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Law and Practice

Contributed by Cuatrecasas

Contents

Cuatrecasas is a leading Iberian law firm with its main offices in Portugal and Spain, and an international presence through offices in ten other countries. Clients include companies in all commercial and industrial sectors, financial institutions, funds, supervisory authorities and governmental entities. The firm seeks to offer high standard advice in the context of clients' international strategies.

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1. Loan Market Panorama

1.1 The Impact of Recent Economic Cycles and the Regulatory Environment

Portugal faced a considerable reduction in credit activity that started with the financial crisis and was intensified during the years of the external financial assistance programme. After the end of the financial assistance programme, the credit market slowly started to recover its pace and is now increasing significantly as a result of the boom in the real estate market and in tourism, backed up by a greater willingness by Portuguese banks to grant house loans now that their balance sheets are healthier.

There is a clear link between recent economic growth – mainly led by tourism and real estate – and the trend of the loan market with regard to major real estate acquisition finance, in particular shopping centres, hotels, touristic apartments and several real estate developments (either for housing or tourism purposes).

The low interest rates and liquidity provided by the European Central Bank has enabled Portuguese banks and banking clients to have access to financing at historic low levels of interest, thus boosting the real estate market and loan market.

As a consequence of the boom in the real estate market, we are also seeing several financial transactions for the acquisition of large portfolios of non-performing loans (NPLs) and real estate owned assets ("REOs"). This has been one of the most active years in terms of sales of these types of portfolios – for example, the sale by Bankinter Portugal of secured and non-secured NPL portfolios, the sale by Caixa Geral de Depósitos of a portfolio of NPLs and REOs, the sale by Caixa Gerald e Depósitos of SMEs NPLs, and the sale by Santander of a portfolio of REOs.

The good momentum in the loan market is also attracting new players to the sector. By way of example, ABanca purchased the Portuguese retail business of Deutsche Bank in Portugal and the Portuguese Postal Bank (Banco CTT) purchased 321 Crédito.

1.2 The High-yield Market

The high-yield market has continued to be active during 2018 and was one of the most common structures of financing, particularly in large acquisitions.

The increasing use of the high-yield market, which commonly uses incurrence-based covenants, has generated more flexibility on the side of the banking loan industry and there is clearly more convergence in respect of borrowers' protection.

1.3 Alternative Credit Providers

The Portuguese loan market has not seen a significant growth in alternative credit providers because credit activity is a regulated activity in Portugal. This limits substantially the activity of alternative credit providers, such as funds, which only in limited circumstances are entitled to grant loans – namely loans granted by certain type of investment funds (ie, venture capital funds, the European social entrepreneurship funds and the European long-term investment funds) to small and medium-size companies. In any event, funds are clearly more active in the Portuguese debt secondary market (particularly bonds) and the NPLs market, where they have no restrictions on their investments.

1.4 Evolution of Banking and Finance Techniques

See above, **1.3 Alternative Credit Providers**. On the other hand, there has been some development and growth of financing through crowdfunding and new digital platforms. This growth has been boosted by legislation specifically applicable to this activity. See also below, **1.5 Recent or Expected Legal, Tax, Regulatory or Other Developments**.

1.5 Recent or Expected Legal, Tax, Regulatory or Other Developments

Banking and finance techniques have been evolving in Portugal, particularly in debt secondary markets and the restructuring sector. The regulation on credit activity limits to a great extent new banking and finance players and consequently new banking and finance techniques that emerge in other EU countries, particularly the UK.

Some of the developments in banking and finance techniques arise from regulation requirements, namely FATCA provisions (with new legislation approved in the last months), the BRRD, CRR, CRD IV and Basel III requirements, as well as sanctions and money-laundering compliance; regulation has been significantly amended to greatly increase the obligations and duties of entities in regard to money-laundering. In addition, the law transposing MiFID II has been recently published, introducing important amendments to various legal texts concerning financial instruments, including for the banks. In the case of the Portuguese market, there is a big challenge ahead related to the need for Portuguese banks to issue debt with a structure allowing for loss-absorbing capacity and complying with MREL and TLAC requirements.

We also see some development in crowd-funding activity (with some legislative developments), as well as peer-to-peer lending, but this does not yet have as significant a relevance in the Portuguese lending market as it has in other countries.

2. Authorisation

2.1 Requirements for Authorisation to Provide Financing to a Company

Under the Legal Regime of Credit Institutions and Financial Companies approved by Decree Law No 298/92, of 31 December 1992, as amended (the "RGICSF"), the granting of loans or financing, which includes factoring, financial leasing and granting of guarantees, on a professional basis is a regulated activity. Non-banks are in principle not authorised to provide financing to a company organised in Portugal, unless they incorporate one of the relevant credit institutions or financial companies that is duly authorised by the regulator to exercise such activity.

EU-domiciled banks, however, may benefit from the EU passport established in the Banking Directive and be registered with the Bank of Portugal to carry out credit activity, enjoying the freedom to provide services on a cross-border basis without any local presence in Portugal. This registration is made by means of the credit institution or financial company making a notification in its home country indicating the activities that it wants to render in Portugal, which then is sent by that entity to the Bank of Portugal to make the respective registration. After such a notification, the credit institution or financial company may start providing its services in Portugal under the EU passport.

However, a non-EU-domiciled entity is only allowed to carry out banking activities in Portugal through the set up of a branch or the incorporation of a subsidiary, both subject to specific authorisation procedures with the Bank of Portugal.

3. Structuring and Documentation Considerations

3.1 Restrictions on Foreign Lenders Granting Loans

As mentioned in **2 Authorisation** above, only credit institutions and financial companies previously registered with the Bank of Portugal can engage, on a professional basis, in activity related to credit operations, including the granting of guarantees and other commitments, financial leasing and factoring.

If, however, the credit operation is an isolated transaction and there is no further transaction in the future, it can be upheld that this is not an exercise of a credit activity on a professional basis.

In addition, the mentioned registration/authorisation with the Bank of Portugal will not be required to the extent that, in respect of a concrete transaction, the Portuguese-domiciled client contacts the non-EU-domiciled banking entity and requests a determined banking service on its own initiative without any prior solicitation and marketing of such a service by the banking entity (ie, the "reverse-solicitation principle").

A good alternative method to raise financing (other than by means of a loan) is by way of issuance and subscription of bonds integrated in a Portuguese clearing system, given that this activity is not qualified as a credit activity. This structure also presents certain tax advantages.

3.2 Restrictions on Foreign Lenders Granting Security

The granting of security or guarantees is not restricted in terms of credit activity. However, as a result of generic corporate law rules, there are relevant limitations on the granting of guarantees or security.

Under the Portuguese Companies Code, Portuguese companies can only grant guarantees or security for third parties' obligations provided that:

- the company has a justified corporate interest; or
- the company is in a controlling or group relationship with the legal entity or person whose obligations are being secured pursuant to the guarantees or security.

