

THE PROJECTS AND
CONSTRUCTION
REVIEW

SEVENTH EDITION

Editor
Júlio César Bueno

THE LAWREVIEWS

THE

PROJECTS AND CONSTRUCTION REVIEW

The Projects and Construction Review

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For further information please email

Nick.Barette@thelawreviews.co.uk

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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 modern* (Paris: Dalloz, 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 International Academy of Construction Lawyers (IACL), the Royal Institution of Chartered Surveyors (RICS), the Chartered Institute of Arbitrators (CIArb), the Society of Construction Law (SCL), the Dispute Resolution Board Foundation (DRBF), the American Bar Association's Forum on the Construction Industry (ABA), the American College of Construction Lawyers (ACCL), the Canadian College of Construction Lawyers (CCCL) and the International Construction Lawyers Association (ICLA). All of these institutions and associations have 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 highly specialised areas of legal practice. They are intrinsically functional and pragmatic and require the combination of a multitasking 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.

I am glad to say that we have a contribution from yet another new jurisdiction in this year's edition: Uzbekistan. Although there is an increased perception that project financing and construction law are global issues, the local flavour offered by leading experts in 22 countries has shown us that 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 who graciously agreed to participate.

Finally, I dedicate this seventh edition of *The Projects and Construction Review* to SCL International, a worldwide federation or alliance of national or regional Society of Construction Law (SCL) organisations that aim to foster the academic and practical legal

aspects of the construction industry. We celebrate the success of SCL International's Biennial Conference in São Paulo in September 2016, but also the upcoming conferences in New Delhi (2017) and Chicago (2018). I thank the leaders of SCL International for all their support in the organisation of these events.

Júlio César Bueno

Pinheiro Neto Advogados

São Paulo

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PINHEIRO NETO ADVOGADOS

Rua Hungria 1100
01455-906 São Paulo
Brazil
Tel: +55 11 3247 8667
Fax: +55 11 3247 8600
Mobile: +55 11 98214 7443
jbueno@pn.com.br
www.pinheironeto.com.br

JÚLIO CÉSAR BUENO

Pinheiro Neto Advogados

Júlio César Bueno has been a partner at Pinheiro Neto Advogados since 2001. He is based in São Paulo and has considerable national and international experience focusing on the practice of construction law and engineering contracts (including the use of FIDIC standard forms), project finance, public procurement, as well on arbitration and mediation proceedings, and dispute boards.

He represents some of the world's largest organisations (owners, multilateral agencies, financial institutions, contractors and developers) in their global infrastructure and construction projects located throughout Brazil and the rest of Latin America, and in Africa. He assists clients across the entire project spectrum and recent examples include gas facilities, power plants (nuclear, coal-fired, gas-fired, combined cycle and hydro), wind farms, steel manufacturing facilities, copper mining facilities, coal mining facilities and ports.

He is the president of the Brazilian Society of Construction Law. He is also a member of the board of directors of Region 2 of the Dispute Resolution Board Foundation, and a former officer of the International Bar Association's Latin American Forum and the International Construction Projects Committee. He is also a fellow of the Chartered Institute of Arbitrators and the Royal Institution of Chartered Surveyors. He is a fellow of the International Academy of Construction Lawyers, the coordinator of the Dispute Board Commission of the Center for Arbitration and Mediation (CAM/CCBC), a co-coordinator of the Brazilian Arbitration Committee's working group dealing with arbitration in infrastructure contracts, a board member of the International Construction Law Association and a member of the Mediation and Arbitration Chamber of the Institute of Engineering of São Paulo and the Brazilian Institute of Civil Procedure Law.

He holds a law degree from the University of São Paulo Law School (LLB, 1991), a master's degree from the University of Cambridge (LLM, 1995) and a doctorate from the University of São Paulo Law School (PhD, 2001). He has published several articles on matters relating to civil procedure law, energy, engineering contracts, infrastructure and construction law.

He is recommended in *Who's Who Legal* (for construction, project finance, government contracts and public procurement); *Chambers Latin America* (for construction and projects, and dispute resolution); *IFLR1000* (for project finance); by Practical Law Company (for construction and projects); and Brazilian directory *Análise Advocacia 500* (for construction and projects, dispute resolution and contracts).

PORTUGAL

Manuel Protásio, Teresa Empis Falcão and Frederico Quintela¹

I INTRODUCTION

It is public knowledge that in 2011 the Portuguese government put in place a severe austerity programme as a consequence of the bailout advanced by the European Union (EU) and the International Monetary Fund (IMF), which resulted 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 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 has reached a conclusion in respect of several road PPPs but is yet to be completed in a significant number of concessions.

The construction sector one was of the sectors most severely affected by the economic crisis of 2011, with the construction companies seeking new opportunities in foreign markets, particularly in the Portuguese-speaking countries in Africa.

