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The International Comparative Legal Guide to:

Securitisation 2011

A practical cross-border insight into securitisation work

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1 Receivables Contracts

1.1 Formalities. In order to create an enforceable debt obligation of the obligor 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 behaviour of the parties?

(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) To the extent that a tacit declaration ("*declaração tácita*") can be extracted from the behaviours of the parties ("*comportamentos concludentes*"), such behaviours might be sufficient to sustain the existence of a contract between such parties.

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 a 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 Portuguese 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; (c) permit consumers to cancel receivables for a specified period of time; or (d) provide other noteworthy rights to consumers with respect to receivables owing by them?

(a) The Portuguese Civil Code establishes that the legal and subsidiary interest rate, applicable to both civil and commercial agreements, is determined by a joint order from the Ministry of Justice and from the Ministry of Finance.

Currently the legal and subsidiary interest rate, applicable to both civil and commercial agreements, is set forth by Order no. 291/2003, of 8 April, at 4% (four per cent).

The stipulation of an interest rate in amount above the legal and subsidiary interest rate, applicable to both civil and commercial agreements, should be made in writing and must not exceed such amount in 3 (three) or 5% (five per cent) 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 not 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 is the legal and subsidiary interest rate of 4% (four per cent), as defined in (a) above, except if before the default a higher interest rate was due or if the parties have agreed on an interest rate higher than the legal and subsidiary interest rate of 4% (four per cent), in any case with the limitations referred to in (a) above.

There is, however, a specific subsidiary interest rate on late payments applicable to credits in which the creditors are corporate entities, either legal or natural. Such rate is set out by a joint order from the Ministry of Justice and from the Ministry of Finance. Currently the method of determining the subsidiary interest rate on late payments applicable to credits in which the creditors are corporate entities, either legal or natural, is set forth by Order no. 597/2005, of 19 June, 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 per cent). For the first semester of 2011, the subsidiary interest rate on late payments applicable to credits in which the creditors are corporate entities, either legal or natural, was set forth by Notice no. 2284/2011, of 21 January 2011, at 8% (eight per cent).

The stipulation of an interest rate on late payments in an amount above the applicable legal and subsidiary interest rates, should be made in writing and must not exceed such amount by 7 (seven) or 9% (nine per cent) 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.

(c) and (d) Please note that in Portugal the activity of concession of credit to consumers is regulated pursuant to Decree-law no. 133/2009, of 2 June, which implemented Directive no. 2008/48/EC, of the European Parliament and Council, of 23 April. This Decree-law provides for a number of rights of consumers, the most important of which are (i) the right of the consumer to receive pre-

determined information in respect of the credit agreement to be entered into, pursuant to annex II and annex III of that Decree-law (ii) the right of the consumer to revoke the credit agreement within 14 (fourteen) calendar days from entry into of such agreement or from the delivery to the consumer of its copy of the credit agreement and of all related information should such delivery occur after the entry into of the credit agreement and (iii) 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 or collection of those 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 obligor do not specify a choice of law in their receivables contract, what are the main principles in Portugal that will determine the governing law of the contract?

The rules on conflicts of law in respect of contractual obligations applicable in Portugal are contained in Regulation EC no. 593/2008, of the European Parliament and Council, of 17 June 2008, on the Law applicable to the contractual obligations (Rome I) (the "**Rome I Regulation**").

To the extent that the law applicable to the receivables contract has not been chosen in accordance with article 3 of the Rome I Regulation, and notwithstanding the application of articles 5 to 8 of the Rome I Regulation, the receivables contract shall be governed by the law indicated in no. 1 of article 4 of the Rome I Regulation, taking into consideration the type of the contract from which the receivables arise.

In accordance with no. 2 of article 4 of the Rome I Regulation, should the receivables contract be of a type which is not covered by no. 1 of article 4 of the Rome I Regulation, or should the elements of the receivables contract be of a type which is covered in more than one sub-paragraph of no. 1 of article 4 of the Rome I Regulation, the receivables contract shall be governed by the law of the country where the party required to effect the characteristic performance of the receivables contract has its habitual residence.

Where it is clear from all the circumstances of the case that the receivables contract is manifestly more closely connected ("*conexão mais estreita*") with a country other than that indicated in no. 1 and 2 of article 4 of the Rome I Regulation, the receivables agreement shall be governed by the law of such other country.

Also, where the law applicable cannot be determined pursuant to no. 1 and 2 of article 4 of the Rome I Regulation, the receivables contract shall be governed by the law of the country with which it is more closely connected ("*conexão mais estreita*").

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

2.2 Base Case. If the seller and the obligor are both resident in Portugal, and the transactions giving rise to the receivables and the payment of the receivables take place in Portugal, and the seller and the obligor choose the law of Portugal to govern the receivables contract, is there any reason why a court in Portugal 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 Foreign Law of Non-Resident Seller or Obligor. If the seller is resident in Portugal but the obligor is not, or if the obligor is resident in Portugal but the seller is not, and the seller and the obligor choose the foreign law of the obligor/seller to govern their receivables contract, will a court in Portugal give effect to the choice of foreign law? Are there any limitations to the recognition of foreign law (such as public policy or mandatory principles of law) that would typically apply in commercial relationships such that between the seller and the obligor under the receivables contract?