Pursuant to the Portuguese Companies Code, "controlling relationship" is defined as the relationship between Portuguese companies where one has, directly or indirectly, a dominant influence over the other. The Portuguese Companies Code has legal presumption that such dominant influence exists when one of the companies holds, directly or indirectly, the majority of the capital or voting rights in the other company or the right to appoint the majority of the members of the board of directors or supervisory board of the company. The same code defines "group relationships" as the relationships between Portuguese companies where:

- one of the companies holds, directly or indirectly, 100% of the other;
- the companies have entered into a group; or
- the companies have entered into a subordination agreement whereby one of them is subject to the instructions or management of the other.

If there is no group or controlling relationship, the guarantee will only be valid if there is a justified corporate interest. Otherwise it can be challenged and considered null and void. However, the Portuguese jurisprudence has been very flexible in the analysis of this requirement, considering, in the majority of the cases, that it is enough for the company to allege having a justified corporate interest.

The Portuguese Companies Code also includes a prohibition relating to financial assistance. The guarantees or security granted by a Portuguese company cannot guarantee any obligations related to financing incurred for the acquisition of either the shares representing the share capital of such company or the shares representing the share capital of its direct or indirect parent company. Such guarantees or security would constitute unlawful financial assistance and thus would be considered null and void. Violation of the financial assistance prohibition can trigger liability of the directors of the target company.

It is advised that, for tax reasons, the secured obligations are typically limited to an agreed maximum amount. This is related, in the case of security, to the value of the asset being encumbered or in the case of a guarantee to the intrinsic value Portuguese target or subsidiary company. As a result, the Portuguese companies limit their liability to that maximum amount and will not have a direct obligation to repay any amounts that exceed the agreed threshold.

3.3 Restrictions and Controls on Foreign Currency Exchange

There are no restrictions or controls regarding foreign currency exchange and there is no limitation on the expatriation of dividends or investments abroad. There are reporting obligations to the Bank of Portugal in respect of certain finance transactions, namely transfer of certain amounts of funds, and there are also the standard general rules on money-laundering.

3.4 Restrictions on the Borrower's Use of Proceeds

As general rule, and other than those mentioned above in relation to financial assistance and corporate interest, there are no restrictions on the borrower's use of proceeds from loans or debt securities. However, we note that it is market practice to set out contractually that the capital granted to the borrower may not to be used for any purpose other than the purpose established in the facility agreement.

3.5 Agent and Trust Concepts

Contrary to other jurisdictions, Portuguese law does not recognise the concept of parallel debt or trusteeship, except for a very specific regime in the Madeira Free Trade Zone. Therefore, the beneficiary of the security needs to have a valid underlying obligation duly secured by the security and, accordingly, if the lenders want to be able to enforce security directly they will need to appear and be registered as holders of the security with the competent registration department.

Typically, the security agreement and/or the indenture, as well as the inter-creditor agreement, provides that only the security agent has the right to enforce the security documents in its capacity as agent (*mandatário com representação*) and also as a joint and several creditor (*credor solidário*) and will thus be the only entity registered as beneficiary of the security and the only entity legally entitled to enforce the same.

Accordingly, the guarantee or security is usually enforced by the security agent after the occurrence of an event of default and following instructions from the lenders in accordance with the provisions of the inter-creditor agreement or the relevant security agreement (or the indenture, as the case may be).

Alternatively, the banks may request to have the security registered in their own name and have the ability to enforce it upon the occurrence of an event of default. This structure is more common when Portuguese banks are involved.

3.6 Loan Transfer Mechanisms

Under Portuguese law, loans can be transferred either (i) by way of an assignment of credits, or (ii) or by way of an assignment of contractual position that enacts a full transfer of all credit rights and liabilities of the former creditor to the assignee.

Usually, the parties prefer to use the assignment of credits mechanism. As opposed to the assignment of contractual position this does not require the consent of the borrower, and thus raises fewer issues on its implementation. There can be limitations established for the assignment, namely

related to tax issues (given that foreign lenders may be more expensive in terms of taxation if there is a gross-up obligation) and regulatory issues.

The assignment is made by way of private contract between the assignor and the assignee and it entails the transfer of the security package associated with it. In the event that the security comprises mortgages, a public deed or private document with recognition of signatures is required as a formality for the security to be adequately transferred. Further steps for the transfer may be required, depending on the type of security, namely registration with the real estate registry department in the case of mortgages, registration with the bank in the case of pledges over bank accounts, registration with the commercial registry department in the case of pledges over quotas or registration with the depositary bank in the case of deposited or de-materialised shares.

3.7 Debt Buy-back

A debt buy-back by the borrower is typically not allowed as it can trigger a subordination of the debt in the case of insolvency of the borrower. Alternatively, and in order to overcome this limitation, the borrower is usually entitled to repay the loan partially in advance.

3.8 Public Acquisition Finance

There are no specific rules regarding the "certain funds" similar to those in the City Code on Takeovers and Mergers.

Under Portuguese law, an offeror in a takeover bid is only required to have the funds deposited or to present a bank guarantee for payment when applying for the registration of the takeover bid with the Portuguese Securities Market Commission. There can be debt financing for the consideration of the offer (as we have seen in practice), but such financing will always need to take the final format of a bank guarantee or a deposit in favour of the shareholders of the target company. Thus, in such cases, there will need to be a direct commitment of the lenders towards such shareholders.

In addition, when a public takeover bid is at stake, there will usually be a financial intermediary who will co-ordinate all relevant arrangements for the financing of the offer before and during the takeover bid process with the offeror. For the reasons expressed above, the "certain funds" provisions are not very common in public acquisition finance transactions

4. Tax

4.1 Withholding Tax

Under Portuguese Corporate Income Tax ("CIT") rules currently in force, interest owed by Portuguese residents to non-resident entities is liable to final withholding tax herein, at the domestic rate of 25%, over the interest gross amount.

The domestic withholding tax rate may, however, be reduced pursuant to the provisions of a double taxation agreement concluded between Portugal and the country of residence of the lender, typically to 10% or 15%.

Notwithstanding this, interest derived from loans granted by non-resident financial institutions to resident credit institutions are exempt from withholding tax to the extent that the interest is not allocated to a local permanent establishment of the non-resident creditor. However, this exemption is not applicable if:

- the recipient of the interest is resident in a "tax blacklisted jurisdiction"; or
- the recipient of the interest, without a permanent establishment in Portugal, is held, directly or indirectly, in more than 25%, by resident entities, except when the entity is resident in another EU country, in a EEA country bound by fiscal co-operation identical to the one established within EU, or in a country that has concluded a double tax treaty with Portugal providing for exchange of information.