The financial assistance programme came to an end in May 2014 and the Portuguese economy has since shown consistently positive signs of recovery.

With regard to public works, growth has been relatively slow, because of the government's unwillingness to allow an increase in debt, combined with political and social pressure to avoid PPP models.

The Strategic Plan for Transport and Infrastructure approved by the former Portuguese government has earmarked a range of infrastructure projects that could have a positive economic impact on Portugal until 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 deemed essential to complete the road network, as well as the increase of cargo capacity at Lisbon Airport.

The execution and financing of these investments – in an amount exceeding €6 billion – together with the views of the new Portuguese government on the role of public investment in boosting the economy – might still give rise to many opportunities in the coming years, although execution is, at the time of writing, quite delayed.

¹ Manuel Protásio and Teresa Empis Falcão are partners and Frederico Quintela is a managing associate at VdA Vieira de Almeida.

II THE YEAR IN REVIEW

Project finance and PPP business in Portugal has been quiet in recent years with regard to new deals coming to the market.

There were, however, some important projects accomplished in the past year, as in the case of the Tunel do Marão project, construction of which was completed in May 2016. Nevertheless, in this case, the Portuguese state used a typical turnkey structure instead of reverting to a PPP solution.

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 a renegotiation commission to negotiate the relevant contracts on its behalf.

The main goal of the renegotiation process was to reduce public expenditure during the life of those contracts 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 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, some road concessions whose renegotiation is still ongoing, with the final results expected shortly.

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 health sector, some PPP-based contracts will soon come to the end of their terms; therefore, renegotiation with the private partners is ongoing, with the maintenance of the PPP model in these hospitals or, conversely, their return to public management, being currently under political discussion. It should be stressed that the contractual structure adopted in the PPPs in the healthcare sector in Portugal was implemented in a particularly innovative way, by including the provision of the healthcare services in the scope of the PPP. For that purpose, two concessionaires were incorporated in some PPP projects in the healthcare sector, to ensure the segregation of liabilities and remuneration: one entity was responsible for the design, build, financing, maintenance and operation of the hospital facilities and another entity was responsible for the provision of the healthcare services. Also, the solution regarding the risk allocation adopted in the PPP projects in the healthcare sector has proved to be rather favourable for the public partner, allowing significant savings for the state budget, when compared with traditionally managed National Health Service hospitals.

With respect to the construction industry, it is worth mentioning that the tourism sector's enhancement in recent years has proved to be vital in the renovation of main cities' historical centres, with a positive impact on small and medium-sized construction companies.

Also, in 2013, the Portuguese government and the Portuguese Construction and Real Estate Confederation, representing Portuguese construction companies, signed the Commitment towards Sustainable Competitiveness of the Construction and Real Estate Sectors with the aim of creating new jobs and skills, improving access to funds and promoting private investment, promoting urban regeneration and the real estate lease market, and 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:

- a* changes to the release mechanism of performance bonds;
- b* a new legal regime applicable to real estate brokers;
- c* an exceptional and temporary regime for urban regeneration works mainly for housing purposes;
- d* exceptional and temporary rules regarding the criteria for setting what are 'abnormally low prices' for public works contracts; and
- e* the enactment of a Portuguese Technical Building Code to harmonise several acts into a single piece of legislation.

Many of the announced competitiveness measures have already been completed while others are still in progress. Among the former, we should highlight the exceptional and temporary (seven-year) regime approved by the government in 2014, simplifying procedures and requirements² for urban regeneration works, which applies mainly to buildings or flats for housing purposes either 30 years old or more, or located in urban regeneration areas. The execution of the Commitment is monitored by the Construction and Real Estate Institute.

With respect to works activities, a new legal regime was recently enacted, introducing new rules on access to public and private works activities

III DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

Other than the power projects (where one can come across the build-own-operate-transfer 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 or design-build-finance-operate structure. There is no precedent in Portugal of project financings making use of a build-operate-lease structure.

The Companies Code contemplates two forms of limited liability companies that may be used for the purpose of developing projects in Portugal. These corporate forms are the corporation (SA), whose capital is represented by shares, and the limited company, the share capital of which is represented by immaterial participations (quotas) evidenced by registration with the commercial registry.

The SA is the type of company typically chosen; the rationale being that an SA has a more complex management structure and decision-making mechanism (compared with a limited

2 Decree Law 53/2014 of 8 April 2014, as amended.

company) and is generally subject to more stringent corporate governance requirements – both as to management and auditing of its activities. This combination of factors 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 limited companies, owing to the less restrictive transfer formalities to which they are subject and their ability both to raise funds in the capital markets and to enable enforcement (including foreclosure) by lenders.

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 or 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 the 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.

As regards 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 Portuguese law and, therefore, most finance documents executed thereafter are governed by Portuguese law, notwithstanding that they closely follow 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 or the Institution of Civil Engineers. 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.