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

In any case, and pursuant to no. 4 of article 3 of the Rome I Regulation, where all other elements relevant to the situation at the time of the choice of law are located in one or more European Union Member States, the parties choice of applicable law other than that of one European Union Member State shall not prejudice the application of provisions of Community law which cannot be derogated by agreement, as implemented in Portugal.

In addition, pursuant to no. 2 of article 9 of the Rome I Regulation, the choice of law pursuant to the Rome I Regulation does not restrict the application of overriding mandatory provisions ("*normas de aplicação imediata*") of Portuguese law.

Moreover, and pursuant to article 22 of the Portuguese Civil Code, foreign law provisions which application results from a conflict rule applicable in Portugal (including the provisions of Rome I Regulation) should not be applicable by Portuguese Courts to the extent that such foreign law provisions are contrary to the principles of Portuguese international public policy ("*princípios fundamentais da ordem pública internacional do Estado Português*").

2.4 CISG. Is the United Nations Convention on the International Sale of Goods in effect in Portugal?

Portugal had not, as of 1 March, 2011, signed or ratified the United Nations Convention on Contracts for the Sale of Goods.

3 Choice of Law - Receivables Purchase Agreement

3.1 Base Case. Does Portuguese law generally require the sale of receivables to be governed by the same law as the law governing the receivables themselves? If so, does that general rule apply irrespective of which law governs the receivables (i.e., Portuguese laws or foreign laws)? Are there any exceptions to this rule that would apply to receivables sale transactions?

Pursuant to no. 1 of article 14 of the Rome I Regulation, the mutual

obligations of the seller and of the purchaser under an assignment of a credit right against another person (the debtor) shall be governed by the law that under the Rome I Regulation applies to the agreement between the seller and the purchaser. In this respect what is referred to in relation to article 3 and 4 of the Rome I Regulation will apply (see questions 2.1 and 2.3 above).

However, pursuant to the provisions of the Rome I Regulation, in particular those contained in no. 2 of article 14, if the receivables are governed by Portuguese law, regardless of the choice of law of the parties to govern the receivables purchase agreement, 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.

Although neither the Rome I Regulation nor the Portuguese Civil Code imposes the obligation that assignments of receivables 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 executable 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 Freedom to Choose Other Law. If (a) the receivables are governed by one country's laws (whether Portuguese law or foreign laws), (b) the seller sells the receivables to a purchaser located in a third country, and (c) the seller and the purchaser choose the law of the purchaser's country to govern the receivables purchase agreement, will a court in Portugal give effect to their choice of foreign law? Are there any exceptions to this rule that would apply to receivables sale transactions?

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

3.3 Freedom to Choose Home Country Law. Conversely, if (a) another country's law governs the receivables (e.g., a foreign obligor's country), and (b) the seller and purchaser are resident in Portugal, will a court in Portugal permit the seller and purchaser to choose the law of Portugal to govern the receivables sale? Will a court in Portugal permit the seller and purchaser to choose the law of Portugal to govern the receivables sale if only one of the seller or the purchaser are resident in Portugal? Are there any exceptions to this rule that would apply to receivables sale transactions?

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

3.4 Recognition of Foreign Law Sales. If (a) both the receivables contract and the receivables purchase agreement are governed by the same foreign law, and (b) the requirements for a true sale have been fully met under that foreign law, will a court in Portugal recognise that sale as being effective against the seller, the obligors and other third parties (such as creditors or insolvency administrators of the seller and the obligors) without the need to comply with Portuguese law own sale requirements? Are there any exceptions to this rule?

To the extent that (i) the choice of foreign law to govern the receivables contract and the receivables purchase agreement is valid, (ii) the requirements for a true sale have been fully met under that foreign law and (iii) such sale is, pursuant to the applicable governing foreign law, effective against the seller, the obligors and other third parties, a Portuguese court should, in principle, recognise the sale as being effective against the seller, the obligors and other third parties without the need to comply with sale requirements provided for under Portuguese law.

For exceptions in what respect the applicability of foreign law by Portuguese courts, please see what is referred to in this respect in question 2.3 above.

4 Asset Sales

4.1 Sale Methods Generally. In Portugal what are the customary methods for a seller to sell 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 establishing 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 deals with the requirements that purchasers of these types of receivables must comply with), the general principles of the Portuguese Civil Code shall also apply to transactions under this Decree-law.

4.2 Perfection Generally. What formalities are required generally for perfecting (i.e., making enforceable against other creditors of the seller) a sale of receivables? Are there any additional or other formalities required for the sale of receivables to be perfected against any subsequent good faith purchasers for value of the same receivables 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 the covered bonds (Decree-law no. 59/2006, of 20 March), 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.

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.

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 Obligor Notification or Consent. Must the seller or the purchaser notify obligors of the sale of receivables in order for the sale to be effective against the obligors and/or creditors of the seller? Must the seller or the purchaser obtain the obligors' consent to the sale of receivables in order for the sale to be an effective sale against the obligors? 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? Are there any limitations regarding the purchaser notifying the obligor of the sale of receivables even after the insolvency of the seller or the obligor?

