
THE
PROJECTS AND
CONSTRUCTION
REVIEW

FOURTH EDITION

EDITOR
JÚLIO CÉSAR BUENO

LAW BUSINESS RESEARCH

THE PROJECTS AND CONSTRUCTION REVIEW

The Projects and Construction Review

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THE
PROJECTS AND
CONSTRUCTION
REVIEW

Fourth Edition

Editor
JÚLIO CÉSAR BUENO

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CONTENTS

Editor's Prefacevii
	<i>Júlio César Bueno</i>
Chapter 1	INTERNATIONAL PROJECT FINANCE.....1
	<i>Phillip Fletcher and Andrew Pendleton</i>
Chapter 2	DISPUTE RESOLUTION IN CONSTRUCTION PROJECTS.....13
	<i>Robert S Peckar and Denis Serkin</i>
Chapter 3	RELATIONSHIP CONTRACTING.....23
	<i>Doug Jones</i>
Chapter 4	A GUIDE TO ALTERNATE PROJECT DELIVERY SYSTEMS.....33
	<i>Maurice Masucci, Frank Giunta, and David Price</i>
Chapter 5	STANDARDS FOR THE MEASUREMENT OF LAND AND BUILDINGS.....51
	<i>Alexander Aronsohn, Ben Elder and Marcia Ferrari</i>
Chapter 6	THE NEED FOR INTERNATIONAL CONSTRUCTION MEASUREMENT STANDARDS.....69
	<i>Matthew Saunders and Alan Muse</i>
Chapter 7	ARGENTINA.....80
	<i>Pedro Nicholson</i>
Chapter 8	AUSTRALIA.....91
	<i>Matt Bradbury, Kristen Podagiel, Hayden Bentley, Tim Hanmore, Emma Murray, Liam Davis, Meg Morgan and James Arklay</i>

Chapter 9	AUSTRIA	105
	<i>Alric A Ofenheimer and Michael Strenitz</i>	
Chapter 10	BELGIUM.....	118
	<i>Rony Vermeersch and Diederik De Block</i>	
Chapter 11	BRAZIL	130
	<i>Júlio César Bueno</i>	
Chapter 12	CANADA	152
	<i>Ian Bendell, Andrew Burton, Bruce Darlington, Lana Finney, David Foulds, James Kelsall, Howard Krupat, Elizabeth Mayer and Mitchell Mostyn</i>	
Chapter 13	CHILE.....	167
	<i>Victor Ríos and Carlos Molina</i>	
Chapter 14	CHINA.....	179
	<i>Zhu Maoyuan and Zhang Jiong</i>	
Chapter 15	COLOMBIA.....	194
	<i>Carlos Umaña, María Luisa Porto, César Rodríguez and Juan Martín Estrada</i>	
Chapter 16	DENMARK.....	208
	<i>Peter Wengler-Jørgensen, Maygan Mike Lundgaard and Daniel Hedegaard Nielsen</i>	
Chapter 17	FRANCE	222
	<i>Paul Lignières, Mark Barges, Pierre Guillot and Darko Adamovic</i>	
Chapter 18	GERMANY	232
	<i>Rouven F Bodenheimer and Claus H Lenz</i>	
Chapter 19	INDIA	244
	<i>Dina Wadia and Divyanshu Pandey</i>	

Chapter 20	INDONESIA.....	258
	<i>Darrell R Johnson, Ade B Adamy and Awang F Bahrin</i>	
Chapter 21	IRELAND.....	272
	<i>Conor Owens, Mary Dunne and Michael Kennedy</i>	
Chapter 22	ITALY	284
	<i>Francesco Sanna, Anna Amprimo and Carolina Teresa Arroyo</i>	
Chapter 23	JAPAN	301
	<i>Tetsuya Itoh, Reiji Takahashi and Tetsuro Motoyoshi</i>	
Chapter 24	KOREA.....	313
	<i>Michael Chang, Sang-Hyun Lee and Seung-Gyu Yang</i>	
Chapter 25	MEXICO	324
	<i>Juan Carlos Serra and Francisco Javier González</i>	
Chapter 26	NETHERLANDS	342
	<i>Frédérique Jacobse, Zeeger de Jongh, Werner Runge and Arent van Wassenaer</i>	
Chapter 27	PORTUGAL.....	354
	<i>Manuel Protásio, Teresa Empis Falcão and Frederico Quintela</i>	
Chapter 28	QATAR.....	368
	<i>Andrew Jones, Zaher Nammour and Sarah Stewart</i>	
Chapter 29	SOUTH AFRICA.....	381
	<i>Anton Barnes-Webb, Rob Morson, Lido Fontana and Daryn Webb</i>	
Chapter 30	SPAIN	393
	<i>José Guardo and Alejandro León</i>	
Chapter 31	SWITZERLAND	406
	<i>Thomas Mueller-Tschumi and Francis Nordmann</i>	

Chapter 32	TURKEY	417
	<i>H Ercument Erdem</i>	
Chapter 33	UNITED ARAB EMIRATES.....	429
	<i>Dr Daniel Brawn</i>	
Chapter 34	UNITED KINGDOM.....	443
	<i>David Brynmor Thomas, Alexandra Bodnar and Rebecca Drake</i>	
Chapter 35	UNITED STATES	456
	<i>Carolina Walther-Meade, Karen Wong, Henry Scott and Miguel Duran</i>	
Chapter 36	URUGUAY	478
	<i>Beatriz Spiess</i>	
Chapter 37	VENEZUELA.....	490
	<i>Pedro Ignacio Sosa Mendoza, Pedro Luis Planchart, Verónica Díaz Hernández and Rodrigo Moncho Stefani</i>	
Appendix 1	ABOUT THE AUTHORS.....	503
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS ..	537
Appendix 3	GLOSSARY OF TERMS.....	543

EDITOR'S PREFACE

La meilleure façon d'être actuel, disait mon frère Daniel Villey, est de résister et de réagir contre les vices de son époque. Michel Villey, Critique de la pensée juridique moderne (Dalloz (Paris), 1976).

