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Project Finance 2021

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Lexology Getting The Deal Through is delighted to publish the fourteenth edition of *Project Finance*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Covid-19 force majeure provisions in project contracts.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Aled Davies of Milbank LLP, for his continued assistance with this volume.



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Contents

| | | | |
|--|-----------|---|------------|
| Global overview | 3 | Kenya | 70 |
| Aled Davies Milbank LLP | | Christine Oseko, Manzi M Asimwe and Loice B Erambo Oseko & Ouma LLP | |
| Covid-19: force majeure provisions in project contracts | 6 | Mexico | 79 |
| Aled Davies and Justen Fleming Milbank LLP | | Rogelio López-Velarde and Amanda Valdez Dentons | |
| Angola | 9 | Myanmar | 88 |
| Irina Neves Ferreira, João Francisco Cunha and Frederico de Távora Pedro ALC Advogados | | Khin Cho Kyi, Takeshi Mukawa and Nirmalan Amirthanesan Myanmar Legal MHM Limited | |
| Australia | 16 | Nepal | 96 |
| Ben Farnsworth and Michael Ryan Allens | | Anjan Neupane Neupane Law Associates | |
| China | 24 | Panama | 103 |
| Charles Wu Gao Kai Law Firm | | Erika Villarreal Zorita Anzola Robles & Asociados | |
| Cyprus | 33 | Portugal | 111 |
| Stella Strati and Stylianos Trillides Patrikios Pavlou & Associates LLC | | Teresa Empis Falcão and Ana Luís de Sousa VdA | |
| Dominican Republic | 40 | South Korea | 118 |
| Fabio J Guzmán Saladín, Alfredo A Guzmán Saladín and Alberto Reyes-Báez Guzmán Ariza | | Michael Chang, Sang-Hyun Lee, Mikkeli Han, Seok Choi and Na Yu Shin & Kim | |
| Germany | 49 | Switzerland | 126 |
| Alexander M Wojtek, Henner M Puppel, Richard Happ and Tim Rauschnig Luther Rechtsanwaltsgesellschaft | | Thiemo Sturny and Roger Ammann Walder Wyss | |
| Italy | 55 | Thailand | 133 |
| Giovanni Scirocco Legance – Avvocati Associati | | Jessada Sawatdipong, Kobkul Trakulkoed and Sarunporn Chaianant Chandler MHM Limited | |
| Japan | 61 | United Kingdom | 142 |
| Naoaki Eguchi, Pierre Chiasson and Kosuke Suzuki Baker McKenzie | | Mark Richards, Alexander Hadrill and Helen Miller Bryan Cave Leighton Paisner (BCLP) | |
| | | United States | 157 |
| | | Armando Rivera Jacobo White & Case LLP | |

Portugal

Teresa Empis Falcão and Ana Luís de Sousa

VdA

CREATING COLLATERAL SECURITY PACKAGES

Types of collateral

1 | What types of collateral and security interests are available?

Under Portuguese law, various types of security and collateral may be given to secure loans, notably mortgages on real estate and certain movable assets subject to registration (such as automobiles, ships and planes), and pledges on movable assets in general, including equipment, receivables, bank accounts, credits, deposits and shares (including new shares to be acquired). It is then possible to create security over different assets through a single security agreement.

The law generally requires the secured assets to be determined (although security on future assets and credits may be permitted in specific situations) and the concept of floating charge does not apply under Portuguese law. As an exception to those principles, the 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.

Collateral perfecting

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

Immovable and movable assets

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

The law permits mortgages to cover fixtures (buildings, plants and machinery) not incorporated into the relevant property at the time of creation of security, a legal mechanism commonly used in the context of project financing of industrial premises (eg, factories, power stations). The creation of said security interests over plant and machinery may be made by means of a specific type of mortgage - the 'factory mortgage' - which covers the property and surface rights over the land and buildings where the factory is located, the equipment and the movable assets used in the factory's activity, which are identified in an inventory attached to the mortgage deed.

Pledges are the form of security interest entitling the beneficiary to be paid from the proceeds of sale of movable (non-registered) assets or of credits. Pledges must generally be executed in writing and require the pledgor to make available to the beneficiary the relevant asset (transfer

of possession, an exception being made to movable assets pledged in favour of banks under documents authenticated by a notary) or the documents enabling the beneficiary (or a relevant third party) to sell the asset or enforce the credit.

