the Commercial Registry Office and, provided that an auditor formally certifies that through that agreement the debtor restructures at least 30% of its non-subordinated liabilities and that, as a result of such agreement, it achieves positive equity and its equity results superior to its share capital, it will benefit from the more favourable tax treatment applicable to PER as mentioned above.

Although the RERE is primarily addressed to non-insolvent companies, exceptionally and temporarily, within the 18 months after the entering into force of the RERE regime, a debtor that is technically insolvent may still make use of this special regime, instead of filing for its insolvency.

5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in your jurisdiction.

Directors may continue to trade even if a company is facing financial difficulties provided that they act with a special duty of care and do not violate their legal duties and legal principles applicable to the management of companies.

Within insolvency proceedings, the insolvent entity's directors may be found liable if they fail to meet their legal obligation to file for corporate insolvency proceedings within 30 days of the debtor becoming insolvent or if the insolvency situation has been created or aggravated as a consequence of a felonious or gross fault during the period of three years before the opening of the corporate insolvency proceedings.

Directors may be subject to ancillary penalties – prohibition from performing commercial activities – and/or ordered to pay amounts unduly received from the insolvent company, and may be deemed jointly and severally liable with the company in certain circumstances.

Where the debtor is declared insolvent by the court, directors may also be held criminally liable for fraudulent insolvency, negligent insolvency and the unlawful favouring of creditors.

6 Foreign Investment and Ownership Restrictions

6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?

Under general Portuguese law, there are no restrictions on foreign direct investment or foreign ownership of a project company. However, the exercise of an economic activity within the regulated sectors (such as energy, water and waste management, telecoms, postal services, railways, commercial aviation

and financial services) may require authorisation from the regulator to both Portuguese and foreign investors.

Restrictions may apply under the Law on Money Laundering and the Financing of Terrorism, which transposed the EU Money Laundering regulations into Portuguese law. There may also be temporary embargo situations applying to persons or entities residing in non-EU states.

There are no currency controls under Portuguese law and money can be freely transferred into or out of Portugal. Also, there are no restrictions on the remittance of profits or investments abroad.

6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?

No particular restrictions in relation to foreign direct investments apply.

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

The protection of private property is upheld by the Constitution. Accordingly, the nationalisation, expropriation or requisition of private property can only take place on the grounds of public interest and provided that private entities are duly compensated.

While there is a legal framework setting out the terms for the expropriation process and calculation of indemnification payable in relation to immovable assets, there is no general framework for nationalisation processes.

There is, nevertheless, a specific legal regime setting out the framework for the public appropriation of share capital, in whole or in part, from private legal persons for public interest reasons.

There are no distinctions between domestic and foreign investors in this respect.

7 Government Approvals/Restrictions

7.1 What are the relevant government agencies or departments with authority over projects in the typical project sectors?

The governmental agencies or departments with authority over projects depend mainly on the relevant sector of activity of a project. In general terms, the respective Ministries (energy, infrastructure, transport, health, etc., and – when applicable – environment) are responsible for the launch, licensing and major regulation of the projects, either directly or through their governmental departments, e.g.: *Direção Geral de Energia e Geologia* (energy); *Instituto da Mobilidade e dos Transportes, I.P.* (roads); and *Administração Regional de Saúde* (health), etc.

Other approvals 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 *Unidade Técnica de Acompanhamento de Projetos* ("UTAP"), an administrative entity under the supervision of the Ministry of Finance, created for the follow-up of PPP projects.

7.2 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?

Project documents are valid and enforceable without any need for registration, authentication or filing with any governmental authority, save for certain pledge arrangements which need to be authenticated by a Notary or by any competent authority.

The granting of security and private agreements with acknowledgment of a payment obligation shall also only be directly enforceable before the courts if authenticated by a Notary or by any competent authority. For that reason, financing agreements are usually notarised.

7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?

Other than assets in the public domain (e.g. the hydro domain, mineral resources, roads and railways) which may not be appropriated by private entities, the ownership of land or other assets does not require a licence.

However, the exercise of a specific economic activity by use or operation of such assets may require a licence and, in the case of an asset in the public domain, the attribution of a right of use (of the relevant asset, normally through a concession regime).

There is no distinction between national and foreign entities in this respect.

7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?

There is no specific tax regime applicable to the extraction or export of natural resources, other than in respect of the extraction of oil (but not applicable to natural gas).

Additionally, Portuguese oil legislation foresees that the agreements for the prospection, research and production of oil shall include an annual fee ("*renda de superfície*") calculated by reference to the area of the concession. Other fees and royalties may be agreed in the relevant concession agreements or licences.

Portugal has implemented excise duties on petroleum and energy products, in line with EU legislation, which are triggered when products are released for consumption.

