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Practical cross-border insights into derivatives law

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Expert Analysis Chapter

Q&A Chapters

Portugal


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1 Documentation and Formalities

1.1 Please provide an overview of the documentation (or framework of documentation) on which derivatives transactions are typically entered into in your jurisdiction. Please note whether there are variances in the documentation for certain types of derivatives transactions or counterparties; for example, differences between over-the-counter ("OTC") and exchange-traded derivatives ("ETD") or for particular asset classes.

Typically, OTC derivatives are documented under a 2002 ISDA Master Agreement. These Master Agreements are entered into together with a Schedule to the Master Agreement, which are used in order to alter standard ISDA terms or add provisions. Particular terms of each trade are then added via an ISDA Confirmation.

In addition, there are other documentation schemes adopted in the Portuguese market, mostly by the large players who have built their own models mainly for domestic use with their Portuguese clients.

ETDs are usually entered into under standard instruments issued by the relevant futures' stock exchange or under ISDA Master Agreements.

1.2 Are there any particular documentary or execution requirements in your jurisdiction? For example, requirements as to notaries, number of signatories, or corporate authorisations.

Pursuant to Portuguese law, there are generally no requirements relating to notarisation or the number of signatories for derivatives transactions, and the agreement does not need to be in writing in order to be binding, as oral agreements are enforceable in accordance with Portuguese law. Nonetheless, it is common for parties to document transactions in writing for evidence purposes in case of future disputes.

1.3 Which governing law is most often specified in ISDA documentation in your jurisdiction? Will the courts in your jurisdiction give effect to any choice of foreign law in the parties' derivatives documentation? If the parties do not specify a choice of law in their derivatives contracts, what are the main principles in your jurisdiction that will determine the governing law of the contract?

Given that the 2002 ISDA Master Agreement is the main document used for cross-border derivatives transactions, the parties usually elect English law. Although not common, New York State law-governed ISDA Master Agreements can also be seen in the Portuguese market.

With regard to other types of derivatives contracts entered into strictly between Portuguese entities, we have also seen the choice of Portuguese law.

From a Portuguese law perspective, the choice of English law under the agreement is valid under the rules on conflicts of law applicable in Portugal, on the basis and within the scope of and subject to the limitations arising out of Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 ("Rome I") on the law applicable to contractual obligations, and Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 ("Rome II") on the law applicable to non-contractual obligations, as well as to the limitations arising from mandatory rules (*normas de aplicação imediata*) and Portuguese public policy (*ordem pública portuguesa*).

If the agreement does not include a choice of law provision and none of the specific solutions of Rome I are applicable, the fallback solution of the Regulation applies: the law of the country with which it is most closely connected.

2 Credit Support

2.1 What forms of credit support are typically provided for derivatives transactions in your jurisdiction? How is this typically documented? For example, under an ISDA Credit Support Annex or Credit Support Deed.

In Portugal, the ISDA Credit Support Annex governed by English law (transfer of title) is commonly used with foreign counterparties – notably between financial entities.

Trading subsidiaries of large groups can be seen entering into Master Agreements with a corporate guarantee (and/or comfort letters and other forms of delivering comfort to their counterparties) of their head company (or other entities of the group with better creditworthiness).

It is also worth noting that derivatives negotiated under financing transactions (e.g. an interest rate swap hedging interest rate risk in a project finance) tend to be secured by the same security and guarantees securing the relevant hedged facilities, which can include mortgages over real estate assets or movable assets subject to registration (such as cars, planes and vessels), assignment of property revenues, pledges over shares or quotas, shareholder credits, bank accounts and/or insurance receivables or assignment of credits by way of security.

2.2 Where transactions are collateralised, would this typically be by way of title transfer, by way of security, or a mixture of both methods?

Where transactions are collateralised under a Credit Support Annex, this would typically be by way of an outright transfer of title, while in other tailor-made transactions, such as for the purposes of hedging interest rate risk of a specific financing, it would commonly be made by way of the security further specified in question 2.1 above.