Receivables

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

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

Bank accounts

There may be a pledge over cash deposited in bank accounts, which also qualifies as a pledge of credits. This is typically achieved through financial pledges (ie, those created in accordance with the financial collateral regime (Decree Law 105/2004, of 8 May, as amended, which implemented the Directive on Financial Collateral Arrangements into Portuguese law)), which allow the beneficiary to use and dispose of the deposited funds.

Shares

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

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

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

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

Subjective exemptions may also apply, notably in relation to loans granted by or security granted to institutions such as the European Investment Bank.

Assuring absence of liens

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

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

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

Enforcing collateral rights

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

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

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

Enforcing collateral rights following bankruptcy

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

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

The insolvency order from the court has the effect of suspending outstanding executory proceedings directed at the attachment or seizure of the insolvent's assets and preventing the enforcement of

security (and any new executory proceedings) against the insolvent estate. Accordingly, once initiated, all creditors must claim their credits (and provide evidence of any security as collateral therefor) within the bankruptcy proceedings.

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

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

- employees' claims over the specific company premises where they carry out their activity;
- property taxes;
- secured claims (those with security over assets that are part of the insolvent estate up to the value of those assets);
- preferential claims, including:
 - 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;
 - certain debts to the tax and social security authorities;
 - claims by creditors that have provided capital to finance the insolvent's activity during the PER procedure over all movable assets of the insolvent; and
 - claims by the party that applied for the opening of the insolvency proceedings;
- unsecured claims; and
- subordinated claims (eg, the credits of related parties). Bankruptcy proceedings are generally applicable to all persons or legal entities, with the exception of the Republic of Portugal and public or administrative entities and companies. In addition, insurance companies, credit institutions and other financial corporations are subject to specific insolvency rules (and not to the CIRE).

No different rules apply to domestic or foreign creditors.

FOREIGN EXCHANGE AND WITHHOLDING TAX ISSUES

Restrictions, controls, fees and taxes

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

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

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

Investment returns

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

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

relation to loans and financial fees also attract stamp duty at a rate of 4 per cent.

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

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

No stamp duty or withholding tax apply in relation to interest payments made in respect of the bonds registered with the Portuguese central securities depository (Interbolsa) to bondholders who are not Portuguese residents and do not have a permanent establishment in Portugal.

Foreign earnings

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

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

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

Yes.

FOREIGN INVESTMENT ISSUES

Investment restrictions

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

Under Portuguese law, certain activities may only be exercised by private entities - whether national or foreign - pursuant to licencing or concessions granted by the state (as is the case of certain activities within the energy, water, waste management, postal services, telecoms, railways, commercial aviation and financial services sectors).

A specific framework is set forth with respect to strategic assets which allows the Council of Ministers to oppose to transactions that may lead to the acquisition of control, direct or indirect, by a person or persons of a country outside the European Union and of the European Economic Area, to the extent that such transactions may put into question the defence and national security, or the Country's security of supply of services that are fundamental for the national interest.

Portugal abides by the Law on Money Laundering and the Financing of Terrorism, which transposed the EU Money Laundering Regulations into Portuguese law, which may entail further restrictions to both national and foreign investors. There may also be temporary embargo situations applying to persons or entities from non-EU states.

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

Insurance restrictions

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

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

Worker restrictions

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

The employment of workers from non-EU countries requires that such workers be granted a work visa, which includes a residence permit, to live and work in Portugal.

Equipment restrictions

13 | **What restrictions exist on the importation of project equipment?**

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

Nationalisation laws

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

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

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

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 is no distinction between domestic and foreign investors for this purpose.

FISCAL TREATMENT OF FOREIGN INVESTMENT

Incentives

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

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

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

Transactions made without a local presence will generally trigger payment of withholding tax on income and dividends.

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

GOVERNMENT AUTHORITIES

Relevant authorities

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

The ministers entrusted with the supervision of the relevant sectors (energy, infrastructure, transport, health) are in general responsible for the initiative as well as for licensing and regulating of projects in the sectors under their supervision. This may be done by the specific departments or agencies functioning under the relevant ministries (energy, roads, health, etc). The involvement of the Minister of Finance is also required for the launch of any PPP project.

Moreover, 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.

In addition to the governmental authorities, the independent regulatory authorities for each specific sector (eg, the *Entidade Reguladora dos Serviços Energéticos*, the *Autoridade Nacional de Comunicações*, the *Entidade Reguladora dos Serviços de Águas e Resíduos* and the *Autoridade da Mobilidade e dos Transportes*) are invested with regulatory and supervisory powers over the respective sectors, notably responsible for enforcing the applicable rules and regulations and monitoring the development of each respective sector, both in dealing with private companies acting therein and with consumers.