However, because of 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 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 restoring 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 Póvoa do Varzim–Cacia 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 that 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 mechanism 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.³

³ Namely, 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 if it breaches its obligations under the construction contract. All damages arising from such a breach must be covered, 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 from such a breach. Caps on liability are also generally admitted by most Portuguese scholars.

Portuguese project contractors historically have had unlimited liability under the various 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 as to the types of damages 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 damages arising (which may include loss of profit). The construction contractor may also be compensated on the basis of the back-to-back principle. Some concession contracts set out the method for calculating the damages due to the project company in the event of termination on grounds of public interest; this calculation usually takes into account the status of construction.

Other political risks, such as war, civil disturbance or strikes may be considered as *force majeure* events and, therefore, the project company shall be relieved from its obligations under the concession contract to the extent affected by the relevant *force majeure* event. *Force majeure* events may trigger the financial balance mechanism and, hence, the project company (and consequently, the construction contractor) shall be compensated. In cases 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 rebalancing of the concession. 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 immoveable 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 it exists 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 to the assignment or a condition subsequent to the authorisation for the exercise of rights already assigned by the borrower. Also, Portuguese law does not recognise the concept of a security trustee, and, as this issue has not yet been subject to judicial revision, there is some uncertainty as to whether a security agent might enforce security interests on behalf of the collateral takers, unless they all prove their capacity as creditors.

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 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, 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 a performance bond under the concession contract, but the construction contractor and the operations and maintenance contractor also have to deliver performance bonds under their 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.

Project bonds or monoline structures for project financing, although not common in Portugal until recently, have started to be used to finance some ongoing projects, particularly in the context of refinancings where availability periods and capex controls are no longer applicable. The provisional legal regime that entered into force on August 2012, allowing for an early phased release of performance bonds provided by contractors and subcontractors under public works agreements, is no longer in force, except for those agreements entered into up until 1 July 2016. Under this regime, contractors and subcontractors can obtain an early phased 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.

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 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 secured assets, they will need to bid in the judicial sale along with, and with no preference over, any other parties interested in the purchase of the 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 the debtor's 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 Citius website (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 the event 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 to pay insolvency debts up to a limit of 10 per cent of the proceeds from the 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 to allow the continuation of the company's trading. The directors of the company will remain in office; however, they cannot receive any remuneration.

Taking into consideration the difficult economic environment, a new procedure was enacted to allow debtors in pre-insolvency situations or in difficult economic situations (unable to secure any credit or lacking liquidity) to enter into negotiations with their creditors for the revitalisation of their businesses (the Special Revitalisation Process 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 ranked first, even above the workers' statutory general preferential claims. Additionally, a new legal regime to allow the extrajudicial recovery of companies and individual entrepreneurs was recently enacted and was due to enter into force on 1 July 2017.

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 2003,⁴ procurement procedures may only be launched and awarded after approval of the relevant DIA and once the relevant environmental and urban planning licences and permits have been obtained, 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 industrial emissions 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 the plant's operation.

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.

⁴ Decree Law 86/2003 of 26 April 2003.

ii Equator Principles

Most financial institutions operating in the Portuguese project finance market have already subscribed to the 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, launch, execution and modification of PPPs. The main purpose of the new legal framework is to reinforce supervision and scrutiny of, and consistency of decision-making by, the public partner, and contemplates the creation of the Technical Unit for Monitoring Projects, which centralises and carries out all main tasks related to the preparation and execution of PPP contracts.

This new legal framework continues to take into account, as was the case under 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 procedural rules applicable to any type of PPP contract.

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 healthcare 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 rules applicable to PPPs in connection with municipal water supplies and water and wastewater treatment. At state or multi-municipal level, the restructuring of the water utility company that was launched in 2013 – giving rise to a number of regional concessionaires with a view to permitting (partial) privatisation – was reversed by the current government, which is returning to the traditional public investment and public management model for multi-municipal water supplies and water and waste-water treatment.

In line with the above-mentioned Strategic Plan for Transport 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 previously suspended owing 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, the awarding entity being entitled to choose between the launch of a public tender, limited tender by pre-qualification or a negotiated procedure.

In each procedure allowed by the PCC, administrative principles of equal treatment, legality, transparency and competition are duly reflected in the corresponding regulation.

Moreover, these 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 regulations and principles, it may submit a claim directly to the awarding entity but also to a court. In such cases, 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, 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 or 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 have been 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. However, if the total price of the contract exceeds a certain threshold, which is currently €990,000, all rights and obligations resulting thereunder would enter into force only after the granting of the approval of the Court of Auditors.