This book has been structured following years of debates and lectures promoted by the International Construction Law Committee of the International Bar Association (ICP), the American College of Construction Lawyers (ACCL), the Society of Construction Law (SCL), the Dispute Resolution Board Foundation (DRBF) and the American Bar Association's Forum on the Construction Industry (ABA). All of these institutions and associations dedicated themselves to promoting an in-depth analysis of the most important issues related to projects and construction law practice and I thank their leaders and members for their important support in the preparation of this book.

Project financing and construction law are relatively young, highly specialised areas of legal practice. They are intrinsically functional and pragmatic and require the combination of a multitask group of professionals – owners, contractors, bankers, insurers, brokers, architects, engineers, geologists, surveyors, public authorities and lawyers – each bringing their own knowledge and perspective to the table. That is why I am very happy to present you non-lawyers' chapters specifically prepared for the introductory part of this book: 'The Need for International Construction Measurement Standards' by Matthew Saunders and Alan Muse at the Royal Institution of Chartered Surveyors (RICS). Frank Giunta, Maurice Masucci and David Price, senior representatives from Hill International, offer us 'A Guide to Alternate Project Delivery Systems' and Alexander Aronsohn, Ben Elder and Marcia Ferrari, senior representatives from RICS demonstrate some innovative approaches to spatially enabling land administration and management.

These chapters provide further breadth to the variety already produced by Robert S Peckar (Peckar & Abramson), Douglas S Jones (Clayton Utz) and Phillip Fletcher (Milbank, Tweed, Hadley & McCloy LLP), three leading professionals and lecturers in the field of project finance and construction law. Despite living miles away from each other – in the heartlands of the United States (Bob), the United Kingdom (Phillip) and

Australia (Doug) – they have equally influenced the main players in project financing in dealing with the complex issues related to the development and implementation of projects, the negotiation of construction and engineering contracts and the challenges of crafting the perfect financing package.

I am also glad to say that we have contributions from two new jurisdictions in this year's edition: Indonesia and Turkey. Although there is an increased perception that project financing and construction law are global issues, the local flavour offered by leading experts in 31 countries has shown us that in order to understand the world we must first make sense of what happens locally; to further advance our understanding of the law, we must resist the modern view (and vice?) that all that matters is global and what is regional is of no importance. Many thanks to all the authors and their law firms that graciously agreed to participate.

Finally, I dedicate this forth edition of *The Projects and Construction Review* to Dr Kris R Nielsen, PhD, JD, PMP, MRICS, MJSCE, and Dr Sérgio Alfredo Rosa da Silva, professor at the prestigious University of São Paulo Engineering School. Both passed away last year.

I had the honour of working with both of them and it was a remarkable and unique experience to learn how to deal with projects with a global and strategic perspective on risk management and best practices. They spent their career working towards bettering the construction industry and worked tirelessly to promote the areas of law and engineering with a view to their joint futures.¹

Dr Nielsen and Dr Rosa da Silva will be greatly missed.

I look forward to your comments and contributions for the forthcoming editions.

Júlio César Bueno

Pinheiro Neto Advogados

São Paulo

July 2014

1 Dr Nielsen co-edited and authored an important book entitled *Managing Gigaprojects – From Those That Have Been There Done That*, published by ASCE Press in October 2012, which is already considered a classic and a great reference for those working in the field. In the words of his beloved wife Dr Patricia Galloway: 'Dr Nielsen was a global leader in helping contractors and owners to define what makes a successful project. He helped them examine their operations and how to address subjects like risk management, execution, project controls, value engineering, corporate strategy, construction law, dispute resolution, project sustainability, etc. While on assignments, he worked with his clients to help select younger members of their organisation, i.e., to mentor in how to achieve project success. Dr Nielsen derived great satisfaction in knowing there was a growing cadre of people who were learning and then practising their new-found skills while striving for project success.' See www.pegasus-global.com/personnel/.

Chapter 27

PORTUGAL

Manuel Protásio, Teresa Empis Falcão and Frederico Quintela¹

I INTRODUCTION

The sovereign debt crisis and the bailout advanced by the European Union (EU) and the International Monetary Fund (IMF) to Portugal in May 2011 forced the Portuguese government to put in place a severe austerity programme, resulting in a significant drop-off in government funding for investment in public infrastructure.

Concurrently, the existing public-private partnerships (PPPs) became the subject of strong public disapproval, given the heavy burden that payments by the Portuguese state under those projects represented to the national budget, in a context where taxes have increased considerably and social benefits were significantly reduced.

In January 2013, the Portuguese government initiated a negotiation process with the PPP concessionaires with a view to reducing public expenditure in connection therewith. That negotiation process, although well under way, has not yet reached its conclusion.

