



ICLG

The International Comparative Legal Guide to:

Lending and Secured Finance 2013

1st Edition

A practical cross-border insight into lending and secured finance

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EDITORIAL

Welcome to the first edition of *The International Comparative Legal Guide to: Lending and Secured Finance 2013*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of lending and secured finance.

It is divided into two main sections:

Six general chapters. These chapters are designed to provide readers with a comprehensive overview of key issues affecting lending and secured finance, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in the laws and regulations of lending and secured finance in 35 jurisdictions.

All chapters are written by leading lending and secured finance lawyers, and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Thomas Mellor of Bingham McCutchen LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Portugal?

Given the liquidity issues of Portuguese banks, we have seen recently a significant increase in the lending activity of emerging markets financial institutions, namely from China and Brazil.

1.2 What are some significant lending transactions that have taken place in Portugal in recent years?

The landmark transactions in Portugal during the last year have been: (i) the EUR 1bn loan facility to utility company EDP by the China Development Bank Corporation; (ii) the EUR 600 million Export Credit Facility to Galp Energia by a syndicate of banks and arranged by Banco Santander; (iii) the refinancing of debt of Cimpor in the context of the taker-over bid by Camargo Corrêa; and (iv) the USD 550 million financing to a Portuguese subsidiary of Grupo R, arranged by Mizuho.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

As a general rule, the corporate powers of a company are restricted to those rights and obligations which are necessary or convenient for accomplishing the purpose of the company (which, generally, is to make a profit).

In accordance with Article 6(3) of the Portuguese Companies Code, there is a legal presumption that the granting of guarantees in respect of obligations of other entities is contrary to the purpose of companies, unless there is a justifiable own interest of the company in providing the guarantee or the company in question is in a group or dominion relationship with such entity.

Please note that the legal concept of group relationship is a restricted one, as enshrined in the Portuguese Companies Code.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

In such situations, it is likely that there is no justifiable own interest to the company in providing the guarantee and unless the company is in a group or dominion relationship with the entity whose obligations it guarantees, the provision of the guarantee may be considered to be null and void.

2.3 Is lack of corporate power an issue?

Yes. Please see question 2.1 above.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Except for certain state-owned and other public sector companies, unless there is a restriction contained in the articles of association of the company, in principle, no governmental approvals, consents, filings or other formalities are required by law, for a guarantee provided by a Portuguese company to be enforceable.

However, it is common practice for there to be a requirement for either shareholder approval or board approval for the granting of the guarantee. Usually, such approval will contain an express reference to the benefit to the company from the provision of the guarantee (even if such benefit is an indirect one) or to the dominion or group relationship (if any) with the entity benefiting from the provision of the guarantee.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

No, they are not.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

No, there are not.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

There are various types of collateral available to secure lending obligations, such as:

- (i) mortgage over real estate property, aircrafts, vessels, cars and industrial units (e.g. factories);
- (ii) pledge over movable assets not referred to in (i) above;
- (iii) pledge over a business (including inventory) – only possible if pledgee is a credit institution;
- (iv) pledge of rights (including credits and receivables);
- (v) financial pledge – a pledge of cash or securities in favour of a credit institution; and
- (vi) escrow of income deriving from real estate, aircrafts, vessels or cars.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

In accordance with Portuguese law, the provision of generic security (i.e. over the assets of a given entity generically) is considered null and void because of lack of determination of the specific assets that become subject to the security.

It is therefore necessary that a security agreement identifies, to the greatest extent possible, the assets which are subject to the security created by such agreement. At least, the security agreement must contain certain criteria which would allow the identification of the secured assets at a given time.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes, collateral security may be taken over such assets by means of a deed of mortgage.

A mortgage over a plant will include the real estate property and all the machinery and equipment thereof which is identified in a schedule to the deed.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes, collateral security by means of a pledge over receivables may be taken. An agreement is required as well as notification of the creation of the pledge to the debtors, so that the pledge may be enforced against such persons.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes. There are two types of pledge that can be taken over cash deposited in bank accounts: a pledge created under the Portuguese Civil Code; and a financial pledge.

A Portuguese Civil Code pledge is the most common form of pledge. The financial pledge, which may be created if the pledgee is a bank, provides more flexibility to the pledgor upon enforcement.

In any event, formalities include the execution of an agreement and notice to the bank where the cash is deposited (if the custody bank is not the pledgee). The acknowledgment of the pledge by the bank is not required, but is useful so as to ensure swift enforcement.