REGULATION OF NATURAL RESOURCES

Titles

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

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

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

Royalties and taxes

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

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

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

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

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

Export restrictions

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

The extraction of oil (but not of natural gas) is subject to a specific taxation regime, also including the payment of fees on prospecting, research and production oil concessions, calculated by reference to the relevant concession area. Excise duties also apply on the supply of petroleum and energy products to final consumers, in line with EU legislation. With regard to mining resources, there are no general rules concerning royalties payable to the state. Royalties are, nevertheless, typically negotiated and included in prospecting and exploitation agreements, and they may be either excise- or profit-based. The extraction or export of natural resources may also be subject to the general taxes applicable within the tax system; namely corporate income tax and value added tax.

LEGAL ISSUES OF GENERAL APPLICATION

Government permission

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

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

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

In this respect, reference should be made to the *Unidade Técnica de Acompanhamento de Projetos (UTAP)*.

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

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

Registration of financing

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

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

To ensure a swift enforcement of a private agreement acknowledging a payment obligation, or the appropriation of a commercial pledge created pursuant to the recently enacted Decree Law 75/2017, of 26 June of 2017, it is advisable to have the same authenticated by a notary.

Arbitration awards

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

International arbitration clauses are generally recognised by Portuguese courts, irrespective of the rules applying - Portuguese arbitration law or the commonly chosen rules of international centres such as the International Chamber of Commerce, the London Court of International Arbitration and the Rules of Arbitration of the United Nations Commission on International Trade Law (UNCITRAL) - or of the seat of arbitration. Foreign arbitral awards are recognised and enforced in Portugal under the applicable international treaty (see below) or generally under the New York Convention.

Portugal is a party to the following international conventions:

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

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

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

Law governing agreements

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

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

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

Submission to foreign jurisdiction

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

The parties may freely choose to submit any disputes to a foreign jurisdiction. However, disputes concerning collective labour rights and sports regulation are subject to mandatory domestic arbitration (Decree Law 110/2018, of 10 December 2018, which altered the Code of Industrial Property, as well as Law 62/2011, of 12 December 2011, and, consequently, intellectual property rights related to medicines are now subject to voluntary arbitration, not mandatory arbitration).

ENVIRONMENTAL, HEALTH AND SAFETY LAWS

Applicable regulations

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

There is specific legislation for PPPs in the health sector (Decree Law 185/2002, of 20 August 2002, which was heavily amended by Decree Law 111/2012, of 23 May 2012).

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

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

There is an independent regulatory authorities for each specific sector: the Energy Services Regulator (*Entidade Reguladora dos Serviços Energéticos*), the National Authority for Communications (*Autoridade Nacional de Comunicações*), the Water and Waste Services Regulation Authority (*Entidade Reguladora dos Serviços de Águas e Resíduos*) and the Authority for Mobility and Transportation (*Autoridade da Mobilidade e dos Transportes*).

PROJECT COMPANIES

Principal business structures

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

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

PUBLIC-PRIVATE PARTNERSHIP LEGISLATION

Applicable legislation

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

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

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

PPP - LIMITATIONS

Legal limitations

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

The principles and procedures set out in the above-mentioned Decree Law 111/2012, of 23 May 2012, shall govern the relationship of the state with the private sector in these agreements.

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

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

PPP - TRANSACTIONS

Significant transactions

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

The most relevant PPP or project-related deals completed recently that are worth mentioning (both by size and relevance in this context) were the following:

- 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;
- the EIB financing of a project comprising the development, construction, implementation, operation and maintenance of a 25MW offshore floating wind technology in Portugal;
- the financing, construction and implementation of Europe's largest microalgae production unit located in Portugal (Póvoa de Santa Iria), thus leading Portugal to become part of an innovative European microalgae-biofuel FP7 demonstration project (project Biofat);
- the financing of 40 photovoltaic small-scale generation units, including several regulatory and real estate matters, which, due to the size and specificities of the project of each production unit, had led the project to be structured in such a way that carves out mechanisms to prevent contamination of projects and allow for long-term flexibility and solidity;
- the refinancing by an international syndicate of banks (including commercial banks and EIB) of the debt in the amount of approximately €240 million of six port operators, owned by the same shareholder;
- the financing of a 25MW photovoltaic project, based on a 'corporate PPA' logic. It was the first bank financing of a renewable energy project in the Iberian Peninsula with no guaranteed remuneration (feed-in tariff);
- the 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; and
- 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.