2.3 What types of assets are acceptable in your jurisdiction as credit support for obligations under derivatives documentation?

Generally, there are no restrictions on the assets that are acceptable for credit support purposes.

Collateral under the ISDA Credit Support Annex is typically cash, but some Portuguese counterparties also collateralise their exposure (and accept collateralisation of their counterparties' exposure) with certain types of securities (such as highly rated companies or sovereign debt titles) with some level of discount depending on their credit risk.

Derivatives entered into specifically to hedge interest rate risk of financing transactions usually share security over any assets securing the financing itself (such as properties, rentals, shares, bank accounts, credits, equipment, insurance) or even corporate or personal guarantees and promissory notes.

2.4 Are there specific margining requirements in your jurisdiction to collateralise all or certain classes of derivatives transactions? For example, are there requirements as to the posting of initial margin or variation margin between counterparties?

Pursuant to Regulation (EU) No. 648/2012 of 4 July 2012 ("EMIR") and Delegated Regulation (EU) No. 2016/2251 of 4 October 2016 (the "Delegated Regulation") supplementing EMIR, margin requirements apply to certain uncleared OTC derivatives between certain types of counterparties.

2.5 Does your jurisdiction recognise the role of an agent or trustee to enter into relevant agreements or appropriate collateral/enforce security (as applicable)? Does your jurisdiction recognise trusts?

Portugal does not recognise trusts, except in very limited cases in the Madeira Free Trade Zone, which are not usually relevant for derivatives trading.

Portuguese entities may enter into derivatives via attorneys-in-fact duly empowered under a proper mandate or powers of attorney. Companies and individuals often mandate their financial institution counterparties to perform regulatory obligations on their behalf.

2.6 What are the required formalities to create and/or perfect a valid security over an asset? Are there any regulatory or similar consents required with respect to the enforcement of security?

As a rule, security and guarantees can be provided under a simple private document, although there are exceptions; for example, mortgages and assignment of property revenues must be executed by deed (public document) before a notary, or an authenticated document (private) before a notary, lawyer or Portuguese solicitor (*solicitador*), and registered.

3 Regulatory Issues

3.1 Please provide an overview of the key derivatives regulation(s) applicable in your jurisdiction and the regulatory authorities with principal oversight.

The key regulations on derivatives applicable in Portugal are: EMIR; Regulation (EU) No. 600/2014 of the European Parliament and of the Council of 15 May 2014; the Delegated Regulation; Decree-Law No. 486/99 of 13 November 1999, as amended (the "Portuguese Securities Code"); Decree-Law No. 298/92 of 31 December 1992, as amended (the "Banking Act"); and Decree-Law No. 70/97.

Law No. 83/2017 of 18 August 2017 and Law No. 58/2020 of 31 August 2020 are also relevant as they provide for compliance measures to prevent money laundering and terrorist financing.

Please note that the Portuguese Securities Code was recently amended in December 2021 and its rules tend to follow the provisions of Directive No. 2014/65/EU of the European Parliament and of the Council on markets in financial instruments.

In Portugal, the regulatory authorities with principal oversight are the Portuguese Securities Market Commission (*Comissão do Mercado de Valores Mobiliários*) and the Bank of Portugal (*Banco de Portugal*).

3.2 Are there any regulatory changes anticipated, or incoming, in your jurisdiction that are likely to have an impact on entry into derivatives transactions and/or counterparties to derivatives transactions? If so, what are these key changes and their timeline for implementation?

On 29 October 2020, the Bank of Portugal placed a preliminary draft of the future Activity Code (*Código da Atividade Bancária*) in public consultation.

The main objectives of the preliminary draft are: (i) the replacement of the current General Regime of Credit Institutions and Financial Companies (*Regime Geral das Instituições de Crédito e Sociedades Financeiras*), systematising and updating its rules; (ii) the aggregation of several currently dispersed special regimes, facilitating the application of the rules in question; and (iii) the transposition of the European directives relating to the so-called "Banking Package" (CRD V and BRRD II) and, partially, the Directive on investment firms.