During this period, construction companies have also experimented with dramatic conditions, essentially due to liquidity constraints and due to the slowdown of the Portuguese construction market in connection with the economic crisis, leading many of those companies to search for new opportunities in foreign markets, particularly in the Portuguese-speaking countries in Africa.

In early 2014, the Portuguese government approved the Strategic Plan for Transport and Infrastructure, which has earmarked a range of infrastructure projects that could have a positive economic impact on Portugal from 2014 to 2020. The priority projects include the modernisation of the Portuguese rail freight sector, the development and increase in capacity of major Portuguese ports, a few projects in the road sector

¹ Manuel Protásio is a partner, Teresa Empis Falcão is of counsel and Frederico Quintela is a managing associate at Vieira de Almeida & Associados, Sociedade de Advogados, RL.

deemed essential to complete the road network, as well as the increase of cargo capacity at the Lisbon Airport.

The execution and financing of such investments – in an amount exceeding €6 billion – together with the improved performance of the Portuguese economy, are expected to give rise to many opportunities in the coming years.

II THE YEAR IN REVIEW

The project finance and PPP business in Portugal has been quiet for the past three years with regard to new deals coming to the market, and all relevant PPP activity during this period was focused on the renegotiation of the road PPP contracts.

With a view to meeting the conditions of the EU-IMF financial assistance programme and following the feasibility assessment of major PPP projects, the Portuguese government set in motion the renegotiation of certain road PPP contracts, by appointing, in December 2012, a renegotiation commission to negotiate the relevant contracts on its behalf.

The main goal of such renegotiation process was to reduce the public expenditure during the life of those contracts so as to bring sustainability to the Portuguese road sector. To this end, some development projects were reduced in their scope, permitting savings not only in the construction works and associated capital and financing costs, but also in operation and maintenance spending in the future.

Moreover, in relation to the projects already completed, the renegotiation process encompassed the reduction of service requirements and availability payments and, in one specific case, the replacement of availability payments with a traffic risk-based regime together with a minimum revenue assured by the contracting authority to the extent required to service debt under the financing contracts. Renegotiated contracts will also contemplate a set-off mechanism against toll revenues for the benefit of the concessionaires and an upside-sharing mechanism to encourage concessionaires to promote traffic in their concessions.

Those amendments to the concession contracts, taken together, represent a substantial modification to the original risk allocation between the contracting authority and the road project companies.

The renegotiation process was completed in 2013 in relation to most of the road concessions included in the renegotiation package, although still pending lenders' approval and the formal amendment of the concession contracts. There are, however, two road concessions whose renegotiation is still ongoing, with the final results expected shortly. More recently, the Portuguese government has also appointed negotiation commissions to renegotiate the urban rail PPP contracts and the port terminal concession contracts.

With respect to the construction industry, it is worth mentioning that, in March 2013, the Portuguese government and the Portuguese Construction and Real Estate Confederation (CPCI), representing the Portuguese construction companies, signed the 'Commitment towards Sustainable Competitiveness of the Construction and Real Estate Sectors' with the aim of (1) creating new jobs and skills, (2) improving access to funds and promoting private investment, (3) promoting urban regeneration and the real state lease market, and (4) supporting environmental sustainability in the sector.

This Commitment includes a list of support measures to relaunch and stimulate competitiveness in the construction and real estate sectors, such as (1) changes to the release mechanism of performance bonds, (2) a new legal regime applicable to real estate brokers, (3) an exceptional and temporary regime for urban regeneration works mainly for housing purposes, (4) exceptional and temporary rules regarding the criteria for setting what are ‘abnormally low prices’ for public works contracts, and (5) the enactment of a Portuguese Technical Building Code in order to harmonise several acts into a single piece of legislation.

Many of the announced measures of competitiveness have already been completed while others are still in progress. Among the former, we should highlight the exceptional and temporary (seven-year) regime for urban regeneration works approved by the government in February 2014, which applies mainly to buildings or flats for housing purposes either 30 years old or more or located in urban regeneration areas, simplifying procedures and requirements (Decree Law 53/2014 of 8 April 2014). The execution of the Commitment is monitored by the Construction and Real Estate Institute (InCI).

III DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

Other than the power projects (where one can come across with the build-own-operate-transfer (BOOT) model), most project finance deals closed to date in Portugal are based on concessions granted by a governmental authority or a municipality and typically follow a build-operate-transfer (BOT) or design-build-finance-operate (DBFO) structure. There is no precedent in Portugal of project financings making use of a build-operate-lease (BOL) structure.

The Companies Code contemplates two forms of limited liability companies that may be used for the purpose of developing projects in Portugal. Those corporate forms are the *sociedade anónima* (SA) and the *sociedade por quotas*.

The SA is the type of company typically chosen, the rationale being the fact that an SA has a more complex management structure and decision-making mechanism (compared with a *sociedade por quotas*) and is generally subject to more stringent corporate governance requirements – both as to management and auditing of their activities – which is generally seen as ensuring a higher level of transparency and allowing a stronger degree of control of the activities of the project company by the stakeholders.

Other important features of SAs are the perceived higher liquidity of their equity participations (shares) when compared with that of *sociedades por quotas*, due to the less restrictive transfer formalities to which they are subject and their ability to raise funds in the capital markets.