The extraction and/or export of natural resources may also be subject to the general taxes applicable within the Portuguese tax system; namely, Corporate Income Tax ("CIT") and Value-Added Tax ("VAT").

7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?

Income derived from foreign currency exchange may be subject to CIT. Commission fees payable to a financial credit institution for foreign currency exchange may trigger Stamp Duty.

In general terms, Portugal does not apply controls on foreign currency exchange, without prejudice to money laundering controls in line with those applicable in other EU Member States. Furthermore, reporting obligations to the Bank of Portugal may also apply to certain transactions.

7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments 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% (this rate may, under certain circumstances, be increased to 35%).

With respect to interest or dividend payments, the 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 signed by Portugal, as long as certain conditions are met.

Note that the CIT legislative reform implemented a participation exemption regime for dividends (and capital gains), which considerably extended the cases in which dividends paid to other jurisdictions (e.g. with whom Portugal has signed a double tax treaty and there is administrative cooperation in tax matters) are not subject to withholding tax.

7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?

There are no restrictions or limitations regarding the establishment and maintenance of onshore foreign currency accounts or offshore accounts in other jurisdictions.

7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in your jurisdiction or abroad?

Please see question 7.6 above concerning withholding taxes related to the payment of dividends to a foreign parent company. Regarding dividends paid to a resident parent company, exclusion from taxation is also available provided some requirements are met (namely, a certain level of shareholding – currently 10% held for at least 12 months).

7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?

Environmental impact assessments are generally required for infrastructure projects. The PPP law establishes that PPP procurement procedures shall only be launched after approval of the relevant environmental impact declaration. Financing documents also normally include this environmental impact declaration as a condition precedent ("CP") to the disbursement of funds.

Depending on the sector in question, a project may also be subject to the European Integrated Pollution Prevention and Control ("IPPC") rules. The environmental licence (which is required, in particular, for industrial projects) must be obtained before operation commences, and must be successively renewed during the entire period of operation of the relevant plant.

Specific titles for the use of water resources (e.g. discharge of waste water and extraction of water) and for emissions in the air, as applicable, must also be obtained in addition to the obtainment of the environmental licence.

Furthermore, in the context of the EU emissions trading system, for projects in certain industrial sectors and meeting certain conditions and/or thresholds, operators must hold a permit to emit greenhouse gases, and be the holder of emission allowances.

Depending on the sector of activity, health and safety laws may apply in terms consistent with European directives in this respect.

7.10 Is there any specific legal/statutory framework for procurement by project companies?

In general terms, project companies are not subject to specific procurement rules. There are, however, some specific cases where a project company may be subject to the regime set forth in Portuguese public procurement law, namely: (i) if the project company has been established for the specific purpose of meeting general interest needs and is controlled by public entities or financed mainly from the public budget; (ii) if the project company, having been created for the specific purpose of meeting general interest needs or not, operates in the energy, water, transport or postal services, and a public entity exercises a dominant influence over it; and (iii) if a project company has been granted, without an international public procurement process, special or exclusive rights in the public energy, water, transport or postal services sectors, affecting the ability of third parties to exercise activities on those sectors.

Moreover, public procurement rules shall also apply to construction contracts and services agreements entered into by a project company (i) which is in more than 50% directly financed by a public entity, and (ii) whose contractual price equals or exceeds €5,548,000 and €221,000, respectively.

8 Foreign Insurance

8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?

Portuguese law does not foresee any restrictions, controls, fees or taxes on the granting of insurance policies by a foreign insurance company.

8.2 Are insurance policies over project assets payable to foreign (secured) creditors?

Yes. No limitation applies under Portuguese law regarding payment of insurance to foreign secured creditors.

9 Foreign Employee Restrictions

9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?

In general, no restrictions apply to the employment of foreign workers. However, citizens of non-EU countries must obtain a work, visa residence or equivalent permit to live in Portugal.

10 Equipment Import Restrictions

10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?

In general, the import of goods is a taxable event for the purposes of VAT and customs duties. VAT and customs duties are payable by the importers (whether or not a taxable person) at

the time the goods pass the customs control. In some circumstances, VAT may be self-assessed by importers in their VAT return.

10.2 If so, what import duties are payable and are exceptions available?

VAT is charged on importation of goods at the rate that applies to a supply of similar goods within the Portuguese territory. The taxable value of imports is determined in accordance with customs legislation, excluding VAT itself but including customs duties and any other taxes or charges levied on imports, as well as incidental expenses such as commissions, packaging, transport and insurance expenses incurred up to the first destination within Portugal.

Customs duties are calculated, on an *ad valorem* basis, as a percentage of the value of the goods being declared for importation. The level of that percentage depends on the kind of product imported and the country of origin.