The date of publication is not yet known.

3.3 Are there any further practical or regulatory requirements for counterparties wishing to enter into derivatives transactions in your jurisdiction? For example, obtaining and/or maintaining certain licences, consents or authorisations (governmental, regulatory, shareholder or otherwise) or the delegating of certain regulatory responsibilities to an entity with broader regulatory permissions.

In general, counterparties may enter into derivatives transactions for hedging purposes. There is, however, a Portuguese law doctrine debate on whether these entities may enter into derivatives transactions for other purposes without a financial licence.

Entities that wish to enter into derivatives as a financial service must be registered as a financial intermediary.

Other restrictions may apply depending on the specific activities or the specific nature of the relevant entity.

3.4 Does your jurisdiction provide any exemptions from regulatory requirements and/or for special treatment for certain types of counterparties (such as pension funds or public bodies)?

EMIR is not applicable to the members of the European Central Bank, of the national central banks of all EU Member States (the "SEBC" members), or of the International Payment Bank.

4 Insolvency / Bankruptcy

4.1 In what circumstances of distress would a default and/or termination right (each as applicable) arise in your jurisdiction?

Pursuant to the Portuguese Insolvency Act, as a general principle, performance of obligations under a bilateral agreement are to be suspended until the insolvency administrator decides whether to maintain the agreement or refuse to comply with it.

Nonetheless, the Portuguese Insolvency Act provides for an exception for derivatives transactions with specific characteristics.

The application of banking resolution measures may also affect derivatives and counterparties' rights thereunder.

4.2 Are there any automatic stay of creditor action or regulatory intervention regimes in your jurisdiction that may protect the insolvent/bankrupt counterparty or impact the recovery of the close-out amount from an insolvent/bankrupt counterparty? If so, what is the length of such stay of action?

The effects of the declaration of insolvency in this respect are manyfold.

First, pursuant to Article 85 of the Portuguese Insolvency Act, all pending proceedings whose outcome may affect the value of the insolvent estate are joined to the insolvency proceeding upon request from the insolvency official.

Second, in line with Article 88, any enforcement proceedings targeting the insolvent estate are suspended and creditors are prevented from bringing new actions. Suspended proceedings are extinguished once the insolvency proceedings are finished.

Third, in accordance with Article 89, no enforcement actions regarding insolvent estate liabilities can be brought within three months following the declaration of insolvency.

Resolution measures applied to credit institutions may also impose a short stay of early termination rights. Furthermore, in the context of banking resolution, if a bridge bank is created and agreements are transferred to the bridge bank, early termination would generally not be possible based on the transfer alone.

4.3 In what circumstances (if any) could an insolvency/bankruptcy official render derivatives transactions void or voidable in your jurisdiction?

The Portuguese Insolvency Act provides for the general rule that any act considered harmful to the insolvency estate may be reversed by the insolvency official if:

a) it has been performed within a period of two years before the declaration of insolvency; and
b) the third party involved acted in bad faith.

The third party is deemed to have acted in bad faith where either it (i) knew its counterparty was insolvent, or (ii) was aware of the transaction's detrimental effect and knew its counterparty was on the brink of insolvency. Bad faith is presumed if the act was carried out within the two years prior to the insolvency proceedings and where a person specially related to the insolvent party participated in or benefitted from it.

Article 121 of the Portuguese Insolvency Act lists several acts that are voidable irrespective of any requirements. These include: (i) providing security *in rem* regarding pre-existing obligations within six months before the insolvency proceeding; (ii) providing security *in rem* in the 60 days prior to the insolvency proceeding; (iii) accepting to become guarantor in a transaction where the insolvent party holds a real interest within six months before the insolvency proceedings; and (iv) entering into transactions whereby it accepts conditions manifestly unbalanced to its detriment in the year prior to the insolvency proceedings.