With respect to the construction contractor, the corporate form generally used where the same is formed by a group of construction companies is the *agrupamento complementar de empresas* (ACE). The ACE is a joint and several joint venture incorporated and registered with the commercial registry and subject to a specific legal regime.

ii Documentation

The underlying contractual framework of a project finance transaction in Portugal traditionally includes a concession contract or a licence giving the project company the right to carry out the project, a shareholders' agreement to regulate the relationship between the sponsors/project company's shareholders and an equity subscription agreement, a set of finance documents and certain major commercial contracts.

The finance package usually comprises a commercial bank credit agreement (as well as a European Investment Bank (EIB) credit agreement and an intercreditor agreement whenever the EIB is also providing finance to the project), an accounts agreement, a forecasting agreement, security documents and direct agreements between the lenders and the contracting authority and the major project parties, all in a form consistent with international market standards.

Among the major commercial contracts, there is typically a construction contract and an operation and maintenance contract. Supply agreements and sales agreements may also be entered into in connection with the project.

In relation to the project financings closed in Portugal in the 1990s and early 2000s, it was generally accepted that, given the need to adapt the legal structure of the facility agreements to international syndication, the whole financing package other than the security documents had to be governed by English law, while the project documents, notably the concession contract, were subject to Portuguese law. That ceased to be the case from the mid-2000s onwards, at which point the project financiers active in Portugal had become sufficiently comfortable with the Portuguese law and, therefore, most finance documents executed thereafter are governed by Portuguese law, notwithstanding closely following the structure of a typical English law project finance documentation package.

iii Delivery methods and standard forms

In the vast majority of the Portuguese project finance transactions closed to date, the concession-based construction contracts used do not follow any standard form, such as those issued by the International Federation of Consulting Engineers (FIDIC), the Joint Contracts Tribunal (JCT) or the Institution of Civil Engineers (ICE). Hence, the form of construction contract used in each case has varied depending on the sector of industry at stake or the sponsors involved.

The standard forms of construction contracts issued by the FIDIC or adjusted FIDIC-based contracts have, however, been used in Portugal for large power (including renewable) project deals where the contractor is a foreign entity.

It is worth noting, however, that, due to the crisis, Portuguese construction companies turned their attention to developing markets in Africa, in particular to the Portuguese-speaking countries, where the contractual forms issued by FIDIC prove to be important as contractual guidelines for foreign investors.

IV RISK ALLOCATION AND MANAGEMENT

i Management of risks

The concession contract allocates the relevant project risks between the contracting authority and the project company. The risks that remain with the contracting authority

are covered by the so-called financial balance mechanism, which is a key concept in all concession-based project finance transactions in Portugal.

If a financial balance event arises causing a deterioration in the levels of the project ratios, the contracting authority agrees to compensate the project company with a view to restore the financial balance of the concession. Typical financial balance events include unilateral variations by the contracting authority, force majeure events, specific change of law and construction delays caused by the contracting authority.

Traditionally, archaeological and ground risks were borne by the contracting authority. That was, however, not the case in the PPP1 Poceirão-Caia high-speed rail project closed in May 2010 (which was cancelled, as part as the austerity-led review of PPPs), and in the PPP hospital projects, where that risk was partially assumed by the project company and transferred by the latter to the contractor.

The project company generally passes on to the contractor all design and construction obligations, liabilities and risks under a construction contract which is fully back-to-back with the concession contract.

The contractor usually undertakes to perform the design and construction obligations on a turnkey and fixed-price basis and, hence, it bears the risk of price escalation of the material, equipment or workers. In some cases, the contractor is allowed to revise the price annually to reflect inflation.

Other risks that are transferred by the project company to the contractor under a classic concession-based construction contract include the delay and completion of the works, approval risk, expropriation (where the cost and delivery risk is passed on to the project company by the contracting authority), the risk of damage to the works and defects during the defects liability period.

The risks generally covered by the financial balance under the concession contract do not entitle the contractor to suspend the works or in any way relieve the contractor of its obligations under the construction contract. The contractor shall, however, be entitled to compensation in accordance with the 'back-to-back, if and when' principle, (i.e., the contractor will only receive compensation for any of the relevant events to the extent the project company is compensated for those same events under the concession contract).

ii Limitation of liability

Under general Portuguese law, the contractor is liable to the project company for the breach of its obligations under the construction contract. All damages caused by such breach must be compensated, including all direct damages and loss of profit but excluding indirect or consequential damages.

Portuguese law expressly forbids prior general waivers of the right to compensation (although specific waivers after the occurrence of the fact giving rise to the right to compensation are permitted). It is possible, however, for the parties to agree an amount of liquidated damages for breach of obligations, provided that it represents a reasonable estimate of the damages that may result of such breach. Caps on liability are also generally admitted by most Portuguese scholars.

Portuguese project contractors historically have had unlimited liability under the respective contracts. In recent years, liability caps have been introduced in construction contracts in line with the commercial practices in other countries.

In contracts where a liability cap is foreseen, the same is often equivalent to the contract price and, since no restrictions are made to the type of damages that are considered for compensation purposes, the relevant legal provisions will apply. In recent projects, contractors have successfully demanded the introduction of tighter liability caps and the exclusion of loss of profit suffered by the project company.

iii Political risks

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.