UPDATE & TRENDS

Key developments of the past year

30 | In addition to the above, are there any emerging trends or 'hot topics' in project finance in your jurisdiction?

Refinancings have been the main trend in the Portuguese market in the past year, particularly in the energy sector – the refinancing of the second largest renewable energy generator in Portugal having reached financial close in the first semester of 2019.

We have also continued to witness an ever-growing interest for refinancings with recourse to the issuance of bonds, green loans and sustainable finance – with the so-called Taxonomy Regulation likely to rise to prominence soon in future financings.

The activity in secondary market of participations in project companies continues to increase with the original shareholders, such as construction companies, seeking to sell their shares to free up equity to invest in their core business or in other projects in different jurisdictions. Short-term investors such as investment funds also continue to become increasingly more active in the market, replacing to a certain extent the more traditional banking syndicates and investors.

We would also highlight the 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 the new capacity auctions, which

have been launched in the first semester of 2020. Besides green loans and sustainable finance, mobility projects are also expected to bring new financing opportunities.

Coronavirus

31 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

In the context of the covid-19 pandemic, a significant number of legislative changes have been enacted, of which we highlight the creation of a specific moratorium for bank loans and an exceptional regime for financial rebalance in long-term contracts and limitation of non-contractual liability of the Portuguese state under these circumstances.

Other changes enacted so far at sector-specific levels (eg, supply of essential goods and services) aim at ensuring the protection of consumers during the pandemic and in its financial aftermath.

Moratorium

The moratorium regime was enacted pursuant to Decree Law no. 10-J/2020, of 26 March, which sets out certain exception measures seeking to mitigate the economic and financial impact of a reduction in the economic activity caused by the covid-19 pandemic, chiefly by postponing payment obligations towards financial institutions so that the persons and legal entities benefitting from this exceptional regime retain a liquidity buffer to maintain their businesses in operation.

It applies to any debtor headquartered and carrying its economic activity in Portugal, subject to it being neither in default for longer than 90 days nor in an insolvency situation, suspension or cessation of payments or already subject to enforcement actions by the relevant creditors.

This regime foresees the following three exceptional measures:

- a prohibition of revocation, whether in whole or in part, of credit lines and loans from 27 March 2020 and until 30 September 2020;
- for credit or loan agreements which repayment was set to be made at the end of the contract (bullet loans), a time extension for repayment equivalent to the duration of the regime for payments of principal and interest; and
- for credit or loan agreements which repayment was set to be made in instalments, the suspension of such payments for a period equal to the duration of this regime, effectively extending the contractual repayment schedule.

Credits covered under this moratorium regime are not classified as being in default or in forbearance.

As it currently stands, this regime will be in force until 31 March 2021.

Exceptional regime for financial rebalance in long-term contracts and limitation of the non-contractual liability of the Portuguese state

This exceptional regime was enacted pursuant to Decree Law no. 19-A/2020 of 30 April 2020, which sets out a temporary regime for the financial rebalance in long-term contracts to which a public entity is a party (including PPPs) and exceptional limitations to the state non-contractual liability. This regime determines, inter alia:

- the suspension of any clauses and legal provisions that set out the right to financial rebalance or to a compensation for loss of revenues from 3 April 2020 (first renewal of the state of emergency in Portugal) to 2 May 2020 (expiry of the state of emergency in



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Portugal), preventing private parties from relying on such clauses and provisions in respect of any events that occurred during such period; and

- that for events occurring after 2 May 2020 and whenever the contracts expressly allow for the private party to claim for financial rebalance on the grounds of any loss of revenues or the occurrence of a pandemic, the compensation for such rebalance can only be achieved with the extension of the deadline for the performance of the relevant contractual obligations or the extension of the term of the contract, eliminating the right of the private party to adjust prices or to receive other financial compensations from the public party.

The exercise of any rights to financial rebalance regarding events occurred before 3 April 2020 is not limited by this regime.

This exceptional regime further sets aside any non-contractual liability of the state (as compensation for sacrifice) for damages caused by acts of the state or any other public entity aimed at preventing and fighting the covid-19 pandemic, provided that those acts are duly performed within the scope of the powers vested by public health legislation or as part of the emergency state.

This piece of legislation will remain in force for as long as the World Health Organization qualifies the covid-19 disease as a pandemic.

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