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Global Legal Group

The International Comparative Legal Guide to:

Securitisation 2007

A practical insight to cross-border Securitisation Law

Published by Global Legal Group with contributions from:

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1 Receivables Contracts

1.1 Formalities. In order to create an enforceable debt obligation of the debtor to the seller, (a) is it necessary that the sales of goods or services are evidenced by a formal receivables contract; (b) are invoices alone sufficient; and (c) can a receivable "contract" be deemed to exist as a result of historic relationships?

(a) and (b) The general rule under Portuguese law (article 219 of Decree-law no. 47344, of 25 November 1966 (the "**Portuguese Civil Code**")) is that, except where provided by law, there is no specific legal formality under which a contractual debt obligation must be created.

As a consequence, contractual debt obligations can arise either from formal written agreements or from other types of "*non formal*" agreements such as oral agreements, exchange of letters, invoices and receipts, etc.

(c) In addition, pursuant to certain Portuguese legal doctrine, it is arguable that a relationship between two parties - a creditor and a debtor - can be established pursuant to social typical behaviour ("*comportamento sociais típicos*").

However, the relationship emerging from social typical behaviours should not be considered as a "*contractual*" relationship, notwithstanding the fact that the provisions on the effects of the agreements are applicable to such relationships.

1.2 Consumer Protections. Do your country's laws (a) limit rates of interest on consumer credit, loans or other kinds of receivables; (b) provide a statutory right to interest on late payments; or (c) provide other noteworthy rights to consumers with respect to receivables owing by them?

(a) The Portuguese Civil Code establishes that the legal and subsidiary civil and commercial interest rate is determined by a joint order from the Ministry of Justice and from the Ministry of Finance. Currently the legal and subsidiary civil and commercial interest rate is of 4% (four percent).

The stipulation of an interest rate above the legal and subsidiary civil and commercial interest rate should be made in writing and must not exceed such amount in 3 (three) or 5% (five percent) depending on whether security is granted or not.

If the parties stipulate an amount in excess of the above-mentioned legal limitations, such amount will be considered reduced to the legal limits referred to above.

Please also note that these limits are not applicable to credit institutions.

(b) Pursuant to the Portuguese Civil Code, an indemnity obligation will arise in case of late payment of monetary obligations. The indemnity will comprise the payment of interest on the amount due.

The interest rate on late payments arising from civil agreements is the same rate as defined in (a) above.

The stipulation of an interest rate on late payments in an amount above the legal and subsidiary civil and commercial interest rate should be made in writing and must not exceed such amount by 7 (seven) or 9% (nine percent) depending on whether security is granted or not.

There is a specific interest rate on late payments applicable to commercial agreements in which the creditors are companies. Such rate is set out by a joint order from the Ministry of Justice and from the Ministry of Finance. Currently the interest rate on late payments applicable to commercial agreements in which the creditors are companies is of 10.5% (ten point five percent) and such rate is revised every six months based upon the interest rate applicable by the European Central Bank to its latest refinancing operation accrued of 7% (seven percent).

(c) Please note that in Portugal the activity of concession of credit to consumers is regulated pursuant to Decree-law no. 359/91, of 21 September (as amended by Decree-law no. 100/2000, of 2 June and Decree-law no 82/2006, of 3 May). This Decree-law provides for a number of rights of consumers, the most important of which are (i) the right of the consumer to revoke the credit agreement within 7 (seven) days from entry into of such agreement; and (ii) the right of the consumer to be informed of the Annual Effective Global Rate ("*Taxa anual de encargos efectiva global*") calculated pursuant to annex I of that Decree-law.

1.3 Government Receivables. Where the receivables contract has been entered into with the government or a government agency are there different requirements and laws that apply to the sale of receivables?

To the extent that the Government enters into the receivables contract as a "*common party*", the requirements and laws applicable to the sale of receivables should, in principle, apply.

2 Choice of Law - Receivables Contracts

2.1 No Law Specified. If the seller and the debtor do not specify a choice of law in their receivables contract, what are the main principles in your country that will determine the governing law of the contract?

The Portuguese Republic is a party to the Rome Convention on the Law applicable to contractual obligations, of 19 June 1980 (the "**Rome Convention**") and, therefore, the general principles set forth in the Rome Convention are applicable in Portugal.

Pursuant to no. 1 of article 4 of the Rome Convention, to the extent that the law applicable to the receivables contract has not been chosen in accordance with article 3 of the Rome Convention, the receivables contract shall be governed by the law of the country with which it is most closely connected ("*conexão mais estreita*").