Public interest may also constitute grounds for termination of the concession contract by the contracting authority, in which case the contracting authority shall compensate the project company for all the damages caused (which may include loss of profit). The construction contractor may also be compensated under the back-to-back principle. Some concession contracts set out the method for calculating the damages incurred by the project company in case of termination by reason of public interest. Such calculation usually takes into account the status of construction.

Other political risks, such as war, civil disturbance or strikes may be considered as events of force majeure and, therefore, the project company shall be relieved from its obligations under the concession contract to the extent affected by the relevant event of force majeure. Force majeure events may trigger the financial balance mechanism and, hence, the project company (and consequently, the construction contractor) shall be compensated. In case of prolonged force majeure or if the restoration of the financial balance of the concession proves too onerous, the concession contract may be terminated.

Changes in law may also be treated as a political risk. Only a specific change in law entitles the project company to financial balance. The risk of change in general law is typically assumed by the project company.

V SECURITY AND COLLATERAL

The two main types of security that can be created under Portuguese law are mortgages and pledges. Mortgages will entitle the beneficiary, in the event of a default, to be paid with preference to non-secured creditors from the proceeds of the sale of immovable assets or rights relating thereto or of moveable assets subject to registration (such as automobiles, ships, planes). Pledges will confer similar rights to those created by the mortgages but are created in respect of moveable (non-registered) assets or credits. Portuguese law does not recognise the concept of a floating charge.

Portuguese law does not permit the creation of security over future assets and, therefore, promissory agreements and assignments in security are entered into to overcome this hurdle. However, since Portuguese law does not recognise the concept of assignment by way of security as existing in most (if not all) common law jurisdictions, the instrument used is a true assignment of rights, with the occurrence of an event of default being either a condition precedent or a termination event, depending on the bargaining power of the borrower and sponsors (as applicable).

Also, Portuguese law does not allow for remedies other than outright sale, other than in the case of financial pledges where appropriation of financial collateral is permitted on enforcement of the pledge, provided that the parties have agreed a commercially reasonable mechanism for evaluating the price. Financial pledges may be granted over cash on bank accounts or financial instruments (including shares but not quotas in Portuguese limited liability companies) and, more recently, credits over third parties.

Portuguese project finance documentation generally includes direct agreements between the lenders and the contracting authority and the lenders and any major contractors. All direct agreements contemplate step-in rights in favour of lenders, which may be exercised upon the occurrence of certain events: default of the concessionaire under the underlying contracts and, in certain cases, default of the concessionaire under the finance documents.

The creation of security interests over assets located in Portugal (including share pledges) attracts stamp duty, levied on the secured amount. Stamp duty shall not be payable in the case of security interests that are ancillary and created simultaneously (even if contained in a separate notarial deed or agreement) to a loan provided that the loan has already been subject to a similar taxation (no duplication of tax applies).

Shareholders are generally required to provide on-demand bank guarantees in order to guarantee their equity subscription and other funding obligations. Standby equity commitments to fund general investment, operational costs overruns or loss of revenues are often also supported by on-demand bank guarantees.

In health sector PPPs, the shareholders have been requested to provide a corporate guarantee to guarantee, in the proportion of their shareholding in each project company (the ClinicCo and the InfraCo) and up to a certain amount, any lack of funds in the project and breach of the obligations of the project company.

VI BONDS AND INSURANCE

In Portuguese projects, the contractor is usually required to provide a performance bond to ensure the fulfilment of its obligations. In concession-based projects, not only the concessionaire has to provide such performance bond under the concession contract but also the construction contractor and the operations and maintenance (O&M) contractor have to deliver performance bonds under the respective agreements. Most frequently, performance bonds are provided by means of irrevocable on-demand bank guarantees.

In addition, concession contracts foresee the obligation of the project company to insure the works for their reinstatement value. That insurance obligation is commonly transferred to the contractor under the construction contract to the extent that the insurance relates to the activities performed thereunder. Alternatively, the contractor may partially bear the costs of the insurance policies taken out by the project company.

Any parties who are responsible for the design of the works (including contractors who are engaged under design contracts) will be expected to maintain professional indemnity insurance in respect of their design liabilities.

The use of project bonds or monoline structures to finance projects in Portugal is not common practice and the bond refinancing of SCUT do Algarve shadow toll road project, in 2001, is the only known successful precedent.

In August 2012, a new provisional legal regime entered into force allowing for an early phased release of performance bonds provided by contractors and subcontractors under public works agreements, to apply to agreements already in place and to those to be entered into until 1 July 2016. The contractors and subcontractors may obtain such release one year from provisional reception of the works if an inspection confirms that there are no defects for which the contractors or the subcontractors are responsible. A further review of the performance bonds releasing mechanism has been announced by the Portuguese government.

VII ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

The enforcement of mortgages shall be made through court proceedings and the proceeds of the relevant sale shall be paid to the mortgagee (after payment of any preferential claims). The enforcement of pledges may be made through court or out-of-court proceedings and the proceeds of the relevant sale shall be paid to the pledgee. Alternatively, the financial pledges may also be enforced by appropriation of the relevant assets.

Appropriation or foreclosure of the asset is not available to mortgagees or pledgees under pledges that are not financial pledges. Should the lenders be willing to acquire the actual assets, they will need to bid in the judicial sale along with, and with no preference above, any other parties interested in the purchase of such property.

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.