3.6 Can collateral security be taken over shares in companies incorporated in Portugal? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Yes, collateral security may be taken over shares in companies incorporated in Portugal as a pledge of shares.

Shares may be either in certificated form or in book-entry form.

Yes, provided that any formalities required under Portuguese law for the validity and effectiveness of the pledge are complied with.

The procedure will depend on the type of company in question.

If the company is a private limited liability company (*sociedade por quotas*), registration of the pledge over the shares at the Commercial Registry is required.

If the company is a public limited liability company (*sociedade anónima*), the necessary formalities will depend on whether the shares are in certificated form or book-entry form. A pledge of shares in certificate form requires the delivery of the shares to the pledgee, in the case of bearer shares, or annotation of the creation of the pledge on the share certificate and registration of the pledge in the books of the issuer, in the case of registered shares.

The creation of the pledge over book-entry shares is made by annotation of the creation of the pledge in the securities account in which the shares are deposited.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Security over inventory is possible if such security is granted in favour of a credit institution. The procedure includes the execution of a written agreement. Upon default or the occurrence of other circumstances as set out in the pledge agreement, it is customary for the pledgee or security agent to give an enforcement notice to the pledgor crystallising the stock.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, but please see the restrictions on the provision of guarantees in question 2.1 above, which are also applicable in relation to the provision of security interest by companies.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

The costs for the creation of security are, generically, as follows:

- (i) notarial fees (only applicable where the execution of a public deed is required): approximately EUR 280 per deed;
- (ii) registration fees: EUR 225 per property asset, if registration is requested by the notary; and

- (iii) stamp duty (please see below on the applicability of stamp duty):
- (a) 0.04 per cent. per month over the secured amount, in the case of security granted for a period of less than one year;
 - (b) 0.5 per cent. over the secured amount for security granted for a period of one year or more and less than five years; and
 - (c) 0.6 per cent. over the secured amount for security granted for a period of five years or more.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

In principle there should be no timing issues.

As regards expenses, these can be a considerable amount in the event that stamp duty is due on the granting of guarantees or the creation of security.

3.11 Are any regulatory or similar consent required with respect to the creation of security?

No, they are not.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

No, there are not.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

Yes, the creation of security over real estate requires the execution of a deed, usually made before a notary. In such case, the powers of attorney, if any, must also be granted before a public notary (and bear the apostille of The Hague Convention, if executed outside of Portugal).

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

Yes, this is expressly forbidden in accordance with Article 322 of the Portuguese Companies Code. Few exceptions are available.

(b) Shares of any company which directly or indirectly owns shares in the company

No express prohibition exists, but please note that the corporate powers of the company may be restricted in respect of granting of guarantees or security – please see question 2.1 above.

(c) Shares in a sister subsidiary

No express prohibition exists, but please note that the corporate powers of the company may be restricted in respect of granting of guarantees or security – please see question 2.1 above.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Portugal recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Yes, it will.

5.2 If an agent or trustee is not recognised in Portugal, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable – please see above.

5.3 Assume a loan is made to a company organised under the laws of Portugal and guaranteed by a guarantor organised under the laws of Portugal. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

Yes, notice to the borrower and guarantor of the assignment is required.

However, please note that there might be situations in which the guarantee may not be assigned. For example, if the parties have restricted the ability of the guarantor to assign, or if the guarantee has been provided *intuitu personae* (i.e. the nature of the guarantee is not separable from the person or the borrower).

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Payments of interest by a Portuguese corporate to a foreign lender will be subject to withholding tax, currently at a rate of 25 per cent., or such other reduced withholding tax rate as determined in the applicable Double Tax Treaty. The proceeds of a claim under a guarantee or the proceeds of enforcing security are not subject to withholding tax.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

In general, there are no tax incentives to foreign lenders in the context of bank lending transactions, in contrast to the general tax exemption applicable to foreign bondholders.

However, the following specific tax incentives may apply:

- (i) full or partial tax exemption in respect of interest paid by public sector entities to foreign lenders (for instance, *Schudschein* loans); and
- (ii) full tax exemption on interest paid by entities operating in the Madeira International Business Centre to foreign entities.

A loan to a Portuguese entity or a guarantee provided by a Portuguese entity will, in principle, attract stamp duty at the rates specified in question 3.9 above. However, please note that non-payment of stamp duty will not have an impact of the effectiveness of the loan or security or the valid registration of security.

6.3 Will any income of a foreign lender become taxable in Portugal solely because of a loan to or guarantee and/or grant of security from a company in Portugal?