In accordance with no. 2 of article 4 of the Rome Convention, it shall be presumed that the receivables contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the receivables contract (payment of the debt) has, at the time of conclusion of the receivables contract, his habitual residence, or, in the case of a company or legal entity, its central administration. However, if the receivables contract is entered into in the course of that party's economic or professional activity, the law governing the receivables contract shall be the law of the country in which the principal place of business is located or, where under the terms of the receivables contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is located.

Please note that, whenever the debtor is a consumer, article 5 of the Rome Convention shall apply.

Moreover, pursuant to article 42 of the Portuguese Civil Code, applicable whenever the Rome Convention is not, and whenever the parties to an agreement do not choose the applicable law, the receivables contract should be governed by the law of the common head office or residence of the parties. Should the parties not have the head office or residence in the same country, the law of the place where the receivables contract is entered into will govern such contract.

2.2 Base Case. If the seller and the debtors are resident in your country, and the transactions giving rise to the receivables and the payment of the receivables take place in your country, and the seller and the debtor choose the law of your jurisdiction to govern the receivables contract, is there any reason why a court in your country would not give effect to their choice of law?

In principle, and considering what is referred to in question 2.3 below, there is no reason for the court not to apply Portuguese law to the receivables contract.

2.3 Freedom to Choose Other Law. If the seller and the debtors are resident in your country, and the transactions giving rise to the receivables and the payment of the receivables take place in your country, can the seller and the debtor choose a different country's law to govern the receivables contract and the receivables?

Pursuant to article 3 of the Rome Convention the parties to an agreement can freely, and without any limitation, choose the law applicable to such agreement.

Conversely, and whenever article 41 of the Portuguese Civil Code is applicable (i.e. whenever the Rome Convention is not), the parties can only choose a law that (i) corresponds to a serious interest of one of the parties (subjective criterion); or (ii) is closely related with any of the elements of the agreement (objective criterion).

If the parties choose a law that does not comply with either the subjective or objective criterion, the general rule of article 42 of the Portuguese Civil Code will be applicable (see question 2.1 above).

2.4 Seller Resident. If the seller is resident in your country, and the seller and the debtor choose the law of your country to govern their receivables contract, will a court in your country give effect to their choice of law?

In principle, and considering what is referred to in question 2.3 above, there is no reason for the court not to apply Portuguese law to the receivables contract.

2.5 Debtor Resident. If the debtor is resident in your country, and the seller and the debtor choose the law of your country to govern their receivables contract, will a court in your country give effect to their choice of law?

In principle, and considering what is referred to in question 2.3 above, there is no reason for the court not to apply Portuguese law to the receivables contract.

3 Choice of Law - Receivables Purchase Agreement

3.1 Freedom to Choose Other Law. If your country's law governs the receivables, and the seller sells the receivables to a purchaser in another country, and the seller and the purchaser choose the law of the purchaser's country or a third country to govern their sale agreement, will a court in your country give effect to their choice of law?

Pursuant to article 12 of the Rome Convention, the mutual obligations of the seller and of the purchaser under a voluntary assignment of a right against another person (the debtor) shall be governed by the law that under the Rome Convention applies to the agreement between the assignor and assignee. In this respect what is referred to in relation to articles 3 and 4 of the Rome Convention will apply (see questions 2.1 and 2.3 above).

However, pursuant to the provisions of the Rome Convention, in particular to those contained in article 12, regardless of the choice of law of the parties, Portuguese law shall be the law governing (i) the assignability of the receivables; (ii) the relationship between the owner of the receivables and the underlying debtor; (iii) the conditions under which the assignment can be invoked against the debtor; and (iv) any question as to whether the debtor's obligations have been discharged.

In those cases in which the Portuguese Civil Code is applicable, again, what is referred to in relation to articles 41 and 42 thereto will apply (see questions 2.1 and 2.3 above).

Although neither the Rome Convention nor the Portuguese Civil Code impose the obligation that assignments of credits originated under Portuguese law agreements be carried out under Portuguese law, it is strongly recommended that the assignment of such receivables be carried out under a format recognisable and enforceable under Portuguese law.

This is recommended because in case of the need for enforcement (and the fact that any enforcement will almost certainly have to occur in Portugal), it is important to have a framework that is recognisable and applied by the courts.

It should also be noted that, to our knowledge, securitisation transactions carried out in Portugal have always applied Portuguese law to the terms of the assignment.

3.2 Other Advantages. Conversely, if another country's law governs the receivables, and the seller is resident in your country, are there circumstances where it would be beneficial to choose the law of your country to govern the sale agreement?