Insolvency of the Portuguese companies is governed by the Portuguese Insolvency Code. The debtor will be insolvent whenever its liabilities exceed its assets or if the debtor is unable to meet its financial obligations as they fall due. Insolvency proceedings may be filed by the debtor or by any of its creditors. However, the directors of a company have an obligation to file for insolvency within 30 days of the date on which they become aware or should have become aware of the insolvency and failure to do so may give rise to liability.

The court assumes the key role of ensuring compliance with the legal rules governing the insolvency proceedings, with particular responsibility in the assessment of whether the debtor is insolvent or not, in declaring the debtor's insolvency and in confirming the lawfulness of the insolvency plan approved by creditors. The court's declaration of the debtor's insolvency and the appointment of the insolvency administrator must be published on the web page 'Citius' (the Portuguese judiciary online platform which includes an online section for insolvency notifications) and registered at the debtor's commercial registry.

All creditors have to file a claim by submitting to the insolvency administrator a formal written claim within 30 days (or less if the court rules so) as from the notice publishing the declaration of the debtor's insolvency. Claims submitted by creditors that have been accepted by the insolvency administrator will be paid in accordance with the

payments plan approved by the creditors or, in case of liquidation of the debtor, on a *pro rata* basis, depending on the proceeds resulting from the sale of the insolvent assets, and provided that insolvent estate's debts have been paid (the proceeds from the sale of the secured assets may be used up to pay the insolvency debts up to a limit of 10 per cent of the proceeds from such sale).

After the declaration of insolvency, the company is controlled by the insolvency administrator. The administrator can perform all acts and carry out all transactions within the ordinary course of business in order to allow the continuation of the company's trading. The directors and the shareholders of the company will maintain their functions and competences; however, directors may not perceive any remuneration, and are entitled to resign from their offices.

Taking into consideration the difficult economic environment, a new procedure was enacted to allow debtors in pre-insolvency situations or in difficult economic situations (namely because it cannot secure any credit or lacks liquidity) to enter into negotiations with their creditors for the revitalisation of their businesses (the 'Processo Especial de Revitalização' or 'PER'). This procedure may be of relevance to creditors since any capital granted to the debtor under the PER shall benefit from a statutory creditor's general preferential claim to be graduated first even in respect to the worker's statutory general preferential claim.

VIII SOCIO-ENVIRONMENTAL ISSUES

i Licensing and permits

A new regime concerning environmental impact assessment (EIA) for each project was approved by Decree Law 151-B/2013, of 31 October 2013, pursuant to which any application for an environmental approval must enclose a detailed EIA, the procedure for granting the relevant environmental impact decision (DIA) implying a coordinated effort between a range of entities for better assessment of the environmental risks associated with each project.

With respect to PPP and since the previous PPP Decree Law dated 2003 (Decree Law 86/2003, of 26 April 2003), procurement procedures may only be launched and awarded after approval of the relevant environmental impact declaration and once the relevant environmental and urban planning licences and permits have been obtained, in order to ensure an effective transfer of execution risks to the private partner.

Depending on the sector of industry in question, a project may also be subject to environmental licensing under the new integrated pollution prevention and control legal framework, approved by Decree Law 127/2013 of 30 August 2013. 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 plant, although simplified licensing procedures may be in place in accordance with the scope of the activities carried out.

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

Other industrial and construction licences and permits may be required depending on the type and specific conditions of each project to be implemented.

ii Equator Principles

Most financial institutions operating in the Portuguese project finance market have already subscribed Equator Principles, reflecting the growing importance of environmental issues in Portuguese project finance deals.

iii Responsibility of financial institutions

In general terms, financial institutions are not responsible for any socio-environmental issues arising in connection with a project transaction. Nevertheless, such liability issues may apply to the lenders in a step-in scenario, particularly if the concession contract is transferred to them.

IX PPP AND OTHER PUBLIC PROCUREMENT METHODS

i PPP

Decree Law 111/2012 of 23 May 2012 revoked Decree Law 86/2003 of 26 April 2003, and establishes the general rules applicable to any PPP launched by the Portuguese state.

It introduces several amendments to the previous PPP regime, in particular regarding the preparation, launching, execution and modification of PPP. The main purpose of the new legal framework is to reinforce supervision, scrutiny and consistency of the decisions of the public partner and contemplates the creation of the Technical Unit for Monitoring Projects, which centralises and executes all main tasks related to preparation and execution of PPP contracts.

This new legal framework continues to take into account, as per the previous regime, the need to accommodate the type of expenditure within budgetary regulations and requires the preparation of economic and financial surveys to confirm the figures for the public sector comparator, and establishes general procedure rules applied to any type of PPP contracts.

The specific framework for PPPs in the health sector, set out in Decree Law 185/2002 of 20 August 2002, is still in place. That piece of legislation, as amended, governs the development of PPPs for the construction, financing, operation and maintenance of health-care units forming part of the National Health Service. An important feature of these PPPs is that they may envisage the private partner not only managing the hospital facilities but also providing clinical services as part of the National Health Service. When both managing facilities and clinical services provision are foreseen, two separate project companies must be incorporated.

It should also be noted that Decree Law 90/2009 of 9 April 2009 and Decree Law 194/2009 of 20 August 2009, as amended, established the rules applicable to PPPs in connection with municipal water supplies and water and wastewater treatment which are still in force.