Non-residents may also benefit from withholding tax exemption on interest derived from listed bonds, pursuant to the regime set forth in Decree Law 193/2005, of 7 November 2005, as amended (this regime also provides for capital gains exemption upon disposal of the bonds). See **4.2 Other Taxes, Duties, Charges or Tax Considerations**, below, for stamp duty treatment of funding obtained through the issue of bonds.

In summary, and to the extent that the necessary requirements regarding the beneficiaries (ie, holders of the bonds) are met, no withholding tax applies over the interest, to the extent that all the necessary formalities are duly fulfilled, namely proof of the non-residence status of the beneficiaries and the required data regarding the debt securities and the beneficiaries.

The bonds must be integrated in a centralised system for securities managed by an entity resident for tax purposes in Portugal (ie, Interbolsa), or an international clearing system managing entity established in another EU Member State (ie, Euroclear and Clearstream Luxembourg) or in an European Economic Area ("EEA") member state, provided it is bound by an administrative co-operation in tax matters similar to the one established within the EU or integrated in other centralised systems. In this last case, the competent government member must authorise the application of the special tax regime.

One should further consider that in a recent decision the Court of Justice of the European Union ("CJEU") found that the Portuguese domestic CIT rules imposing withholding tax over interest obtained by non-residents are in breach of EU Law, considering that the withholding is imposed on the gross amount of the interest, whereas resident financial

institutions are (only) taxed on their net income (decision of 13 July 2016 on Brisal – Auto Estradas do Litoral SA, KBC Finance Ireland v Fazenda Publica – Case C-18/15). It is expected that this decision will precipitate amendments to the Portuguese tax rules.

The reimbursement of the principal and other payments to the lender are not liable to Portuguese withholding tax.

4.2 Other Taxes, Duties, Charges or Tax Considerations

Value Added Tax ("VAT")

Financial operations are as a rule exempt from VAT under domestic VAT law. This exemption covers notably the granting and negotiation of credit, the respective administration and management by the entity granting the credit, the negotiation and granting of security and guarantees, and operations (including negotiation) related to deposit of funds, current accounts, payments, transfers, collection and cheques.

The VAT treatment of bank commissions and fees has to be determined on a case-by-case basis, depending on their actual features, though those commissions corresponding to the operations referred to above shall be in principle VAT-exempt.

Conversely, other commissions or fees charged by the Banks – eg, for consultancy, certain structuring and settlement services – are in principle out of the scope of the referred exemption, hence liable to VAT taxation. If these fees are charged by non-resident banks to Portuguese VAT taxpayers, Portuguese VAT will apply by means of the "reverse charge mechanism".

Financial operations subject to but exempt from VAT are liable to stamp duty as referred to below.

Stamp Duty

Portuguese stamp duty is due on a list of specified taxable events when deemed as occurring in Portugal, including a number of operations, contracts, acts and documents, as outlined in the stamp duty chart, including financial operations.

However, no stamp duty is levied over operations subject to and not exempt from VAT – eg, certain services provided by banks, as referred to above.

The granting of credit is liable to stamp duty, levied over the principal at rates that vary upon the term during which the credit is used as follows:

- credit for less than one year: 0.04% per month or fraction;
- credit for one or more years: 0.5%; and
- credit for five or more years: 0.6%.

The extension of the term of the contract is considered as a new granting of credit, hence raising additional taxation; stamp duty is borne by the borrower.

No stamp duty, however, applies in the case of funding obtained through the issue of bonds over the principal or interest (see comments regarding taxation of interest, below).

The granting of security is also subject to stamp duty whenever it is:

- granted in the Portuguese territory;
- for the benefit of a Portuguese resident entity; or
- herein presented to produce legal effects, with exception made if it is:
  - (a) materially accessory to a taxable stamp duty event; and
  - (b) granted simultaneously with it.

Stamp duty is borne by the entity required to present the guarantee (ie, the debtor).

Accordingly, where security is granted within the context of a loan agreement, it tends not to be subject to stamp duty as the use of credit under the loan agreement will be by itself subject to taxation – provided that (a) and (b) above are met – such as in the case where a Portuguese company borrows funds from a non-resident bank. In case of funding through the issue of bonds, the security granted for the benefit of the relevant bondholders may trigger Portuguese stamp duty.

When due, the stamp duty taxable basis is the value of the underlying security (ie, maximum secured amount), being the effective tax rate dependent on the applicable term, as follows:

- security with a term lower than one year: 0.04% per month or fraction thereof;
- security with a term equal to one year and up to five years: 0.5%; and
- security with a term equal to or over five years or without any specific term: 0.6%.

In the case of operations undertaken by or with the intermediation of credit institutions, financing companies or other entities legally equated to them, or any other financial institutions, interest is also liable to stamp duty over the respective amount at a rate of 4%, as well as commissions and other bank fees over the respective amount at a rate of 3% (commissions for guarantees), or 4% (other commissions and fees for financial services).

As outlined above, no stamp duty is levied over operations subject to and not exempt from VAT – eg, those bank commissions subject and not exempt from VAT.

Notwithstanding the above, an exemption applies to interest and commissions charged, security granted, as well as to the use of credit granted by credit institutions, financial companies and financial institutions to venture capital companies, as well as to companies or entities the form and object of which corresponds to those of credit institutions, financial companies, financial institutions foreseen in EU Law, ones and the other domiciled in the EU Member States or in other states with the exception of jurisdictions with a more favourable tax regime as defined by Order No 150/2004, of 13 February 2004 of the Ministry of Finance (as amended by Order No 291/2011, of 8 November 2011 of the Ministry of Finance).

4.3 Usury Laws

Apart from the criminal regime (Article 226 of the Portuguese Criminal Code), there are two main legal regimes regarding usury in Portuguese law.

The first is applicable to credit agreements between professionals and consumers and the second to credit agreements between credit or financial institutions and consumers.

As regards the credit agreements between professionals and consumers, Article 1146 of the Portuguese Civil Code states that any loan agreement stipulating an annual interest that exceeds the legal interest, plus 3% or 5% (depending on whether there is an in remguarantee or not), is always considered a usurious agreement. The same Article provides that, whenever the interest rate exceeds the referred-to threshold, the same shall be considered reduced to such maximum thresholds. Currently, the annual legal interest rate is 4%. Therefore, the maximum interest rate allowed by law is 7% or 9%, depending on whether there is an in rem guarantee or not.

The Portuguese Civil Code also establishes a generic prohibition regarding usurious agreements, whereby an agreement is void as a result of usury when someone, exploiting a situation of necessity, inexperience, dependence, mental state or weakness of character on the part of others, obtains for him or herself, or for third parties, the promise or granting of excessive or unjustified benefits.