11 *Force Majeure*

11.1 Are *force majeure* exclusions available and enforceable?

Although Portuguese law does not provide for a specific provision regarding exclusion of liability in case of *force majeure*, the principle is generally accepted and enforceable in Portugal. In general, project contracts provide for detailed provisions in relation to *force majeure* events and the terms under which the parties have agreed to mitigate the effects of *force majeure*, and exclude liability for breach of contract resulting from a *force majeure* event. The terms agreed between the parties in this respect are generally accepted and enforceable in Portugal.

12 Corrupt Practices

12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

No specific rules apply on corruption and bribery activities in the projects sector. Nevertheless, entities are subject to general criminal law, which sets forth corruption and bribery as criminal offences which may be punished with fines or imprisonment up to a maximum of eight years (without prejudice to the possibility of aggravated penalties in specific cases).

We also refer to the provisions of the Law on Money Laundering and the Financing of Terrorism, which transposed the EU Money Laundering regulations into Portuguese law.

13 Applicable Law

13.1 What law typically governs project agreements?

Project agreements are typically governed by Portuguese law. A different applicable law may be chosen (provided that the choice of law observes the requirements set out in Portuguese law or in the applicable international conventions). We note, however, that concession contracts and other project agreements entered into with public entities are mandatorily governed by Portuguese law.

13.2 What law typically governs financing agreements?

The parties may freely choose the law which will govern the financing agreements with observation of the requirements set out in Portuguese law or in the applicable international conventions.

Although financing agreements in project finance deals in Portugal are commonly subject to Portuguese law, it is not uncommon for international lending syndicates to require finance agreements to be submitted to English law.

13.3 What matters are typically governed by domestic law?

In the context of project finance deals, 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.

14 Jurisdiction and Waiver of Immunity

14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?

Portuguese courts recognise the parties' autonomy to select the forum of their disputes, even when the selected forum has no particular connection with the dispute, and have consistently recognised the provisions of the Brussels Regulation as prevailing over the Portuguese Code of Civil Procedure, under which the parties are required to establish a significant interest in the designated jurisdiction to select it as the appropriate forum for their disputes.

Notwithstanding, Portuguese courts may ignore foreign jurisdiction clauses and assume jurisdiction in special cases where they may claim to hold exclusive jurisdiction, e.g. actions relating to local land, in proceedings related to the validity of the incorporation or the dissolution of companies domiciled in Portugal, in proceedings relating to the validity of entries in public registers, or in proceedings related to the registration or validity of patents.

In addition, a waiver of immunity is recognised and enforceable in Portugal. Although there is no specific national act or international convention entered into by Portugal in this regard, Portuguese law gives immunity from jurisdiction of the Portuguese courts to sovereign states (and to other public entities) by virtue of a general principle of customary international law. State immunity is, however, given a strict extent and is limited to acts involving the exercise of sovereign authority.

15 International Arbitration

15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?

Major project contracts typically provide that the parties shall resort to arbitration for the resolution of disputes. Where international contractors are involved, the parties often choose to apply the 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").

International arbitration clauses are widely recognised by Portuguese courts irrespective of the choice of the parties to locate the seat of the arbitration in Portugal or abroad. At the enforcement stage, the decree of enforceability of an arbitral award is likely to vary greatly depending on the applicable legal regime. An international arbitral award rendered in Portugal is immediately enforceable in Portuguese territory under the rules of the Portuguese Arbitration Act and of the Portuguese Code of Civil Procedure. Foreign arbitral awards are recognised and enforced in Portugal under the applicable international treaty or bilateral agreement (see question 15.2 below), generally under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention").

Foreign arbitral awards that are not covered by any of these international treaties may still be recognised and enforced in Portugal under the general provisions of the Portuguese Arbitration Act, which were greatly influenced by the UNCITRAL Model Law and by the New York Convention.

15.2 Is your jurisdiction a contracting state to the New York Convention or other prominent dispute resolution conventions?

In the context of international arbitration, Portugal is a party to the following international conventions:

(a) the Geneva Protocol on Arbitration Clauses of 1923;
(b) the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927;
(c) the New York Convention, which entered into force in Portugal on 16 January 1995;
(d) the Inter-American Convention on International Commercial Arbitration, adopted in Panama on 30 January 1975; and
(e) 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.

On a bilateral level, Portugal has signed Judiciary Cooperation Agreements with Guinea-Bissau, Mozambique, Angola, São Tomé and Príncipe, the Special Administrative Region of Macao (People's Republic of China) and Cape Verde. These bilateral agreements entered into between Portugal and other Portuguese-speaking countries equate arbitral awards to national courts' judgments and subject both decisions to the same legal regime.

15.3 Are any types of disputes not arbitrable under local law?

Unless the matter is subject to the exclusive jurisdiction of national courts (e.g. criminal or insolvency disputes and certain disputes with state entities) or to compulsory arbitration (see question 15.4 below), any dispute involving an economic interest is arbitrable. Portuguese law also extends arbitrability to non-pecuniary rights under which the parties can enter into agreements.