In line with the above-mentioned Strategic Plan for Transports and Infrastructure for 2014 to 2020 and taking into account the limitations of the new European funds framework, some of the infrastructure projects in the pipeline are likely to be launched and executed under a PPP model (the use of which was suspended due to the public deficit).

ii Public procurement

The Public Contracts Code (PCC) was published on 29 January 2008 by means of Decree Law 18/2008 and revoked, among other pieces of legislation, Decree Law 59/99 of 2 March 1999, which applied to public works and to public works concessions.

The PCC entered into force six months after its publication, and applies to every public tender procedure launched after that moment; it implemented the public procurement Directives 2004/17/EC and 2004/18/EC of 31 March 2004.

The PCC sets out different procedures for the procurement process applicable to administrative contracts, including those to be entered into in connection with PPP projects: the direct agreement, the public tender, the limited tender by pre-qualification, the negotiation procedure and the competitive dialogue. Differently from the previous legal framework, the PCC does not automatically require a public tender for public works concessions or public services concession, being the awarding entity entitled to choose between the launch of a public tender, limited tender by pre-qualification or a negotiated procedure.

In each procedure allowed by PCC, administrative principles of equal treatment, legality, transparency and competition are duly reflected in the respective regulation. Moreover, such principles are directly applicable to each procedure and may be invoked by any interested party. If an interested party considers that an act under the procurement procedure does not comply with applicable regulation and principles, it may claim directly to the awarding entity but also to a court. In such case, the interested party may ask the court to declare the suspension of all subsequent acts in the procurement procedure by means of a temporary injunction, in order to ensure that its rights are not irreversibly threatened.

Substantive provisions dealing with public works and the public services concessions are included in the PCC, some of which are mandatory in nature. These mandatory provisions refer to relevant features of a PPP, such as termination by the contracting authority and sequestration/step in. Other substantive provisions of the PCC will only apply in the absence of express provision in the relevant contract.

Compliance with all legal conditions and procedures is subject to validation by the Court of Auditors. After the execution of a PPP agreement by any public entity, the Court of Auditors will verify and confirm whether all legal requirements are fulfilled. The granting of the approval by the Court of Auditors is a condition for the contracting authority to make any payments under the contract; the contract may, however, enter into force prior to the validation and all rights and obligations contained therein may be performed, except for public payments.

In February 2014, the European Parliament and the Council adopted the Directive 2014/25/EU (procurement in the water, energy, transport and postal services sectors), the Directive 2014/24/EU (public works, supply and service contracts) and the Directive 2014/23/EU (concession contracts).

The recent economic crisis in Europe has made it necessary to reform public procurement rules, first to make them simpler and more efficient for public purchasers and companies and secondly to provide the best value for money for public purchases, while respecting the principles of transparency and competition. Said Directives comprise major changes to the European public procurement regime with the aim of (1) promoting environmental policies, as well as those governing social integration and

innovation, (2) improving the access of small and medium-sized businesses to public procurement markets, (3) implementing stronger measures preventing conflicts of interest and corruption, and (4) creating new simplified arrangements for social, cultural and health services listed in the Directives. Member States have until April 2016 to incorporate the new rules into their national law (except with regard to e-procurement, where the deadline is September 2018), which will imply major amendments to the PCC (especially with regard to concession contracts).

X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

Foreign direct investment is not restricted under general Portuguese law. However, authorisation from the regulator is required in relation to regulated sectors such as energy, water and waste management, telecoms, postal services, railways, commercial aviation and financial services.

Restrictions may apply under the Law of Money Laundering and Terrorism financing, 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 Member States.

i Removal of profits and investment

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.

Under Portuguese tax law, any income obtained in Portugal by non-resident entities, including dividends of shares in a Portuguese company or interest on loans advanced to a Portuguese borrower, will be subject to withholding tax at the applicable rate. The applicable rate is either the general withholding tax rate for dividends and interest payable to non-resident entities (in the case of companies, currently 25 per cent or 35 per cent if investment income is paid or made available to accounts opened in the name of one or more holders acting on behalf of one or more unidentified third parties, unless the beneficial owner of the income is identified) or the rate otherwise applicable under any relevant double taxation agreement.

XI DISPUTE RESOLUTION

i Special jurisdiction

The Portuguese judicial system is essentially divided into the ordinary and the administrative jurisdictions, the first being formed by the judicial courts, which cover all civil and criminal matters and the latter by the administrative and tax courts, responsible for resolving any administrative or tax matters.

There are no specific courts or tribunals in Portugal when dealing with project finance transactions or construction contracts and, therefore, any disputes arising therefrom will be resolved by the judicial courts or the administrative courts, depending on the nature of the matter in question.

Under Portuguese law, parties may generally elect the jurisdiction that will apply to their contracts or to resolve a particular dispute, provided that, *inter alia*, the contract or the dispute involves rights that can be freely determined by the parties and does not relate to a matter within the exclusive jurisdiction of a court other than the chosen court. There are no other specific jurisdictional issues that need to be considered by foreign project investors.

ii Arbitration and ADR

Major project contracts typically provide that the parties may resort to arbitration for the resolution of any disputes under the same. Standard arbitration clauses refer to the Portuguese Law on Arbitration for the definition of the rules relating to the composition of the arbitration court and the conduction of arbitration proceedings. Where international contractors are involved, the parties often chose to apply the rules of international centres such as the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and the United Nations Commission on International Trade Law (UNCITRAL).