In the cases in which the debtors are all, or almost all, located or resident in Portugal it might be beneficial to have Portuguese law governing the receivables sale agreement for the same reasons expressed in question 3.1 above.

3.3 Effectiveness. In either of the cases described in questions 3.1 or 3.2, will your country's laws apply to determine (i) whether the sale of receivables is effective as between the seller and the purchaser; (ii) whether the sale is perfected; and/or (iii) whether the sale is effective and enforceable against the debtors?

Please see what is referred to in this respect in question 3.1 above.

4 Asset Sales

4.1 Sale Methods Generally. In your country what is (are) the customary method(s) for a seller to sell accounts receivables to a purchaser?

The assignment of credits under Portuguese law may, in broad terms, be carried out by (i) a civil law assignment ("*cessão de créditos*") under the provisions of the Portuguese Civil Code; and (ii) a securitisation transaction under the provisions of Decree Law no. 453/99 of 5 November (as amended) regulating securitisation transactions (the "**Securitisation Law**").

Assignments normally have an underlying purchase and sale transaction of receivables. It is therefore possible to freely agree the terms of payment of such transaction, including foreseeing discounts and deferred purchase prices.

Decree Law no. 171/95, of 18 July, (the "**Factoring Law**") defines a sub-type of assignment, which is characterised as the activity of acquiring short term receivables, resulting from the sale of goods or the rendering of services, and may only be carried out by certain types of financial institutions as purchasers of such receivables. Other than the Factoring Law (which mainly only deals with the requirements that purchasers of these types of receivables must comply with), the general principles of the Portuguese Civil Code are also applicable to factoring transactions under this Decree law.

4.2 Perfection Generally. What formalities are required generally for the sale of accounts receivable to be perfected? Are there any additional or other formalities required for the sale of accounts receivable to be perfected against any subsequent good faith purchasers for value of the same accounts receivable from the seller?

Pursuant to the general rules governing the assignment of receivables, an assignment of credit rights (other than the assignments of certain credit rights that need to be formalised in a public deed, or assignments under the Factoring Law or pursuant to the regime provided for by Decree law no. 59/2006, of 20 March (covered bonds), which mandatorily have to be made by a written contract) to be valid and enforceable between the assignor and assignee does not require the compliance of any formality (i.e. it does not require the agreement to be formalised in a written agreement, nor is it required that such assignment be executed before a certifying authority such as a Notary Public).

It is common practice however for any transfer agreements to be in writing, and the documents may be drafted in any language, including English.

Nevertheless, it should be noted that no. 1 of article 578 of the Portuguese Civil Code provides that "*the requirements and effects of the assignment between the parties are defined pursuant to the type of the underlying transaction*".

Therefore, the general principle of contractual freedom shall not prevail in all the cases in which the cause of the assignment (i.e., the type of underlying transaction) is subject, in its validity, to formality requirements. That is the case, for example, for the assignment of credits for the compliance of the obligation of contributions in kind into a company, subject to public deed (no. 1 of article 7, and article 26 of Decree law no. 262/86, of 2 September, (the "**Portuguese Companies Code**")).

4.3 Perfection for Promissory Notes, etc. What additional or different requirements for sale and perfection apply to sales of promissory notes, mortgage loans, consumer loans or marketable debt securities?

The assignment by way of transfer of bills of exchange, promissory notes and cheques, must be made in writing on the bills of exchange, promissory notes and cheques or on an attached sheet (article 13 of the Uniform Act on Bills of Exchange and Promissory Notes and article 16 of the Uniform Act on Bank Cheques).

4.4 Debtor Notification. Must the seller or the purchaser notify debtors of the sale of receivables in order for the sale to be an effective sale against the debtors?

The assignment only produces effects before the debtor of the assigned credit if the assignment is notified to the debtor, or if the debtor accepts the assignment. Such notification may be executed by any means, by the assignor or by the assignee, and the acceptance of the debtor may be express or tacit. For reasons of proof, it is normally recommended that this notification be made by registered letter with evidence of receipt.

As a result of the fact that external efficiency of the assignment is dependant upon notification of the debtor, the general legal regime, article 584 of the Portuguese Civil Code, provides that "if the same credit is assigned to several people, the assignment notified in the first place to the debtor or that has been accepted by the debtor prevails", and "*the debtor may oppose to the assignee, even if the assignee is not aware of its existence, all the defence means that the debtor would be entitled to before the assignor, except for the ones arising from an event occurring after having knowledge of the assignment*".