4.4 Are there clawback provisions specified in the legislation of your jurisdiction that could apply to derivatives transactions? If so, in what circumstances could such clawback provisions apply?

Please refer to question 4.3 above.

4.5 In your jurisdiction, could an insolvency/bankruptcy-related close-out of derivatives transactions be deemed to take effect prior to an insolvency/bankruptcy taking effect?

Close-out netting is capable of (i) in certain circumstances, being enforceable in relation to insolvent companies in respect of which Portuguese law would be the applicable law, and (ii) being enforceable in relation to Portuguese banks in liquidation to the extent such provisions are enforceable under the laws applicable to Master Agreements in accordance with Articles 31 and 33 of Decree-Law No. 199/2006 of 25 October, as amended (the Liquidation of Credit Institutions and Financial Companies Act), and subject to the exercise of any resolution powers to the contrary by the Bank of Portugal pursuant to Articles 145-AB and 145-AV of the Banking Act.

4.6 Would a court in your jurisdiction give effect to contractual provisions in a contract (even if such contract is governed by the laws of another country) that have the effect of distributing payments to parties in the order specified in the contract?

The Portuguese Insolvency Law provisions regarding the order of payment to creditors are mandatory. As such, they cannot be overruled by contractual provisions either governed by foreign or national law.

5 Close-out Netting

5.1 Has an industry-standard legal opinion been produced in your jurisdiction in respect of the enforceability of close-out netting and/or set-off provisions in derivatives documentation? What are the key legal considerations for parties wishing to net their exposures when closing out derivatives transactions in your jurisdiction?

The Portuguese law firm PLEN has drafted a standard legal opinion in respect of the enforceability of close-out netting and set-off provisions for the ISDA Master Agreement, while Morais Leitão, Galvão Teles, Soares da Silva & Associados has drafted a standard legal opinion regarding the enforceability

of the relevant clauses for the European Federation of Energy Traders. Please note, however, that these do not cover all derivatives and counterparty types.

Parties should pay special attention to insolvency-related close-out netting/set-off, which is the most problematic scenario and discussed extensively in the opinions mentioned above.

5.2 Are there any restrictions in your jurisdiction on close-out netting in respect of all derivatives transactions under a single master agreement, including in the event of an early termination of transactions?

Close-out netting and set-off clauses are generally valid, provided that the enforcement of such clauses happens outside an insolvency scenario and that the requirements of Article 847 of the Portuguese Civil Code are met.

In this sense, for the set-off to be possible, it is necessary that (i) two entities are reciprocally creditor and debtor, (ii) payment of the credit to be set off may be demanded in a court of law, without being subject to an exception, whether peremptory or dilatory, of substantive law, and (iii) both obligations are constituted by fungible assets of the same kind and quality.

5.3 Is Automatic Early Termination ("AET") typically applied/disapplied in your jurisdiction and/or in respect of entities established in your jurisdiction?

From our experience, it is not common for Portuguese counterparties to apply AET clauses in their derivatives contracts.

5.4 Is it possible for the termination currency to be denominated in a currency other than your domestic currency? Can judgment debts be applied in a currency other than your domestic currency?

Yes, the termination currency may be denominated in a currency other than the Portuguese domestic currency. Pursuant to Portuguese law, where payment is stipulated in a certain currency, payment shall be made in that stipulated currency.

If the Portuguese party becomes insolvent, all amounts expressed in a foreign currency should be converted into Euros.

6 Taxation

6.1 Are derivatives transactions taxed as income or capital in your jurisdiction? Does your answer depend on the asset class?

Earnings received from derivatives transactions by individuals are subject to personal income tax ("PIT") in Portugal. Earnings from interest rate swaps are deemed as investment income, whereas other earnings received from derivatives transactions are deemed as capital gains (different rules may apply when those earnings are obtained in the context of a professional activity).

Being deemed as investment income or capital gains may impact on the computation of the taxable income and result in different withholding tax obligations.