Portugal adhered to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) in 1994. Arbitration awards that are not covered by the New York Convention may still be recognised and enforced in Portugal provided that they comply with certain legal requirements and have been submitted to a Portuguese court for review and confirmation.

In line with international market practice, finance contracts generally refer the disputes arising thereunder to the jurisdiction of the judicial courts.

In March 2012, a new Law on Voluntary Arbitration (Law 63/2011 of 14 December 2011) entered in force. The approval of a more modern arbitration law is intended to give a new boost to arbitration in Portugal and to facilitate the recognition and enforcement of foreign arbitral awards, in a context where the arbitration is becoming a valid alternative and, therefore, consistently substituting the judicial courts in Portugal. The main innovations set out in the new arbitration rules are precisely intended to place Portugal as a valid option when electing the seat of arbitration or when choosing the jurisdiction for the recognition and enforcement of arbitral awards.

In the past year, litigation and arbitration has increased in a considerable way, namely in major road PPP concession projects.

XII OUTLOOK AND CONCLUSIONS

There is evidence of recovery of the Portuguese economy, despite the very recent formal conclusion of the three-year EU-IMF adjustment programme.

There is also political willingness that may anticipate new opportunities for the construction industry and, hence, better performance in the construction sector in the coming years.

Other opportunities may arise from the recent focus of the Portuguese government in developing the Green Economy and Green Growth in Portugal, in relevant areas such as climate and energy (including increase of the interconnections between national

electric systems in the EU), water and waste management, biodiversity and sustainable cities.

Finally, the conclusion of the renegotiation of the PPP road contracts and the development of other negotiation processes in the urban rail, ports and health sectors will still be pending for most of 2014.

Appendix 1

ABOUT THE AUTHORS

MANUEL PROTÁSIO

Vieira de Almeida & Associados, Sociedade de Advogados, RL

Manuel Protásio was born and raised in Lisbon and graduated in law in 1984 from College of Law of the Portuguese Catholic University in Lisbon.

He worked on secondment at Deutsche Bank investment bank subsidiary in Lisbon for approximately one year and has been involved in project finance matters since 1992

He joined Vieira de Almeida & Associados in 1991 and is currently one of the partners in charge of the Projects – Infrastructure, Energy & Natural Resources practice group. In such capacity he has participated in or led the teams involved in the most relevant transactions carried out in Portugal to date on the power (including the renewable energies), oil and gas, road, transport, water and wastes sector. He has also been actively working in regulation and public procurement procedures of those sectors.

TERESA EMPIS FALCÃO

Vieira de Almeida & Associados, Sociedade de Advogados, R.L.

Teresa was born and raised in Lisbon and graduated in law in 1995 from the College of Law of the Portuguese Catholic University, in Lisbon. She took an LLM in Banking and Finance Law at the London School of Economics and Political Science, in London, in 1998.

Teresa joined the London office of Allen & Overy LLP, as a member of the Projects Group, in September 1999, where she held a variety of positions (from junior to senior associate) until November 2008. In such capacity, she participated in various banking and project finance transactions, in Portugal and worldwide. During her time at Allen & Overy LLP, she was seconded to Vieira de Almeida & Associados, RL, from November 2004 to November 2008.

Teresa joined Vieira de Almeida & Associados, RL, in December 2008, where she was a managing associate in the Projects – Energy, Infrastructure and Natural Resources practice group. At Vieira de Almeida & Associados, RL, she has been actively involved in or led several transactions, mainly focused on the infrastructure and energy sector and acting either as legal adviser to the sponsors or the lenders.

In August 2011, Teresa left Vieira de Almeida & Associados, RL VdA to join the Cabinet of the Secretary of State for Infrastructure, Transports and Communications, as a deputy.

She is back at VdA as an of counsel since the beginning of May 2014.

Teresa is admitted to the Portuguese Bar Association, to the Law Society of England and Wales, as solicitor, and to the Brazilian Bar Association.

FREDERICO QUINTELA

Vieira de Almeida & Associados, Sociedade de Advogados, RL

Frederico Quintela was born and raised in Lisbon and graduated in law in 2001 from the College of Law of Lisbon University.

He became a postgraduate in corporate law in 2004 from the College of Law of the Portuguese Catholic University, in Lisbon and in 2012 he completed an LLM in International Business Law at the Global School of Law of the Portuguese Catholic University, in Lisbon.

He joined Vieira de Almeida & Associados, RL as a trainee in September 2001 and currently he is a managing associate in the Projects – Energy, Infrastructure and Natural Resources practice group. At Vieira de Almeida & Associados, RL, he has been actively involved in or led several transactions, mainly focused on the infrastructure, health-care or energy sectors and acting either as legal adviser to the grantor, the sponsors or the lenders. Between 2012 and 2013 he was seconded to Pinheiro Neto Advogados, in Brazil.

Frederico is admitted to the Portuguese Bar Association and to the Brazilian Bar Association.

VIEIRA DE ALMEIDA & ASSOCIADOS, SOCIEDADE DE ADVOGADOS, RL

Av. Duarte Pacheco No. 26

1070-110 Lisbon

Portugal

Tel: +351 2 1311 3400

Fax: +351 2 1311 3406

vda@vda.pt

www.vda.pt