An assignment of credits under the Securitisation Law is effective against the relevant debtor after notification of assignment is made in writing to such debtor (similarly to what we mentioned above, it is recommended that this be done by registered letter so as to have evidence of receipt).

However, an exception to this requirement applies when the

assignment of credits is made under the Securitisation Law by, *inter alia*, credit institutions or financial companies, and such entities also act as the servicers of the credits. In this case, there is no requirement to notify the relevant debtor since such assignment is deemed to be effective in relation to such debtor when such assignment is effective between assignor and assignee.

4.5 Debtor Consent. Must the seller or the purchaser obtain the debtors' consent to the sale of receivables in order for the sale to be an effective sale against the debtors? Does the answer to this question vary if (a) the receivables contract does not prohibit assignment but does not expressly permit assignment; or (b) the receivables contract expressly prohibits assignment?

Receivables may be assigned, irrespectively of the consent of the debtor, as long as the assignment is not prohibited by rule of law or the underlying agreement pursuant to which the credit right arises, and the credit right is not, by the nature of the payment obligation, related to the assignor.

Clauses prohibiting the assignment of a credit right (*pactum de non cedendo*) may be contractually agreed amongst the underlying debtor and the assignor, but such restricting clauses will only be opposable to the assignee of a receivable if it is proven that such assignee knew of the prohibition at the time of the assignment of the credit right.

4.6 Liability to Debtor. If the seller sells receivables to the purchaser even though the receivables contract expressly prohibits assignment, will the seller be liable to the debtor for breach of contract?

Under general rules of Portuguese law the debtor may be liable towards the seller for breach of contract if he sells credits that cannot be assigned.

4.7 Identification. Must the sale document specifically identify each of the receivables to be sold? If so, what specific information is required (e.g., debtor name, invoice number, invoice date, payment date, etc.)? Do the receivables being sold have to share objective characteristics?

The assigned credit must be determinable, so that it complies with the determinability requirement for the object of the contractual relations, provided for in article 400 of the Portuguese Civil Code. The Portuguese Civil Code does not set out specific guidelines for what is considered "*determinable*", but it is necessary in the assignment agreement to define a criteria that allows the determination of the credit or entrust such determination to a third party. Assignment is possible so long as the criteria can specifically determine which receivables have been assigned and which have not (this can be done by reference to contracts, to name of clients, to invoice numbers, etc.).

4.8 Economic Effects on Sale. What economic characteristics of a sale, if any, might prevent the sale from being perfected? Among other things, to what extent may the seller retain (a) credit risk; (b) interest rate risk; and (c) control of collections of receivables without jeopardising perfection?

Economic effects do not have an impact on the perfection of an assignment of receivables. However, such economic effects may have an impact on the accounting and tax treatment of the assignment.

When the assignment of credits is made under the Securitisation Law by, *inter alia*, credit institutions or financial companies, such entities also act as the servicers of the credits (which they are obligated to do unless CMVM grants specific dispensation).

4.9 Continuous Sales of Receivables. Can the seller agree in an enforceable manner (at least prior to its insolvency) to continuous sales of receivables?

To the extent that the requirements referred to in question 4.7 are complied with, the seller can agree to a continuous sale of receivables.

4.10 Future Receivables. Can the seller commit in an enforceable manner (both prior to and after its insolvency) to sell receivables to the purchaser that come into existence after the date of the sale contract (as in a "future flow" securitisation)?

Under Portuguese law, (i) existing credit rights held by the assignor at the date of the agreement, (ii) existing credit rights that the assignor does not hold at the time of the assignment but which he expects to acquire, and also credits not yet existing, i.e., future credits (e.g., income arising from a lease agreement not yet entered into or real estate income concerning future months, etc.) may be assigned. In sum, the assignment may have as its object existing credits (matured or non-matured, term or conditional credits) and also future credits.

4.11 Related Security. What additional formalities must be fulfilled for the concurrent transfer of related security to be enforceable? If not all related security can be enforceably transferred, what methods are customarily adopted to provide the purchaser the benefits of such related security?

Under Portuguese law the assignment of receivables implies the automatic transfer to the assignee of the security and other collaterals of the assigned right that are not inseparable from the person of the assignor.

In order to perfect an assignment of receivables against third parties where ancillary security is capable of registration at a public registry (such as a mortgage over real estate), the assignment must be followed by the corresponding registration of the transfer.

5 Security Interests

5.1 Back-up Security. Is it customary in your country to take a "back-up" security interest over the seller's ownership interest in the receivables and the related security, in the event that the sale is deemed by a court not to have been perfected?

No, it is not customary.