The income of a foreign lender deriving from payments of interest will become taxable in Portugal by virtue of the borrower being considered tax resident in Portugal. Please note that, as mentioned in question 6.1 above, there will be withholding tax on the payments of interest in such situation.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

There are other costs, such as notarial fees and land registry fees, for the registration of a mortgage over real estate. These will not be significant unless the security is granted over several properties. The cost of registration of a mortgage is EUR 225 per property, if the registration is submitted by a notary.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

No, there are not.

7 Judicial Enforcement

7.1 Will the courts in Portugal recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Portugal enforce a contract that has a foreign governing law?

In accordance with the general principle set out in the Portuguese Civil Code, the parties to an agreement may elect the law governing the agreement, provided that such election corresponds to a serious interest of the parties or is the law of a jurisdiction which has a connection with the agreement and is legitimate in the context of the principles of private international law.

In addition, it should be noted that Portugal is a party to the Rome Convention, pursuant to which the parties may not elect the laws of a given jurisdiction as the governing law of the agreement in the event that all elements of the contractual relationship are connected with a different jurisdiction.

7.2 Will the courts in Portugal recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Any final judgment obtained in a competent jurisdiction in respect of any sums payable in connection with the Agreements would be enforced by the courts of Portugal under the conditions set out in Council Regulation (EC) 44/2001 of 22 December 2000 or the

Lugano Convention of 16 September 1988 or, if and when such conventions are not applicable, would be enforced by the courts of Portugal without re-examination of the merits of the case provided that:

- (a) there are no doubts about the authenticity or substance of the document in which the judgment is given, and the judgment is final and conclusive;
- (b) any conditions imposed by the law of the country in which it was given, which are conditions to its enforcement in the Portuguese courts, have been complied with;
- (c) it was issued by a foreign court, the jurisdiction of which had not been claimed fraudulently and does not pertain to matters subject to the exclusive competence of the Portuguese courts;
- (d) it would not be adjudged *res judicata* by the Portuguese courts;
- (e) the defendant was duly served for the action in accordance with the law of the country in which the judgment was issued and that the principles of the right to a fair trial (*principio do contraditório*) and equal treatment of the parties have been complied with; and
- (f) it does not contravene the principles of Portuguese public order.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Portugal, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Portugal against the assets of the company?

In general, filing a suit in Portugal, obtaining a judgment and enforcing it could take between 9 and 24 months. Enforcing a foreign judgment in Portugal against the assets of the company could take between 6 and 12 months. In both (a) and (b) scenarios, the timeframe for enforcement of the court decision will depend on how long it takes to identify the assets to be seized.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

Yes, timing of the enforcement may be affected in the event that there is a public auction of the assets or in the event that such auctions are not successful, if, for instance, no offers higher than the reserve amount are received.

Regulatory consents may also impose a significant delay in the conclusion of the enforcement in the event that the sale of the enforced assets to the acquirer is subject to obtaining regulatory consents, in the context of competition laws or sectorial regulation (sale of qualified shareholdings in financial institutions, defence industries, public services concessionaires).

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Portugal or (b) foreclosure on collateral security?

No, in principle, no such restrictions will apply.

7.6 Do the bankruptcy, reorganisation or similar laws in Portugal provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Yes, in accordance with the Portuguese Insolvency Code the commencement of an insolvency proceeding or a *procedimento de revitalização* (similar to a Chapter 11 procedure) will imply a moratorium on the enforcement of collateral security against the insolvent or *quasi* insolvent borrower or guarantor.

7.7 Will the courts in Portugal recognise and enforce an arbitral award given against the company without re-examination of the merits?

The Portuguese Republic is a party to the New York Arbitration Convention and therefore any arbitral awards given in another contracting state will be recognised without re-examination of the merits of the claim.

In relation to arbitral awards given in a state which is not a party to the New York Arbitration Convention, or any other convention to which the Portuguese state is a party, the enforcement of an arbitral award in Portugal is subject to the recognition of such award by a court of competent jurisdiction in Portugal, irrespective of the nationality of the parties.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

In accordance with the Portuguese Insolvency Code, the commencement of insolvency proceedings or *procedimento de revitalização* (similar to a Chapter 11 procedure) will suspend all enforcement proceedings against the company.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Under the Portuguese Insolvency Code there is there is a 2-year suspect period during which any acts that are "prejudicial" to the insolvent entity and are carried out in bad faith will be set aside.