Decree Law No 133/2009, of 2 June 2009, regarding agreements for consumer credit between credit institutions and consumers, establishes a double limit in respect of usury. It considers an agreement to be usurious whenever the overall effective annual rate ("TAEG") at the time of the conclusion of the agreement:

- exceeds by 25% the average TAEG applied by the credit institutions in the previous quarter for any type credit agreement for consumers; or
- although the rate does not exceed the limit referred to above, it exceeds by 50% the average TAEG for any type of credit agreement for consumers in the previous quarter.

Article 28 of Decree Law No 133/2009 also considers the following credit agreements to be usurious:

- an overdraft facility with a repayment obligation of one month and whose TAEG, at the time of its conclusion, and calculated in accordance with the aforementioned methods, exceeds the maximum TAEG value set for credit agreements in the form of an overdraft facility with a repayment obligation period exceeding one month; and
- overrunning, the nominal annual percentage rate ("TAN") of which, at the time of its conclusion, exceeds the maximum TAEG value defined in accordance with the aforementioned methods, of the credit agreements in such a way that establishes the credit repayment obligation for a period exceeding one month.

The Bank of Portugal identifies the type of credit agreements for consumers and the maximum interest rate resulting from the application of the methods referred to above. These are disclosed by the Bank of Portugal quarterly to the public and are applicable to the agreements to be executed in the following quarter.

Similarly to Article 1146 of the Portuguese Civil Code, Article 28 of the Decree Law No 133/2009 considers that any interest rate above the threshold established by law is automatically reduced to half of the said maximum limit, without prejudice to any criminal and/or administrative liability.

Currently, the maximum rates applicable for the third quarter of 2018 are the following:

- personal loans:
  - (a) education, health, renewable energy and equipment leasing – 5.8%;
  - (b) other personal loans (with other scopes) – 13.3%;
- auto loans:
  - (a) leasing or long term rentals (new cars) – 5%;
  - (b) leasing or long term rentals (used cars) – 6%;
  - (c) with retention of title and others (new cars) – 9.4%;
  - (d) with retention of title and others (used cars) – 12.1%;
- credit cards, credit lines, bank accounts, overdraft facilities – 15.7%

It should be noted that Decree Law No 133/2009 is not applicable to:

- loans secured by mortgage for the acquisition of houses;
- lease agreements that do not grant the right or obligation to purchase the leased assets;
- loans granted without interest and other charges; or
- loans granted by the employer to his or her employees, without interest or with a lower TAEG than the one practised by the market.

5. Guarantees and Security

5.1 Assets Typically Available and Forms of Security

The typical Portuguese collateral package includes:

- pledges over the shares of the material guarantors or financed companies;
- pledges over fixed movable assets (namely, pledge over stock, equipment or inventory);
- pledges over the bank account;
- pledges over intercompany receivables;
- assignment of receivables; and
- assignments or pledges over insurance policies and, in some cases (although less frequent) intellectual property rights (ie, patents, trade marks).

In respect of real estate assets, security is less frequent and is only relevant if it is the only asset to be encumbered, or in a project finance transaction, or when the real estate is a relevant asset of the guarantor or financed company. In certain specific finance transactions (such as vessel financing and aircraft financing), security is taken over the financed assets, in this case mortgages over the vessel or the aircraft.

If the requirements are met, the lenders will use the financial collateral regime to the extent the same can be applicable to the security that is being granted, such as bank account pledges or share security.

Formalities

The applicable formalities vary depending on the type of security that is being taken.

In terms of documentation, mortgages over real estate, as well as banking pledges, require a public deed or a document with a term of authentication of the notary. Conversely, bank account pledges and share pledges require only a simple private document. We usually recommend public deeds or notarial term of authentication for certain types of security as they can be used afterwards as judicial enforcement titles.

As for possessory or other similar actions, the creation of pledges over the bearer's shares requires the delivery of the share certificates, and the creation of pledges over the movable assets requires the delivery of the asset to the creditor (except if the pledge at stake is a banking pledge). The assignment of receivables or the pledge of credits requires a notice of the assignment or the pledge to the respective debtors.

In terms of costs, notarial costs are not material and they vary from notary to notary. The relevant cost may be tax, as referred to above in **4 Tax**.

Registration Requirements

The registration requirements also vary depending on the type of security at stake.

Pledges over bank accounts require a registration with the bank with whom the account is held. Conversely, pledges over shares are:

- subject to registration with the issuer in the case of nominative shares (registration in the share register book and inscription of the pledge in the share certificate);
- subject to registration with the relevant depositary bank in the case of deposits, or with the relevant financial intermediary with whom the shares are registered in the case of de-materialised shares (whether or not integrated in a centralised clearing system).

Pledges over quotas are also subject to registration with the commercial registry department.

As for mortgages over real estate or registrable movable assets – such as aircrafts, vessels, vehicles – these are subject to registration with the competent registry office (real estate or other), whose registry is public. The pledges over quotas of quota companies are also subject to registration with the commercial registry department.

Registration costs are not material. By way of example, registration of a mortgage costs EUR250.

5.2 Floating Charges or Other Universal or Similar Security Interests

Under Portuguese law, it is not possible to grant a floating charge or any other universal or similar security interest over all present and future assets of a company. Security is granted over specific assets that need to be identified. Security over future assets can be granted to the extent that they are identifiable, although there are further limitations depending on the type of security. However, some authors have recently argued the admissibility, even if in a limited way, of floating charges.

5.3 Downstream, Upstream and Cross-stream Guarantees

Under the Portuguese Companies Code, downstream, upstream and cross-guarantees are allowed provided that certain requirements referred below are met. However, a few authors have argued that in cases in which there is only a dominant influence (capable of originating a "*de facto* group"), the upstream guarantees are not allowed, considering the legal lack of protection of the daughter company. As mentioned above (in **3.2 Restrictions on Foreign Lenders Granting Security**), Portuguese companies can only grant guarantees or security for third parties' obligations provided that:

- the company has a justified corporate interest; or
- the company is in a controlling or group relationship with the legal entity or person whose obligations are being secured pursuant to the guarantees or security.

The definition of controlling and group relationships is described in detail in **3.2**, above. Usually, cross-guarantees cannot fulfil the requirement of the group or controlling relationship. As such, they need to meet the requirement of the justified corporate interest, otherwise they will be null and void.

5.4 Restrictions on Target

As mentioned above (**3.2 Restrictions on Foreign Lenders Granting Security**), the Portuguese Companies Code provides for a prohibition of financial assistance. The target company is thus strictly prohibited from granting any type of guarantees or security or any other type of funding in respect of any financing for the purposes of acquiring shares in the target company or in its direct or indirect parent company. This shall also include any guarantees or security for the refinancing of a previous debt incurred in the acquisition of shares of the target company or its parent company.

The violation of the prohibition of financial assistance renders the respective guarantees, security, financing or funding made by the target company null and void. In addition, the directors may incur civil and criminal liability. For this reason, it is common to include guarantee limitation language in a guarantee agreement or security agreement to ensure that in no case can any guarantees or security granted by a target company secure repayment of the above-mentioned financing or funding.