5.2 Seller Security. If so, what are the formalities for the seller granting a security interest in receivables and related security under the laws of your country, and for such security interest to be perfected?

N.A, see question 5.1 above.

5.3 Purchaser Security. What are the formalities for the purchaser granting a security interest in receivables and related security under the laws of your country, and for such security interest to be perfected?

The most commonly used security in relation to receivables is the pledge. Pursuant to no. 2 of article 681 of the Portuguese Civil Code, the pledge over the receivables only produces effects when notified to, or accepted by, the debtors. In case of a pledge subject to registration, the pledge will produce its effects from the moment the registration is made.

5.4 Recognition. If the purchaser grants a security interest in the receivables under the laws of the purchaser's country or a third country, and that security interest is valid and perfected under the laws of that other country, will it be treated as valid and perfected in your country?

Although neither the Rome Convention nor the Portuguese Civil Code impose the obligation that security over receivables governed by Portuguese law is granted under Portuguese law, it is strongly recommended that the granting of such security be carried out under a format recognisable and enforceable under Portuguese law.

This is recommended because in case of the need for enforcement (and the fact that any enforcement will almost certainly have to occur in Portugal), it is important to have a framework that is recognisable and applied by the courts.

It should also be noted that, to our knowledge, security granted over receivables governed by Portuguese law have always been granted pursuant to Portuguese law.

5.5 Additional Formalities. What additional or different requirements apply to security interests in or connected to promissory notes, mortgage loans, consumer loans or marketable debt securities?

Please note that, pursuant to Portuguese law, bills of exchange are not considered to be guarantees, but rather instruments of payment.

In relation to mortgage loans, please note that the security should be granted by means of a mortgage and the entry into of a mortgage has to be made through a public deed.

Consumer loans are, in principle, considered as regular credits and, therefore, what is referred to in question 5.3 above will apply.

In relation to marketable debt securities, if those securities are in book entry form, the pledge should be inscribed in the registry accounts with the relevant financial intermediary. If the securities are in paper form, the pledge should be inscribed in the relevant certificate of the securities.

6 Insolvency Laws

6.1 Stay of Action. If, after a sale of receivables that is otherwise perfected, the seller becomes subject to an insolvency proceeding, will your country's insolvency laws automatically prohibit the purchaser from collecting, transferring or otherwise exercising ownership rights over the purchased receivables ("automatic stay")? Does the insolvency official have the ability to stay collection and enforcement actions until he determines that the sale is perfected?

If the seller of receivables under a civil law assignment were to go insolvent, the amounts received from the collection of the receivables would no longer be part of its estate. Bearing that in mind some legal doctrine defends that in such cases the insolvency administrator cannot suspend or stay the effects of the receivables sale agreement and, therefore, no automatic suspension or stay would apply.

Unless an assignment of credits is carried out in "*mala fides*", such assignment under the Securitisation Law cannot be challenged for the benefit of the seller's insolvency estate and any payments made to the purchaser in respect of credits assigned prior to a declaration of insolvency will not form part of the seller's insolvency estate even when the term of the credits falls after the date of declaration of insolvency of the seller.

6.2 Insolvency Official's Powers. If there is no automatic stay, under what circumstances, if any, does the insolvency official have the power to prohibit the purchaser's exercise of rights (by means of injunction, stay order or other action)?

Except as provided in question 6.3 below, and to the extent that a true sale occurred, only through an injunction ("*providência cautelar não especificada*") and subsequent main court action ("*acção principal*") could the insolvency administrator try to prohibit the purchaser's exercise of rights in relation to the assigned credit rights.

6.3 Suspect Period. Under what facts or circumstances could the insolvency official rescind or reverse transactions that took place during a "suspect" or "preference" period before the commencement of the insolvency proceeding?

Pursuant to Decree law no. 53/2004, of 18 March, (the "**Insolvency Code**") and in the context of a possible insolvency procedure affecting the seller, the insolvency administrator, appointed by the court, may, at the request of the creditors and for the purpose of protecting the insolvency estate, rescind certain acts or contracts executed in the four years prior to the opening of the insolvency procedure, considered to be detrimental to the insolvency estate (i.e. actions that diminish, frustrate, difficult, jeopardise or delay the satisfaction of the creditors) and entered into between the seller and a third party, who must be acting in "*mala fide*" (it is considered as "*mala fide*" the knowledge by the third party of: (i) the situation of insolvency of the seller; (ii) the harm or damage that such act or contract caused to the seller and the insolvency situation of the seller; or (iii) the commencement of the insolvency proceedings.

"*Mala fide*" is also presumed to occur when the acts are carried out within the two years preceding the commencement of insolvency proceedings and the person who carried out such acts has a special relation with the insolvent).