In addition, the Portuguese Insolvency Code sets out the specific situations in which certain acts may be set aside, including, *inter alia*:

- (i) any acts carried out within 2 years prior to the commencement of the insolvency proceedings without there having been consideration thereof;
- (ii) the provision of security for existing obligations by the insolvent entity within 6 months prior to the commencement of the insolvency proceedings;
- (iii) the provision of guarantees by the insolvent entity in respect of debts of third parties within 6 months prior to the commencement of the insolvency proceedings where there is no benefit (vested interest) to the insolvent entity; or
- (iv) the provision of security by the insolvent entity in respect of new transactions within 60 days prior to the commencement of the insolvency proceedings.

Under the Portuguese Civil Code there is also a concept of *impugnação pauliana* pursuant to which an action could be brought by a creditor to set aside a transaction that results in the decrease of

the bankrupt companies assets and in circumstances in which there was no consideration given certain requirements are met.

Preferential creditor's rights exist in Portuguese law, such as court fees, tax debts and employees' claims.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Yes, the Portuguese Republic and certain public sector entities are excluded from Portuguese insolvency laws and there is no applicable legislation governing the insolvency of such entities.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

In accordance with (i) the Portuguese Civil Code, (ii) the regime of the financial pledge, or (iii) the regime of the banking pledge, it is possible that the enforcement of a pledge is conducted in an out-of-court proceeding.

In the case of a pledge created under the rules of the Portuguese Civil Code, the parties may agree to an out-of-court sale of the pledged assets. Please note, however, that in this situation, the pledged assets will, in principle, be in the possession of the pledgee or a custodian appointed by the parties.

In the case of a financial pledge or a banking pledge, the assets may not be in the possession of the pledgee.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Portugal?

Provided that the choice of law is valid (please see question 7.1 above) such choice is legally binding and enforceable under the laws of Portugal.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Portugal?

In the event that an entity benefits from sovereign immunity, the waiver of the benefit of such immunity will not be valid in accordance with Portuguese law.

10 Other Matters

10.1 Are there any eligibility requirements in Portugal for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Portugal need to be licensed or authorised in Portugal or in their jurisdiction of incorporation?

No eligibility requirements are applicable in Portugal. Licensing or authorisation in Portugal is required in the event that the lender frequently engages in lending activity in Portugal.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Portugal?

No, there are not.

**William Smithson**

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William Smithson advises on debt and equity capital markets transactions and has established an active banking and structured securities practice. He has built up an extensive securitisation practice having worked on more than 80 ABS, RMBS, CMBS and trade receivables transactions by Portuguese originators and bilateral secured and unsecured lending transactions.

William Smithson joined Simmons & Simmons London as trainee in 1987 and became an English solicitor in 1989. In 1992 moved to the Simmons & Simmons Lisbon office, becoming a Simmons & Simmons Partner in 2001. He was Managing Partner of Simmons & Simmons, Lisbon, from 2004-2008. He is now a partner of SRS Advogados and head of the Financial Markets Group.

Recent transactions include advising Oversea Chinese Banking Corporation on a €40 million refinancing of the Orient Express Hotels Group, Mizuho on the USD 550 million Senior Secured Loan Facility to Grupo R and Goldman Sachs on the €260 million refinancing of the Wireco Group (leading cables and wires industry).

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Gonçalo advises a varied number of domestic (Portuguese banks and corporates) and international clients (mostly international investment banks and hedge funds) in the capital markets, financial services and banking areas. In 2004, he joined SRS Advogados, qualified as lawyer in 2005 with the Portuguese Bar Association and in 2008 as solicitor with the Law Society of England and Wales. He spent a year in the Capital Markets group at Simmons & Simmons and six months on secondment at the Legal Department of Morgan Stanley (Fixed Income Division) in London. Gonçalo is recommended by Legal 500 for its banking & finance, capital markets and regulatory work. Named as an "Associate to watch" by Chambers & Partners he is described by clients as a "solid lawyer" and a "strategist for transactions".

He has recently advised Galp in its EUR 650 million Export Credit Loan Facility, Itaú BBA on the EUR 204 million loan to Cimpor and Mizuho on the USD 550 million Senior Secured Loan Facility to Grupo R.



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The Financial Markets Department comprises a team of lawyers specialised in all areas of finance, corporate finance and ancillary areas. The team draws upon its extensive know-how and experience to provide first-rate service in every aspect of the financial and capital markets.

Our understanding of the Financial Sector is further enhanced by the fact that many of our lawyers have worked in the financial sector either in the City of London or New York, including long term positions or secondments with entities such as Citibank, Goldman Sachs, Lehman Brothers and Morgan Stanley.

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