5.5 Other Restrictions

In addition to the financial assistance prohibition and to the limitations on the granting of guarantees or security in respect of obligations of third parties – which are described in detail in **3.2 Restrictions on Foreign Lenders Granting Security**, above – the parties usually agree, for tax reasons, to limit the maximum amount secured by the guarantees or security in order to limit the impact of stamp duty that needs to be paid in respect of the granting of such guarantees or security. The impact of stamp duty is referred to above (**4.2 Other Taxes, Duties, Charges or Tax Considerations**). Thus, the Portuguese companies will not have a direct obligation to repay any amounts once the relevant maximum secured amount has been reached, nor will the Portuguese security be enforced once that maximum amount is reached.

Aside from this tax issue, it is advised that, in the event that the assets of the Portuguese companies are covered by legal immunities, namely public domain assets of the Portuguese Republic (*"domínio público do Estado"*), or are allocated to any public service purposes, such companies can claim immunity from suit, attachment or other legal process in respect of this.

Under Portuguese law any guarantee or security must guarantee or secure another obligation to which it is ancillary and that obligation needs to be identified in the guarantee or security agreement. Accordingly, the guarantee or security will always follow the underlying secured obligation, as a result of which the invalidity of the underlying obligation entails invalidity of the guarantee or security and termination of the underlying obligation entails termination of the guarantee or security.

5.6 Release of Typical Forms of Security

Under Portuguese law, guarantees and security are ancillary to the guaranteed or secured obligation and thus the repayment, satisfaction or cancellation in full of such obligations automatically determines the release of the guarantees or security.

Although the release is automatic, it is market practise to execute a formal release agreement in order to obtain all necessary documentation from the lenders that allows perfection of the release of the security with the relevant authorities. This is particularly relevant if the security had been registered with the real estate or commercial registration department (in the case of mortgages or pledges) or with a bank (in the case of bank pledges). Other actions such as notices, return of share certificates, cancellation of registrations and others may also be required, depending on the type of security that is being released (eg, pledges of bearer shares, assignment of receivables).

5.7 Rules Governing the Priority of Competing Security Interests

Under Portuguese law, the priority of competing security interests is determined by the date of registration of the security interest if the security is subject to registration, such as in the cases of mortgages over real estate, vessels, aircrafts, factory and car mortgages, pledges over quotas, pledges over bank accounts and pledges over deposited and de-materialised shares. Conversely, if no registration is required and there only needs to be an act of transfer of possession (eg, bearer shares), priority is determined by the date on which the relevant perfection requirements of the security are completed, namely the act of possession by the creditor (eg, delivery of the shares) or similar (eg, notification to debtors in the case of assignment of receivables).

Contractual subordination is allowed under Portuguese law. Creditors are able to qualify their debt as subordinated and have it treated as such in an insolvency proceeding. However, contractual subordination is only recognised if it is made before all creditors (eg, deeply subordinated debt) and not just before certain creditors (eg, mezzanine debt). This is because insolvency law has general categories of creditors (see **7 Bankruptcy and Insolvency**, below), such as secured creditors, common creditors and subordinated creditors. Therefore, the waterfall provisions of intercreditor agreements are not recognised in an insolvency proceeding and, as such, distributions need to be corrected amongst creditors after having received the proceeds in an insolvency proceeding based on the payment provisions of the intercreditor agreement.

Structural subordination with financing made to holding companies or legal subordination that results from law are also permitted under Portuguese law.

6. Enforcement

6.1 Circumstances in Which a Secured Lender Can Enforce Its Collateral

Security interests are usually enforced either by the secured parties directly (if no rule of majority applies to enforcement and the lenders hold the security directly and retain the right to enforce), or by the security agent upon the occurrence of an enforcement event following an instruction of the majority of lenders, in accordance with the provisions of the intercreditor agreement.

It is advised that early termination clauses based exclusively on the declaration of insolvency are not allowed, although it is also generally accepted that in credit agreements granted to corporate entities they can be allowed on the basis of customary practice. We also advise that the default that triggers enforcement needs to be material (such as payment obligations, relevant cross-defaults), otherwise the early termination of the loan may be considered abusive.

Depending on the type of security, the procedures for enforcement vary significantly.

The enforcement of mortgages is subject to a judicial enforcement proceeding, and no private or extrajudicial enforcement is allowed. As a general rule, appropriation by the creditor is not allowed and thus enforcement requires a court sale or an extrajudicial sale. An exception to these rules are financial pledges over shares and bank accounts and other financial collateral arrangements that allow for an appropriation of the asset and for an extrajudicial sale, provided that the agreement sets forth rules for the evaluation of the asset (which in the case of bank accounts is obvious), as well as for a disposal of the underlying asset even before enforcement. In addition, in accordance with the recently published Decree Law No 75/2017, the appropriation of an asset pledged under a commercial pledge is allowed. However, the pledgee is under the obligation of repaying the pledgor the difference between the value of the appropriated asset and the secured amount owed. Finally, assignment of receivables only requires a notification to the debtor/client of the borrower or guarantor to make payments directly to the secured parties.

As a final observation, we advise that borrowers or guarantors usually grant a power of attorney in favour of the security agent in order for the latter to have the necessary powers to create additional security over the new asset or to enforce security and sell the assets upon the occurrence of an event of default.

6.2 Foreign Law and Jurisdiction

The choice of a foreign law is valid, recognised and enforceable under Portuguese law, unless there is a mandatory provision that determines the competence of Portuguese law in accordance with Regulation (EC) No 593/2008, of 17 June 2008, on the law applicable to contractual obligations.

The submission to a foreign jurisdiction is also valid, recognised and enforceable under Portuguese law provided that the exclusive jurisdiction provisions set forth in Council Regulation (EC) No 1215/2012, of 12 December 2012, are complied with.

A waiver of immunity is also recognised, except where, as mentioned above, the assets are in the public domain (*"bens do domínio público"*) or allocated to public interests or in the case of states and diplomatic sectors.

6.3 A Judgment Given by a Foreign Court

As mentioned above, Regulation (EC) No 1215/2012, of 12 December 2012, is applicable in Portugal. Hence, judgments rendered by EU Member State courts are enforceable in Portugal in accordance with the terms of that regulation.