It should be noted that if the purchaser obtains a solvency certificate issued by local auditors, stating that the seller is not in an insolvency situation on the date of the transfer, the risk of the purchaser being considered as acting in "*mala fide*" will be diminished.

The harmfulness to the insolvency estate of the acts that are the grounds for the rescission, as well as the presumption of "*mala fide*", can be rebutted, in the procedure of challenge of the rescission, to be filed in Court within six months after the date of rescission.

The Insolvency Code also defines a certain number of typified acts, presumed to be harmful to the insolvency estate, which presumption cannot be rebutted; some examples are:

(i) acts carried out by the seller for no consideration;

(ii) granting by the seller of security concerning pre-existent obligations;

(iii) payments or any other acts, made within the last 6 months prior to the commencement of the insolvency proceedings, that lead to the termination of obligations whose maturity date would only occur after the commencement of such proceedings;

(iv) payments or any other acts that lead to the termination of obligations, made in the prior 6 months of the commencement of the insolvency proceedings, and made in unusual commercial terms;

(v) contracts entered into in the year prior to the commencement of the insolvency proceedings, which stipulate excessive obligations to the company; and

(vi) repayment of shareholder loans.

These typified acts are not applicable in case of rescission of receivables sale agreements under the Securitisation Law since this law always requires that the insolvency administrator demonstrates the "*mala fide*" of the purchaser and does not allow the insolvency administrator to rely upon typified acts (see no. 2 of article 121 of the Insolvency Code).

6.4 Substantive Consolidation. Under what facts or circumstances, if any, could the insolvency official consolidate the assets and liabilities of the purchaser with those of the seller or its affiliates in the insolvency proceeding?

Portuguese law does not have any provisions regarding substantive consolidation.

6.5 Effect of Proceedings on Future Receivables. What is the effect of the initiation of insolvency proceedings on (a) sales of receivables that have not yet occurred or (b) on sales of receivables that have not yet come into existence?

In relation to the assignment of future receivables under a civil law agreement, if the seller becomes insolvent, the receivables sale agreement will be suspended and the insolvency administrator will have the option to (i) execute the receivables sale agreement or (ii) refuse the execution of the receivables sale agreement (article 102 of the Insolvency Code).

In relation to the assignment of future receivables under the Securitisation Law any payments made to the purchaser in respect of credits assigned prior to a declaration of insolvency will not form part of the seller's insolvency estate even when the term of the credits falls after the date of declaration of insolvency of the seller.

7 Special Rules

7.1 Securitisation Law. Does your country have laws specifically providing for securitisation transactions? If so, what are the basics?

Further to the general principles of the Portuguese Civil Code applicable to the assignment of credits, the Securitisation Law sets out specific requirements and formalities for its applicability to an assignment of credits rights, such as (i) restricting the type of originators eligible to assign credits pursuant to the Securitisation Law, which include, *inter alia*, the Portuguese Republic, credit institutions, financial companies, insurance companies, and any other corporate entity whose accounts have been audited for three consecutive years prior to the securitisation transaction; (ii) including the obligation that credits rights shall be assigned to a specific Portuguese law vehicle (either a Securitisation Fund or a Securitisation Company); and (iii) having the securitisation transaction be approved by the Securities Market Regulatory Committee.

Under the Securitisation Law, only receivables with the following characteristics at the time of the transfer may be securitised: (i) their assignability is not subject to legal or contractual restrictions; (ii) they must be of a pecuniary nature; (iii) they are not subject to any condition; and (iv) they are not the object of any dispute, judicial seizure, and have not been granted as security.

7.2 Securitisation Entities. Does your country have laws specifically providing for establishment of special purpose entities for securitisation? If so, what does the law provide as to (a) requirements for establishment of such an entity; (b) legal attributes and benefits of the entity; and (c) any specific requirements as to the status of directors or shareholders?

The Securitisation Law provides for two different types of SPVs (only these two types of vehicles may acquire credits under the Securitisation Law): (i) credit securitisation funds (*Fundos de Titularização de Créditos* - "**FTC**"); and (ii) credit securitisation companies (*Sociedades de Titularização de Créditos* - "**STC**").

The FTC structure requires that (i) the Fund be managed by a fund manager pursuant to the terms of the applicable fund regulation; (ii) a servicer collect and manage the portfolio assigned to the FTC; and (iii) a custodian (which must be a credit institution) hold the portfolio acquired by the FTC.