If the beneficiary is resident for tax purposes in Portugal, the earnings (including both income and gains) will be subject to PIT, even if obtained outside Portugal, at a rate of 28% (or 35% in case of investment income due by entities resident in low-tax jurisdictions or of earnings paid to bank accounts opened on account of non-identified third parties), unless the beneficiary chooses to aggregate said income (*englobamento*) and subject it to the general and progressive PIT rules of up to 53%.

If the beneficiary is not resident for tax purposes in Portugal, earnings derived from derivatives transactions will only be subject to PIT if the relevant income or gain is deemed to be obtained in Portugal. Tax will be due in this case at a rate of 28% (or 35% in case of investment income due to taxpayers who are resident in low-tax jurisdictions), without prejudice to the benefits that may apply under the applicable double tax treaty ("DTT").

Earnings obtained from derivatives transactions by legal entities are subject to corporate income tax ("CIT") in Portugal. If the beneficiary is a legal entity resident for tax purposes in Portugal or a permanent establishment in Portugal of a non-resident entity, earnings from derivatives transactions will be taxed, even if sourced outside Portugal. The standard CIT rate applicable to resident taxpayers is 21%, to which a municipal surcharge (*derrama municipal*) can be added of up to 1.5% and a state surcharge (*derrama estadual*) of up to 9%.

Non-resident legal entities without a permanent establishment in Portugal are taxed on earnings received from derivatives transactions, as defined for PIT purposes, that are deemed to be obtained in Portugal, at a CIT rate of 25% (or 35% in case of investment income due to entities resident in low-tax jurisdictions or of earnings paid into bank accounts opened on account of non-identified third parties), without prejudice to the benefits that may apply under the applicable DTT.

6.2 Would part of any payment in respect of derivatives transactions be subject to withholding taxes in your jurisdiction? Does your answer depend on the asset class? If so, what are the typical methods for reducing or limiting exposure to withholding taxes?

For PIT purposes, earnings from interest rate swaps (qualified as investment income) paid by or through Portuguese entities having organised accounting are subject to withholding tax at the 28% or 35% rates mentioned above.

For CIT purposes, earnings from interest rate swaps (qualified as investment income) paid by CIT taxable entities or individual entrepreneurs having organised accounting are also subject to withholding tax at the 25% or 35% rates mentioned above.

Other earnings received from derivatives transactions are not subject to withholding tax.

Please note that where tax is due in Portugal and no withholding tax applies, the taxpayer will be required to file a tax return, including the earnings received from derivatives transactions, and pay the tax due directly to the tax authority.

Withholding tax may be waived in certain cases. Please refer to the exemptions mentioned below.

6.3 Are there any relevant taxation exclusions or exceptions for certain classes of derivatives?

In addition to the benefits provided under the applicable DTT, under Portuguese domestic law, capital gains earned by non-resident individuals and entities, without a permanent establishment, from the sale of derivatives instruments traded on a regulated market, are exempt from tax provided that certain conditions are met (in particular, the beneficiary may not be resident in a low-tax jurisdiction).

Additionally, under certain conditions, gains obtained by non-resident financial institutions derived from swap transactions are exempt from CIT, unless they have a permanent establishment in Portugal to which the gains are attributable.

The same applies to gains derived by non-resident financial institutions from swap and forward transactions, and related transactions, executed with the Portuguese State, acting through the *Agência de Gestão da Tesouraria e da Dívida Pública – IGCP, E. P. E.* or with *Instituto de Gestão de Fundos de Capitalização da Segurança Social, I. P.*, unless the financial institution has a permanent establishment in Portugal to which the gains are attributable.

Finally, resident financial institutions are exempt from the withholding tax mentioned above.

7 Bespoke Jurisdictional Matters

7.1 Are there any material considerations that should be considered by market participants wishing to enter into derivatives transactions in your jurisdiction? Please include any cross-border issues that apply when posting or receiving collateral with foreign counterparties (e.g. restrictions on foreign currencies) or restrictions on transferability (e.g. assignment and novation, including notice mechanics, timings, etc.).