In respect of judgments rendered by foreign courts outside the EU and assuming that there is no bilateral treaty, such a judgment will be recognised and enforced in Portugal according to the procedures set out in the Portuguese Code of Civil Procedure for the recognition of foreign judgments, provided that it meets the following requirements:

- the judgment must be final, translated into Portuguese and apostilled without any doubts as to the authenticity of the document and the contents of the judgment;
- the judgment shall not be contrary to Portuguese public policy, and the obligation that the petitioner is attempting to execute has to be lawful in Portugal;
- there shall not be a pending proceeding between the same parties and in relation to the same issues in Portugal;
- there shall not be a judgment rendered between the same parties and for the same cause of action in Portugal or in another country;
- the matters under discussion shall not be related to matters in which the Portuguese courts consider themselves exclusively competent, and the competency of such foreign courts shall not have been obtained by unlawfully circumventing applicable rules;
- the rights of defence of the defendant should have been protected when rendering the foreign judgment (*"princípio do contraditório"*), including but not limited to a proper service of process carried out with sufficient time for the defendant to prepare its defence and appear before the courts and notification (*"citação"*), and with respect for the principle of equal treatment of the parties; and
- the request of recognition of a judgment rendered by a court of competent foreign jurisdiction may be challenged if the party against whom the judgment was rendered is a

Portuguese citizen or a Portuguese company and the result of the judgment would be more favourable to that party if the foreign court had applied Portuguese law (assuming that the Portuguese law would be applicable according to the Portuguese rules of conflict of laws).

In respect of foreign arbitral awards, the enforcement scenarios may vary depending on the concrete situation. Foreign arbitral awards that are covered by the New York Convention or by any bilateral agreement between Portugal and a foreign state are recognised and can be enforced in Portugal under the New York Convention (the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards) or pursuant to the terms of the respective bilateral agreement respectively. Foreign arbitral awards that are not covered by the New York Convention or any bilateral agreement are enforceable in Portugal pursuant to the terms of our internal arbitral legislation.

6.4 A Foreign Lender's Ability to Enforce Its Rights

Aside from those which are mentioned above, there are no other matters which might impact a foreign lender's ability to enforce its rights under a loan or security agreement, except that all the documents are required to be in Portuguese, including any enforcement titles.

7. Bankruptcy and Insolvency

7.1 Company Rescue or Reorganisation Procedures Outside of Insolvency

Currently, there are two main rescue or reorganisation procedures outside of insolvency proceedings: RERE – " *Regime Extrajudicial de Recuperação de Empresas* " (Out of Court Recovery Proceeding), and PER – " *Processo Especial de Revitalização* " (Special Revitalisation Proceeding).

RERE is an extrajudicial voluntary mechanism, which aims to allow to a company in financial difficulties or imminent insolvency the respective recovery through negotiations with (one or more) creditors in order to reach an agreement (as a general rule, a confidential agreement) leading to its revitalisation. If the parties aim that the negotiations for reaching a restructuring agreement produce the effects provided for in RERE, the company and the creditors, representing at least 15% of the company's liabilities (non-subordinated), must sign a negotiation protocol and promote its deposit at the Commercial Registry Office. Once the requirements have been met, the agreement reached will have the same effects as it would have if it was approved in the context of a Special Revitalisation Proceeding. The company may benefit from the intervention of a Corporate Recovery Mediator.

The PER aims, at a time prior to insolvency, to allow the debtor in financial difficulties or imminent insolvency, but whose recovery is still feasible, to enter into negotiations with creditors in order to reach an agreement with them, leading to its revitalisation. The PER basically allows for the debtor to have a moratorium from creditors whilst he or she tries to agree a recovery plan with them. For the approval of the recovery plan, it is required to hold a vote among creditors whose claims represent at least one-third of the total voting-related credits contained in the list of credits which results in a favourable vote of more than two-thirds of the votes cast and more than half of the votes cast corresponding to non-subordinated claims; alternatively, it is necessary to obtain a favourable vote of creditors whose claims represent more than half of the total voting rights and more than half of these votes corresponding to non-subordinated claims. Sometimes this plan may be agreed beforehand with the necessary majority of the creditors for the revitalisation plan to be approved, which facilitates the revitalisation process considerably.

The Legal Framework for Conversion of Debt into Equity was recently published, aiming to allow companies that are in a negative equity position to restructure their balance sheet and strengthen equity, assuming that a majority of creditors propose a conversion of debt into equity. This framework is reserved for situations which are objectively justified by an independent professional and require that the proposing creditors hold claims of an amount which, in other conditions, would allow them to approve a recovery plan in insolvency proceedings.

7.2 Impact of Insolvency Processes

The declaration of insolvency triggers, in principle, the automatic acceleration of the liabilities of the insolvent entity. As such, there will be, in principle, an automatic acceleration of the loan.

In respect of guarantees, the declaration of insolvency determines the automatic clawback actions of:

- granting of in rem guarantees ancillary to pre-existing obligations, or others that replace them, within six months prior to the beginning of the insolvency proceeding;
- personal guarantees, sub-guarantees, sureties and credit mandates made within six months prior to the beginning of the insolvency proceeding; and
- granting of in rem guarantees simultaneously to the creation of the secured obligations within 60 days prior to the beginning of the insolvency proceeding.

These automatic clawback actions do not apply to financial collateral arrangements, such as financial pledges.

In addition, the enforcement of the guarantees and security will need to be made within the insolvency proceeding of the guarantor, except for certain types of security, such as financial collateral arrangements. Therefore, all future enforcement proceedings are no longer allowed and the ones currently pending will be suspended and the creditors will need to lodge their claims in the insolvency proceeding and

wait for the liquidation of the assets and payment to creditors within that proceeding.

7.3 The Order Creditors Are Paid on Insolvency

Portugal's Insolvency Code provides for the following categories and ranking of credits:

- guaranteed credits – credits secured by in rem guarantees, including special statutory liens; accordingly, these include real estate special statutory liens (eg, state credits related to the real estate property tax, "IMI"), third-parties' credits (eg, mortgage, income assignment, pledge), movable assets' special statutory liens (eg, credits resulting of justice expenses incurred in the interest of the creditors).
- privileged credits – credits secured by general statutory liens over assets integrated in the insolvent estate up to the amount corresponding to the value of the assets that are the object of the guarantee or the general statutory liens; as such, these include movable assets' general statutory liens (eg, employment credits), real estate general statutory liens.
- common credits – all credits not included in another category.
- subordinated credits – namely, the interests and credits held by persons with special relations to the debtor (eg, controlling shareholder), the directors or members of the supervisory board.

The payment will be performed according to the credit ranking: firstly guaranteed credits, followed by privileged credits, then common credits and finally subordinated credits.

If the assets of the insolvent estate are insufficient to pay all creditors in full, the payment to common creditors will be made by apportionment amongst all creditors and in proportion to their credits.

The payment of subordinated credits will only take place after full payment of common credits.

7.4 Concept of Equitable Subordination

Under Portuguese law, subordinated credits are defined as any credits held by "connected entities" to the insolvency company, provided that such special connection existed at the time the credit was constituted, and by those that were transmitted in the two years prior to the insolvency proceeding, and the credits arising from shareholders' loans. The subordinated credits will be ranked after all other credits in the insolvency.