An FTC consists of a segregated portfolio of assets in respect of which an undivided ownership interest is held jointly by the holders of the securitisation units. An FTC may be a variable fund (*fundo de património variável*) or a closed fund (*fundo de património fixo*). If an FTC is a variable fund, it may acquire further assets and/or issue further securitisation units. If an FTC is a closed fund, it may not acquire further assets or issue further securitisation units.

STCs can only be incorporated for the purpose of carrying out one or more securitisation transactions by means of the transfer of receivables and the issue of securitisation notes for payment of the purchase price for the acquired receivables.

7.3 Non-Recourse Clause. Will a court in your country give effect to a contractual provision (even if the contract's governing law is the law of another country) limiting the recourse of parties to available funds?

In this broad formulation, it is very arguable whether a court would uphold a clause of this type.

7.4 Non-Petition Clause. Will a court in your country give effect to a contractual provision (even if the contract's governing law is the law of another country) prohibiting the parties from (a) taking legal action against the purchaser or another person; or (b) commencing an insolvency proceeding against the purchaser or another person?

Non-petition clauses are not valid under Portuguese law and therefore courts do not uphold such clauses.

7.5 Independent Director. Will a court in your country give effect to a contractual provision (even if the contract's governing law is the law of another country) or a provision in a party's organisational documents prohibiting the directors from taking specified actions (including commencing an insolvency proceeding) without the affirmative vote of an independent director?

Should a company become insolvent, the commencing of insolvency proceedings is an obligation of the board of directors and, therefore, the fulfilment of such obligation cannot be limited (articles 18 and 19 of the Insolvency Code).

8 Regulatory Issues

8.1 Required Authorisations, etc. Assuming that the purchaser does no other business in your country, will its purchase and ownership or its collection and enforcement of receivables result in its being required to qualify to do business or to obtain any license or its being subject to regulation as a financial institution in your country? Does the answer to the preceding question change if the purchaser does business with other sellers in your country?

The performance of asset portfolio management on a non-professional basis (i.e. sporadically or occasionally) would not, in principle, be deemed as a banking or financial activity and therefore would not be subject to an authorisation.

8.2 Data Protection. Does your country have laws restricting the use or dissemination of data about or provided by debtors? If so, do these laws apply only to consumer debtors or also to enterprises?

Yes, and these laws apply only to consumers and not to companies.

8.3 Consumer Protection. If the debtors are consumers, will the purchaser (including a bank acting as purchaser) be required to comply with any consumer protection law of your country? Briefly, what is required?

Please see question 1.2 above.

8.4 Currency Restrictions. Does your country have laws restricting the exchange of your country's currency for other currencies or the making of payments in your country's currency to persons outside the country?

There are no legal restrictions on international capital movements and foreign exchange transactions, except in international embargo circumstances.

Contracting and the settlement of economic and financial operations with foreign entities can be freely made if payments between residents and non-residents, in relation to economic and financial operations with foreign entities, can be effected directly through any means of payment expressed in a foreign currency.

Banks must report to the Portuguese Central Bank any operations involving a payment made to, or received from, a foreign account if the payment is for more than EUR 12,500 (or the equivalent in foreign currency) by the tenth business day of the month following the completion of the transaction or operation, in accordance with the relevant Portuguese Central Bank instructions.

9 Taxation

9.1 Withholding Taxes. Will any part of payments on receivables by the debtors to the seller or the purchaser be subject to withholding taxes in your country? Does the answer depend on the nature of the receivables, whether they bear interest, their term to maturity, or where the seller or the purchaser is located?

Withholding tax is applicable on the payments of interest to entities that are not financial institutions located in Portugal. Therefore, if the receivables are assigned to an entity that is not a financial institution located in Portugal, interest payments are subject to a 20% final withholding tax (although double taxation treaties may apply). Exemptions apply to interest paid by a resident credit institution to a non-resident credit institution in respect of foreign currency loans and fixed-term deposits. This in practice means that if receivables that include an interest component (if the receivables only have a principal component, then withholding tax will not be due) are sold to non-resident entities, withholding tax will be applied on payments of interest by debtors to such non-resident entity.

Under the Portuguese Securitisation Tax Law, the payments of collections made in respect of the receivables by the Servicer to the FTC or STC is not subject to withholding tax.

9.2 Seller Tax Accounting. Does your country require that a specific accounting policy is adopted for tax purposes by the seller or purchaser in the context of a securitisation?

This depends on the nature of the entities entering into a securitisation operation. We suggest that any company envisaging to enter into a securitisation operation seek advice from its accountants on the accounting policy to be used.