As previously mentioned, legal requirements for counterparties to enter into derivatives transactions within the Portuguese jurisdiction are dependent on a large number of factors. These may include restrictions on providing financial services in Portugal, whereby a licence will be necessary, or the requirements for the creation of security pursuant to Portuguese law (please refer to questions 2.1, 2.4, 3.3 and 5.2).

8 Market Trends

8.1 What has been the most significant change(s), if any, to the way in which derivatives are transacted and/or documented in recent years?

The introduction of EMIR has changed the way parties negotiate derivatives contracts, which makes it probably the most relevant piece of legislation in the derivatives market for many years.

In terms of new trends, we have seen the appearance of financial power purchase agreements, which introduced longer maturities in deals and brought about new, tailor-made documentation.

8.2 What, if any, ongoing or upcoming legal, commercial or technological developments do you see as having the greatest impact on the market for derivatives transactions in your jurisdiction? For example, developments that might have an impact on commercial terms, the volume of trades and/or the main types of products traded, smart contracts or other technological solutions.

In April 2021, the European Commission published a Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence. This proposal provides for a risk-based regulatory approach and is addressed to both providers of software systems or algorithms and its users, which may have an impact on smart contracts or other technological solutions within the scope of how the parties negotiate derivatives contracts.

As for commercial terms, the market is bound to evolve to capture ESG derivatives, following the global trend.

Maria Soares do Lago has worked for over 17 years in banking and finance and capital markets, specialising in corporate financing, project finance, debt/hybrid issues, securitisation (both traditional and synthetic), liability management exercises and derivatives, working for top Portuguese and international corporates and financial institutions.
Her versatility, diversified skills and client-oriented profile have been generally recognised as her most valuable features and have made her one of the go-to lawyers at Morais Leitão since the early stages of her career.

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Elmano Sousa Costa joined Morais Leitão in 2007.
Elmano has vast experience in derivatives transactions, negotiating master agreements and other financial and commodity trading instruments addressing financial and non-financial parties.
He is qualified to practise in both Portugal and Brazil and his work has also included structured finance and project finance, representing lenders and sponsors in several business areas such as energy production, water and sewage concessions and hazardous waste recovery plants, as well as real estate finance, debt issue transactions and bank debt restructuring.

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Raquel Maurício joined Morais Leitão in 2021. She is a member of the Tax team.
Raquel practises in several areas of tax law, both in domestic and international taxation, specialising in particular in wealth management, tax litigation and M&A.

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Carolina Nagy Correia joined Morais Leitão in September 2021. She is a member of the Banking & Finance team. Since 2022, Carolina has been an assistant teacher at the University of Lisbon School of Law, lecturing mainly contract law, as well as a researcher for CIDP (the Lisbon Centre for Research in Private Law).
Carolina has previously attended internships at Cuatrecasas, Gonçalves Pereira & Associados, Campos Ferreira, Sá Carneiro & Associados, and Morais Leitão within the Banking & Finance team.

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Morais Leitão, Galvão Teles, Soares da Silva & Associados (Morais Leitão) is a leading full-service law firm in Portugal, with a solid background of decades of experience. Broadly recognised, Morais Leitão is a reference in several branches and sectors of the law on a national and international level. The firm's reputation amongst both peers and clients stems from the excellence of the legal services provided. The firm's work is characterised by its unique technical expertise, combined with a distinctive approach and cutting-edge solutions that often challenge some of the most conventional practices. With a team comprising over 250 lawyers at a client's disposal, Morais Leitão is headquartered in Lisbon and has additional offices in Porto and Funchal, and has recently opened an office in Singapore. Due to the creation of the Morais Leitão Legal Circle in 2010, the firm can also offer support through offices in Angola (ALC Advogados), Mozambique (MDR Advogados) and Cabo Verde (VPQ Advogados).

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