7.5 Risk Areas for Lenders

Aside from the risks mentioned above (**7.1 Company Rescue or Reorganisation Procedures Outside of Insolvency**) regarding clawback actions and automatic acceleration, it is also advised that all security over assets of the insolvent entity (except for financial collateral arrangements) will need to be enforced in the respective insolvency proceeding, and accordingly the creditors will need to wait for the liquidation of the assets and respective payments to creditors to be made. Furthermore, if there were any pending judicial enforcement proceedings, these will be suspended and the creditors will need to lodge their claims in the insolvency proceeding and wait for the liquidation of the assets and payment to creditors within that proceeding.

In addition, and from a practical perspective, it should also be pointed out that the insolvency proceeding can jeopardise the day-to-day functioning of the company (debtor, guarantor or other) and as such the value of the company and recoveries of the lender. In addition, the special recovery processes referred to above are dependent on the will of the debtor, which makes it more difficult to entail a recovery proceeding based on an agreement exclusively between creditors.

8. Project Finance

8.1 Introduction to Project Finance

After some decades of intense growth in project finance transactions, the international banking crisis, followed by the 2011 external financial assistance programme to Portugal, led to a significant decrease in project finance transactions being launched. This was due in particular to the suspension of almost all relevant public projects and the renegotiation of the existing ones – the only projects agitating the sector were renewables, certain municipal concessions and certain refinancing of project finance or the secondary market of the PPP road sector.

In 2014, the Portuguese Government approved certain priority projects in the infrastructure sector, such as modernisation of rail freight, expansion and construction of ports and others in the road and airport sectors. However, the majority of the projects did not move forward and the new government has decided not to engage in further privatisation processes or PPP concessions for public utilities, such as public buses and subways, as well as hospitals, and it appears that the strategic projects approved in 2014 will not move forward. It is likely that in 2018 no projects will be approved and there may be a new incentive for public investments and PPP. The future is still very uncertain for this sector.

As for project finance, there is no specific legal framework. The Public Contracts Code ("PCC") approved by Decree Law 18/2008 of 29 January 2008, which transposed Directives 2004/17/EC and 2004/18/CE of the European Parliament and of the Council of 31 March 2004, establishes the legal regime applicable to public contracts and the material regime applicable to contracts of an administrative nature. One of the PCC's major innovations is the creation of adequate regulation of some aspects of project finance techniques not reflected in ordinary legislation and which had hitherto created a conflict between the contractual techniques and the legal rules relating to public procurement.

8.2 Overview of Public-private Partnership Transactions

The PPP legal framework is addressed in the PCC and in Decree Law 111/2012 of 23 May 2012 (the "PPP Legislation"), which sets forth the regime for the preparation, launch, implementation and subsequent change of PPP in Portugal.

Portuguese PPP typically follow project finance structures with a BOT model. The concession agreement regulates the major contractual issues of the PPP, namely the terms on which the project company will construct the project and operate it and the payment terms of the PPP. Attached to the concession agreements are also the remaining documents comprising the PPP package: equity subscription agreement, shareholder's agreement, direct agreement, construction contract, operation contract and the finance documents (eg, facility agreement, intercreditor agreement, security agreement and accounts agreement).

Before launching and awarding the PPP, the environment impact declaration and urban planning licences need to have been issued. An environmental licence may also be required for certain industrial projects.

Under PPP legislation, the risks of the project shall be clearly and contractually identified and its allocation shall be made in accordance with each partner's ability to manage it. This is despite the fact that the partnership should imply a significant and effective transfer of risk to the private partner, particularly the financing risk, which shall always be on the private partner's side.

The financial rebalance, as the main mechanism covering project risks, remains with the public contracting entity.

Following the execution of the PPP contract, and prior to its entry into force, the Court of Auditors will review the agreement to verify that the acts, contracts or other instruments that generate expenditure or represent direct or indirect financial liabilities are in accordance with the laws in force. The acts, contracts and other instruments subject to the previous auditing by the Court of Auditors may produce its effects prior to the visa, save in respect to payments resulting from such acts, contracts or instruments being audited.

8.3 Government Approvals, Taxes, Fees or Other Charges

Project finance transactions do not need any governmental approval, save for certain sectors of activity or public concessions (namely energy, transport, health and others). In such cases, the authority for the approval lies with the relevant ministries or their respective governmental agencies or departments (eg, IMT for transports, DGEG for energy). In addition, our Court of Auditors is also a relevant entity to take into consideration because it is responsible for verifying that the acts, contracts or other instruments that generate expenditure or represent direct or indirect financial liabilities are in accordance with the laws in force.

We also note that, for PPP, there is the Technical Unit for Monitoring Projects (UTAP – " *Unidade Técnica de Acompanhamento de Projetos* ") that has the role of executing the majority and most relevant tasks in respect of the preparation and implementation of PPP contracts.

The project finance documents do not normally need to be registered or filed with the governmental body, save for the cases referred to above and also with the notary in case there is a need to execute a public deed or make a term of authentication.

As referred to above (**4.2 Other Taxes, Charges or Tax Considerations**), stamp duty may be due in respect of the granting of guarantees or security, as well as for providing loans.

8.4 The Responsible Government Body

In the energy sector, the responsible government bodies are the Ministry of Economy, ERSE (" *Entidade Reguladora do Sector Energético* "), the public department of energy and geology (DGEG – " *Direcção Geral de Energia e Geologia* ") and the entity for the oil and gas sector, ENMC (" *Entidade Nacional para o Mercado de Combustíveis* ") – recently renamed ENSE (" *Entidade Nacional para o Sector Energético* "), although the approval is not yet published and is therefore not in force. In the transport and infrastructure sector, the government body is the Ministry of Planning and Infrastructure and the relevant public department is the IMT (" *Instituto da Mobilidade e dos Transportes* "). In the health sector, the government body is the Ministry of Health and the most relevant public department is the " *Administração Regional de Sáude* ".

There is a history of state ownership in the energy sector but, following the 2011 financial assistance programme, Portugal has sold all its relevant stakes in the major energy companies, namely EDP (electricity) and Galp (oil and gas). In the transportation and infrastructure sector, the state has recurrently resorted to PPP structures for the majority of the projects, whilst in the healthcare sector there are very few PPP, and no more are expected in the near future.

8.5 The Main Issues When Structuring Deals

The project finance structures in Portugal are similar to those used internationally. A special-purpose company is usually incorporated in the form of a share company or, more rarely, a quota company. The financing structure is usually a loan, although bond structures (namely project bonds) are also used when there is international financing involved or there is the participation of funds that, for regulatory reasons, cannot grant loans. Monoline structures are less common but they have been used successfully in the past. The loan structures can have different types of facilities for working capital, letters of credit or banking guarantees, liquidity, VAT

or long-term loans, and they can be granted by one or two banks, or they can be club deals, depending on the size of the financing. In certain projects (in particular toll roads and other PPP), there can also be a European Investment Bank credit agreement.