9.3 Stamp Duty, etc. Does your country impose stamp duty or other documentary taxes on sales of receivables?

As a general rule, no tax is payable on the civil law assignment of receivables. Care must however be taken to ensure that the transaction cannot be qualified as a loan transaction (i.e. if it is deemed to be a sale with non-recourse), as Stamp duty is charged on loan or credit agreements at a rate of 0.04 per month or 0.5% or 0.6% on the amount involved, depending on whether the term for repayment is less than 1 year, less than 5 years, or 5 or more years.

Stamp duty is exempted if the assignment is made to another licenced EU financial institution, as stamp duty is not applicable on, *inter alia*, loans and security between EU financial institutions.

The above risk does not apply to transactions under the Securitisation Law as Decree Law no. 219/2001, of 4 August, (the "**Securitisation Tax Law**") provides expressly that no stamp duty is payable on the assignment (so no tax would be due even in the hypothetical re-characterisation of a transaction under the Securitisation Law as a loan).

The amounts charged by Servicers for the servicing of the receivables will be subject to stamp duty at a rate of 4% if they are considered to be "commissions for financial services". If not, they will alternatively be subject to the usual rate of VAT (21%) which is chargeable on the provision of services. The qualification normally depends on the nature of the entity providing these services.

The Securitisation Tax Law specifically foresees that no tax is due and payable on commissions charged by the Servicer.

Stamp duty is payable on the issuance of mortgages, guarantees, sureties and pledges (unless ancillary to a contract already subject to stamp duty - i.e. so long as they are granted at the same time as a loan and secure the amount of the loan - but note that a true sale of credits would not be subject to stamp duty) at the same rates - i.e. 0.04 per month or 0.5% or 0.6% on the amount secured, depending on whether the term for repayment is less than 1 year, less than 5 years, or 5 or more years respectively.

9.4 Value Added Taxes. Does your country impose value added tax, sales tax or other similar taxes on sales of goods or services, on sales of receivables or on fees for collection agent services?

Please see question 9.3 above.

9.5 Purchaser Liability. If the seller is required to pay value added tax, stamp duty or other taxes upon the sale of receivables (or on the sale of goods or services that give rise to the receivables) and the seller does not pay, then will the taxing authority be able to make claims against the purchaser or on the receivables or collections for the unpaid tax?

The liability for the payment of the stamp tax belongs to the seller. In case the seller does not pay for the stamp tax the tax authorities may claim such payment from the purchaser, but will not pursue the receivables or the collections (to the extent that these have been validly assigned to by the purchaser).

9.6 Doing Business. Assuming that the purchaser conducts no other business in your country, would the purchaser's purchase of the receivables, its appointment of the seller as its servicer and collection agent, or its enforcement of the receivables against the debtors, make it liable to tax in your country?

Tax is due over income obtained in Portugal. If these acts do not imply receiving income in Portugal no tax is due (please note that enforcement of a claim in Portugal is not considered, in itself, as income obtained in Portugal).

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Filipe Lowndes Marques joined the firm in 2001. He is now working with the Banking, Finance and Project Finance Practice Group.

He has extensive experience in the area of Project Finance, having worked since 1995 on several types of projects, including bridges, motorways, power plants, wind farms, LNG terminals and natural gas concessions. He has also advised, amongst others, on the financing for one of the stadia for the Euro 2004 and for the 3rd generation mobile phone network. He has also been active in the field of capital markets, having advised on several securitisation transactions (including the first under the new law and the first synthetic securitisation) and worked on several IPOs of state owned companies.

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He participated in the securitisation of tax and social security non-performing claims of the Portuguese Republic, the setting up of the first synthetic securitisation transaction in Portugal, and has also been involved in the reorganisation process of the national energy sector and having advised on several securitisation transactions and worked on several IPOs of state owned companies.

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In the areas of corporate and M&A, privatisation, capital markets, litigation, tax and EU and competition law, as well as in real estate and Labour, our firm has been the legal advisor on most of the major transactions within Portugal, as well as on high-value, cross-border transactions involving Portuguese interests, consistently advising both local and foreign clients on domestic and international matters as well as offering multi-lingual representation of corporations and businesses from all over the world in their business dealings in Portugal.

In 2001 our firm was admitted to Lex Mundi as the exclusive member firm for Portugal. Lex Mundi is the world's leading association of independent law firms, with more than 17,000 lawyers and 160 law firms in over 99 countries. These premier law firms provide legal representation and local market knowledge just about anywhere a client's legal needs may arise. Our firm's membership in Lex Mundi provides us with global reach and access to legal resources that enhance our ability to serve our clients' needs around the world.

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