In February 2014, the European Parliament and the Council adopted Directive 2014/25/EU (procurement in the water, energy, transport and postal services sectors), Directive 2014/24/EU (public works, supply and service contracts) and 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 second 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. Because of the change of government at the end of 2015 and its intention to implement wide-ranging reforms in the public procurement legal regime, Portugal failed the legal deadline (April 2016) for transposition of the said Directives into national law. However, the incorporation of the new rules into national law is expected shortly, as a draft law was submitted for public consultation in September 2016. Also a specific new legal framework for electronic platforms for public procurement (e-procurement) is currently under discussion; the deadline for the transposition of the Directives regarding this matter is September 2018.

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 entities⁵ 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 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.

⁵ 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.

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, the London Court of International Arbitration and the United Nations Commission on International Trade Law.

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 arbitration is becoming a valid alternative and, therefore, consistently replacing the judicial courts in Portugal.

The main innovations set out in the new arbitration rules are precisely intended to present 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 recent years, litigation and arbitration has increased considerably, mainly in major PPP road concession projects, and relevant arbitration awards were made in this sector in 2016.

XII OUTLOOK AND CONCLUSIONS

There is growing evidence of recovery in the Portuguese economy since the formal conclusion of the three-year EU–IMF adjustment programme in 2014.

The construction sector, one of the most severely affected by the sovereign debt crisis of 2011, has shown some positive signs over the past year. In fact, according to a survey conducted by the Institute for Public Markets, Real Estate and Construction, the highest number of public works contracts since January 2014 was registered in October 2016.

As part of the Portugal 2020 programme, a partnership agreement entered into between the Portuguese state and the European Commission, a considerable amount of funding has already been approved for investment in construction projects (mainly in the airport sector and urban regeneration). Also the new government has shown political willingness to provide new opportunities for the construction industry and, hence, better performance in the

construction sector is anticipated in the coming years. A clear example of this is the approval of the Strategic Plan for Transport and Infrastructure, as mentioned above, with a significant number of projects expected to follow from this, whether using a PPP model or not.

Other opportunities may arise from the Portuguese government's recent focus on developing the green economy and green growth in Portugal, in relevant areas such as climate and energy (including increasing the interconnections between national electricity 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 are expected in the near future.

Alternatives to traditional project finance, or complementary ways of financing, may result in new opportunities for investment in Portugal. Notable in this context, along with the increasing use of project bond or monoline structures, is the fact that the private equity legal regime was recently subject to extensive amendments with the enactment of Law No. 18/15 of 4 March, which partially transposes Directive No. 2011/61/EU of 8 June 2011 on Alternative Investment Fund Managers, and No. 2013/14/EU of 21 May 2013.

VDA VIEIRA DE ALMEIDA

Av. Duarte Pacheco 26
1070-110 Lisbon
Portugal
Tel: +351 21 311 3400
Fax: +351 21 311 3406
vda@vda.pt
www.vda.pt

MANUEL PROTÁSIO

Vda Vieira de Almeida

Manuel Protásio was born and raised in Lisbon and graduated in 1984 from the School of Law of the Catholic University of Portugal, Lisbon.

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

He joined Vda Vieira de Almeida in 1991 and is currently one of the partners in charge of the projects—infrastructure, energy and natural resources practice group. In this capacity, he has participated in or led the teams involved in the most significant transactions carried out in Portugal to date in the power (including renewables), oil and gas, road, transport, water and waste sectors. He has also been actively engaged in the areas of regulation and public procurement procedures in those sectors.

TERESA EMPIS FALCÃO

Vda Vieira de Almeida

Teresa was born and raised in Lisbon and graduated in law in 1995 from the School of Law of the Catholic University of Portugal, Lisbon. She obtained an LLM in banking and finance law from the London School of Economics and Political Science 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 that 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 Vda Vieira de Almeida, from November 2004 to November 2008.

Teresa joined Vda Vieira de Almeida in December 2008 as managing associate in the projects—energy, infrastructure and natural resources practice group. At Vda Vieira de Almeida, she has been actively involved in or led several transactions, mainly focused on the infrastructure and energy sector and acting as legal adviser to either the sponsors or the lenders.

In August 2011, Teresa left Vda Vieira de Almeida to join the Cabinet of the Secretary of State for Infrastructure, Transport and Communications, as a deputy.

She has been back with the firm since May 2014 and is currently a partner in the practice.

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

FREDERICO QUINTELA

VdA Vieira de Almeida

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

He obtained his postgraduate degree in corporate law in 2004 from the School of Law of the Catholic University of Portugal, Lisbon, and in 2012 he completed an LLM in international business law at the Global School of Law at the same university.

He joined VdA Vieira de Almeida as a trainee in September 2001 and is currently a managing associate in the projects—energy, infrastructure and natural resources and oil and gas practice groups. At VdA Vieira de Almeida, he has been actively involved in or led several transactions, mainly focused on the infrastructure, healthcare and oil and gas sectors, and acting as legal adviser to either 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.