There is typically a full security package which, however, limits the recourse to the project, project assets and project documents (such as the construction contract and operation contract) and is not available to shareholders of the project company, which usually have their liability limited to certain amounts in relation to their respective participation in the share capital of the project company.

The laws relevant to the project depend on the project at stake. In the energy sector, the energy legal framework is of utmost importance and the lenders usually try, for example, to obtain certain protection on the reduction of feed-in tariffs. In the transportation and infrastructure sector, the concession agreement is usually the main legal document to take into consideration.

There are no relevant limitations on foreign investment, except for energy and certain other sectors.

8.6 Typical Financing Sources and Structures for Project Financings

Export credit agency financing is not that common in Portugal, although it has increased in the last few years. It is common to have financing coming from both commercial banks and EIB, which requires the structure to be duly modelled to ensure an higher ranking for EIB debt and usually guarantees from the commercial banks of the bank financing. As to project bonds, they are not commonly used but they were successfully implemented in project finance deals in which the firm was involved, namely the refinancing of SCUT Algarve. The use of monoline structures was previously common, particularly in the railway and subway financing contracts, but nowadays is a less common structure.

In Portuguese project finance structure, the use of performance bonds is quite standard. Performance bonds are delivered by the contractor, as well as by the O&M contractor and the constructor in concession projects; they usually consist of bank guarantees and are intended to assure the performance of the obligations of said contractors.

8.7 The Acquisition and Export of Natural Resources

In Portugal, the ownership of hidden mineral resources is vested in the state. Any entity that is interested in searching for or exploiting such resources needs to obtain an adequate licensing title. The type of licence that is required can vary, depending on the type of resource sought (oil and gas, for instance, and is subject to a different type of regulation from other mineral resources) and also on the type of activity. Usually, mere exploration requires a simple licence, while exploitation will necessarily imply a concession.

Mining rights can be acquired by direct negotiations with the licensing authority, which can be either the DGEG (" *Direcção Geral de Geologia e Minas* ") or, in the case of oil and gas, ENMC (" *Entidade Nacional para o Mercado de Combustíveis* "). As mentioned above, some of the competences in this latter aspect will be transferred to DGEG according to a recent decree law approved in Council of Ministers, but not yet published. ENMC will be renamed ENSE (" *Entidade Nacional para o Sector Energético* "). However, in the specific case of oil and gas rights, there was recently an indication that future rights will only be awarded as part of competitive bidding procedures.

The actual execution of exploration and exploitation operations requires prior adequate environmental assessment, subject to public discussion. Any protective or remedial actions that are identified as necessary are for the licensee's exclusive account and risk.

The licensee is entitled to take and dispose of the production resulting from his or her activity, except for any quantities that may be due to the state as royalties that the state decides to take in kind. Export is not subject to any specific duty or tax, and is free, other than as may otherwise be regulated under sanctions adopted by the UN or the EU or other competent international organisations.

8.8 Environmental, Health and Safety Laws

Projects may be subject to environmental impact assessment, to environmental incidence assessment, and sometimes to environmental licensing.

The main environmental diplomas which apply to projects are: Law No 19/2014, of 14 April 2004, which approves the Environmental Bases Policy; Decree Law No 151-B/2013, of 31 October 2013, as amended by the recent change of Decree Law No 152-B/2017, of 11 December, which sets forth the legal regime for the Environmental Impact Assessment; and Decree Law No 127/2013, of 30 August 2013, together with Decree Law No 75/2015, of 11 May, that both regulate administrative proceedings related to the grant of pollution and emissions licences for several activities.

The regulatory body that oversees the Environmental Law area is the " *Agência Portuguesa do Ambiente* ", which is a public institute regulated by Decree Law No 56/2012, of 12 March 2012, and by Order No 108/2013, of 15 March 2013, that approves its by-laws. This body is an independent administrative entity, under the supervision of the Agriculture, Sea, Environment and Territorial Planning Ministry.

Decree Law No 273/2003, of 29 October 2003, established the prerequisites regarding health and safety in projects that entail construction. It requires the existence of a health and

safety plan and of a safety co-ordinator for the project drafting and afterwards for the project execution.

The Authority for Work Conditions (" *Autoridade para as Condições do Trabalho* ") is responsible for the control of the above-mentioned requirements.

Also relevant is the fact that, in order to obtain and maintain a permit to perform public or private works, an insurance for work accidents is required. The IMPIC (*Instituto dos Mercados Públicos, do Imobiliário e da Construção*) is responsible for the control of the existence of those insurances. Sometimes, in turn-key or concession contracts, additional rules regarding health and safety are inserted.

9. Islamic Finance

9.1 Overview of the Development of Islamic Finance

As far as we are aware, there has been no Islamic project finance in Portugal and thus no specific Islamic finance policy has been legally or practically established in the financial or legal sector. Portugal has not approved any legislation that facilitates Islamic finance transactions such as that which exists in, for example, the UK and France.

9.2 Regulatory and Tax Framework for the Provision of Islamic Finance

As mentioned above, Portugal does not have any specific tax or regulatory framework that applies to Islamic finance transaction, which are subject to the same general legal framework that applies to all finance transactions. Portugal has thus far not followed the route of countries such as the UK and France, which have created special tax and regulatory regimes.

Sukuk, for example, would not be qualified as an interest payment or repayment of principal but as a gain. The tangible asset involved in the structure of the sukuk does not have a different tax treatment that applies generally, namely for sale and lease-back.

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The same is also true for takaful and re-takaful insurance products, which are not products commercialised in the Portuguese jurisdiction nor by Portuguese banks in Portugal or abroad.

9.3 Main Shari'a-compliant Products

The Portuguese Securities Market Commission ("CMVM"), the Bank of Portugal and the Insurance Supervisory Authority are the main regulators in Portugal and the ones that can supervise the activity related with shari'a-compliant products. There is no specific legal framework nor regulatory authority for Islamic products.

In addition, as referred to above, there has been no Islamic project finance in Portugal. Therefore, shari'a-compliant products are not commercialised in Portugal nor by Portuguese banks in Portugal or abroad.

9.4 Claims of Sukuk Holders in Insolvency or Restructuring Proceedings

In principle, claims relating to sukuk would be treated as common claims, since, despite the fact that the sukuk holder holds a part of the assets, it does not become a shareholder of the company. Considering the defining characteristics of sukuk instruments, they would initially be qualified as hybrid instruments; however, differently from typical bonds, sukuk do not bear interest. Sukuk instruments do not confer the shareholder capacity, even if they (temporarily) grant ownership of the financed asset. Nonetheless, sukuk instruments are closer to typical bonds and, consequently, would be treated in Portugal as a debt instrument.

9.5 Recent Notable Cases

As far as we are aware, there has been no jurisdictional cases regarding the applicability of shari'a or the conflict of shari'a and local law relevant to the banking and finance sector.