

## FINANCIAL COLLATERAL AGREEMENTS

Directive no. 2002/47/CE of the European Parliament and of the Council, of 6 June, with respect to **financial collateral agreements**, has been implemented in the domestic law by Decree-law nr. 105/2004, of 8 May which has been enacted on 7 June 2004.

In brief, said decree-law identifies (i) financial institutions as the entities suitable of assuming either the role of providers or takers of the financial guarantees, (ii) financial instruments or money as assets capable of being given as guarantee, and (iii) payment obligations (either in cash or in securities) as those susceptible of being guaranteed by this type of agreement.

Considering their effects, financial guarantee agreements may bear two different forms: trust disposition as guarantee or financial pledge, depending respectively on the encumbered asset being transferred to the beneficiary or not.

**Financial pledge** (security financial collateral arrangement) grants to the guarantee taker the possibility to dispose of the encumbered asset, such entitlement including the right to transfer title or create liens as if he was the owner of such asset, pursuant to the terms provided for in the relevant agreement.

In this scenario, rules in terms of foreclosure assume a special relevance, the guarantee taker being able to carry out foreclosure procedures and acquire title over the financial instruments encumbered by the financial guarantee, so far as parties have agreed on that and on the rules that applying to the evaluation of the financial instruments (which will not set aside the legal obligation to evaluate the financial guarantee and calculate the financial obligations guaranteed thereby according to reasonable commercial criteria).

The acceptance of foreclosure in the referred terms is an exception to the rule contained in

article 694. of Portuguese Civil Code, thus allowing the guarantee taker, on an exceptional basis, to foreclose it by means of acquiring title over the encumbered asset, notwithstanding remaining obliged to return to the provider the amount corresponding to the difference between the value of the encumbered asset and the amount of the guaranteed financial obligations.

**Trust disposition** (title transfer financial collateral arrangement) sets forth the obligation of the guarantee taker, up to the date agreed for the fulfilment of the guaranteed financial obligations, to return to the provider: (i) the financial guarantee or an equivalent asset, (ii) an amount in cash corresponding to the value that the encumbered asset has by the time of the maturity of the return obligation pursuant to the terms agreed by the parties and according to reasonable commercial criteria, the beneficiary being also able (iii) to discharge its obligation by means of setting-off against the value of the credit held by the provider being evaluated according to the terms referred to in (ii) above.

The possibility for the parties to agree the transfer of full ownership of financial collateral to a collateral taker for the purpose of securing or otherwise covering the performance of financial obligations constitutes one of the most innovative aspects of the approved legal framework. With the acknowledgement of a new way to transfer title, even for guarantee purposes, the *numerus clausus* established by article 1306. of Portuguese Civil Code is therefore enlarged, what will allow the recognition of the validity of trust dispositions.

Common characteristic of the trust disposition and financial pledge agreements is the ability for the parties to agree that, in an event of default by the provider, the return obligation is accelerated and may be the subject of set-off.

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