Only a few types of disputes, namely some disputes related to insolvency proceedings, are subject to the exclusive jurisdiction of national courts and thus considered non-arbitrable.

15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

Disputes concerning collective labour rights and sports regulation are subject to mandatory domestic arbitration.

16 Change of Law / Political Risk

16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

Although it is common in project finance deals to have direct agreements with the government (in particular, in its capacity as grantor in a concession contract), those agreements are normally designed to address step-in rights of financial institutions and do not provide any particular political risk protections.

Change-in-law risk is normally addressed by contract in the standard terms for international project finance deals.

17 Tax

17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Under certain circumstances (e.g. interest paid to financial institutions), withholding tax on interest payments may be waived.

Under the EU Interest and Royalties Directive and since 1 July 2013, no withholding tax is due on interest payments made by resident companies, provided the following conditions are met: (i) the paying and beneficiary entities are subject to (and not exempt from) corporate tax and take one of the legal forms listed in the annex of this directive; (ii) both entities are considered EU residents for the purposes of double tax treaties; (iii) a direct 25% shareholding is held by one of the companies in the other's capital, or both are sister companies (i.e. are both held, in at least 25%, by the same direct shareholder and in either case the shareholding must be held for at least a two-year period); and (iv) the entity receiving the interest payment should be its effective beneficiary. Under the provisions of the double tax treaties signed by Portugal, the domestic withholding tax rates foreseen for interest payments can be reduced to rates ranging from 5% to 15% (no withholding applies in the case of long-term loans extended by US banking or financial institutions).

Withholding tax may apply depending on the taxable construction of the claim under the guarantee.

17.2 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 tax regimes aimed at fostering investment, particularly foreign investment. These comprise tax incentives to investment made in Portugal in specific business sectors (e.g. the mining and manufacturing industry), such as (i) CIT deductions or tax credits, and (ii) exemptions or reductions in Real Estate Tax, Real Estate Transfer Tax and Stamp Duty.

The tax exposure of a foreign investment in Portugal will depend on how such investment is structured (e.g. if it involves a direct presence in Portugal or not). For instance, if such foreign investment is made through a local subsidiary, this affiliate will be subject to the taxes which are typically applicable to national companies; namely (among others), CIT, VAT, Stamp Duty and property taxes.

Loans, mortgages and other security documents may be subject to Stamp Duty in Portugal, at rates that vary between

0.04% per month or fractions thereof up to 0.6% (one-off), depending on the maturity of the loan or the term of the guarantee, as applicable. Interest payments and financial fees also attract Stamp Duty at the rate of 0.4%.

The current Stamp Duty Code provides for exemptions applicable to certain loans (e.g. shareholders' loans, under certain conditions) and guarantees (e.g. those granted to financial or credit institutions, under certain conditions).

18 Other Matters

18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in your jurisdiction?

In general, the most relevant issues have been addressed.

18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.

In general terms, bonds may only be issued by limited liability companies incorporated in Portugal whose share capital is paid up in full and which have been registered with the relevant Commercial Registry Office for at least one year. This requirement may be waived if the issuer makes available to investors financial information on the company, with reference to a date not later than three months prior to the issue date, audited by an independent auditor, registered with the Portuguese Securities Market Commission, and prepared in accordance with the applicable accounting rules.

In accordance with new legislation published in February 2015, a company may only issue bonds if, after the issuance, it has a ratio of financial autonomy equal to or higher than 35%, to be calculated in accordance with a certain legally set formula. This limit does not apply to (i) companies listed on a regulated market, (ii) companies enjoying a credit rating or bond issues enjoying a credit ratio attributed by a rating agency registered with the European Securities and Markets Authority ("ESMA") or with the Portuguese central bank (*Banco de Portugal*), (iii) issuances the repayment of which is specially secured in favour of the bondholders, (iv) bond issues with a nominal or subscription amount equal to or higher than €100,000, or (v) issuances subscribed by qualified investors (and without subsequent placement to non-qualified investors).

19 Islamic Finance

19.1 Explain how *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in your jurisdiction.

To the best of our knowledge, there is no experience of Islamic project finance in Portugal, nor are there any finance instruments structured in accordance with Islamic law in the Portuguese financial sector.

19.2 In what circumstances may *Shari'ah* law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of *Shari'ah* or the conflict of *Shari'ah* and local law relevant to the finance sector?

See question 19.1 above.

19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in your jurisdiction? If so, what steps could be taken to mitigate this risk?

The inclusion of interest payment obligations in a loan agreement is common practice and fully valid and enforceable in Portugal.

Although civil law foresees maximum rates of interest, those provisions are not applicable to loans provided by financial institutions in relation to which only very specific limitations (e.g. for consumer credit or a surplus interest rate for overdue amounts) may apply.

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