Obligor Notification

The assignment is only effective towards the obligor of the assigned credit if the assignment is notified to the obligor, or if the obligor accepts the assignment. Such notification may be executed by any means, by the assignor or by the assignee, and the acceptance of the obligor may be express or tacit. For reasons of proof, it is normally recommended that this notification is 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 obligor, 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 of 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 obligor after notification of assignment is made in writing, by registered letter, to such obligor.

However, an exception to this requirement applies when the assignment of credits is made under the Securitisation Law by, *inter alia*, credit institutions, insurance companies, 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 obligor since such assignment is deemed to be effective in relation to such obligor when such assignment is effective between assignor and assignee.

Obligor Consent

Receivables may be assigned, irrespectively of the consent of the obligor, 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 ("*intuitu personae*").

Insolvency of the seller

Only a minority of Portuguese doctrine argues that the notification or acceptance of the obligor in relation to the assignment of the receivables is a condition for the production of effects of the assignment towards the insolvency state, arguing that the insolvency official should be considered a third party in relation to the assignment of the receivables.

The majority understanding is that the insolvency official must solely manage the insolvency state, which only includes the credits owned by the insolvent entity. Thus, the credits assigned from the seller to the purchaser, prior to the insolvency, even if such assignment has not been notified or accepted by the obligor, do not form part of the insolvency state of the seller.

Insolvency of the obligor

If the obligor is notified of the assignment of the receivables after the beginning of the insolvency procedure, the purchaser has full right to claim its credits within the insolvency procedure, in any case, set-off of claims and debts between the purchaser and the obligor may be subject to limitations.

4.5 Restrictions on Assignment; Liability to Obligor. Are restrictions in receivables contracts prohibiting sale or assignment generally enforceable in Portugal? Are there exceptions to this rule (e.g., for contracts between commercial entities)? If Portugal recognises prohibitions on sale or assignment and the seller nevertheless sells receivables to the purchaser, will either the seller or the purchaser be liable to the obligor for breach of contract or on any other basis?

Clauses prohibiting the assignment of a credit right ("*pactum de non cedendo*") may be contractually agreed amongst the underlying obligor and the assignor.

However such provisions will only be opposable to the purchaser of a receivable if it is proven that such purchaser knew of the prohibition at the time of the assignment of the credit right.

Under general rules of Portuguese law the seller may be liable towards the obligor for breach of contract if he sells credits that cannot be assigned pursuant to a "*pactum de non cedendo*".

4.6 Identification. Must the sale document specifically identify each of the receivables to be sold? If so, what specific information is required (e.g., obligor name, invoice number, invoice date, payment date, etc.)? Do the receivables being sold have to share objective characteristics? Alternatively, if the seller sells *all* of its receivables to the purchaser, is this sufficient identification of receivables?

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.).

4.7 Respect for Intent of Parties; Economic Effects on Sale. If the parties denominate their transaction as a sale and state their intent that it be a sale will this automatically be respected or will a court enquire into the economic characteristics of the transaction? If the latter, 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/or (c) control of collections of receivables without jeopardising perfection?

Portuguese courts have broad discretion in determining the nature of a transaction pursuant to legal criterion and the economic characteristics, irrespectively of the type of underlying agreement defined by the parties.

It may prove difficult to evidence the true, complete and accurate spirit of each party when entering into the underlying agreement. This assessment will ultimately rest upon the discretionary powers of the court, the circumstances of the individual agreement at stake and the evidence presented before the court.

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 exemption).

4.8 Continuous Sales of Receivables. Can the seller agree in an enforceable manner (at least prior to its insolvency) to continuous sales of receivables (i.e., sales of receivables as and when they arise)?

To the extent that the requirements referred to in question 4.6 are complied with, the seller can agree to a continuous sale of receivables.

4.9 Future Receivables. Can the seller commit in an enforceable manner to sell receivables to the purchaser that come into existence after the date of the receivables purchase agreement (e.g., "future flow" securitisation)? In that regard, is there a distinction between receivables that arise prior to or after the seller's insolvency?

Under Portuguese law, (i) existing credit rights held by the assignor at the date of the agreement and (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.

In general terms, as a result of insolvency declaration, the insolvent seller looses the ability to dispose of its assets, either present or future, which after the insolvency declaration are included in the insolvency estate and, therefore, subject to the administration and disposition powers of the insolvency official.

4.10 Related Security. Must any additional formalities be fulfilled in order for the related security to be transferred concurrently with the sale of receivables? 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 Issues

5.1 Back-up Security. Is it customary in Portugal 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 Portugal, and for such security interest to be perfected?

This is not applicable in Portugal.

5.3 Purchaser Security. What are the formalities for the purchaser granting a security interest in receivables and related security under the laws of Portugal, 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 obligors. In case of a pledge subject to registration, the pledge will produce its effects from the moment the registry 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 Portugal or must additional steps be taken in Portugal?

Although neither the Rome I Regulation nor the Portuguese Civil Code imposes 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 executable 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 title of the securities.

5.6 Trusts. Does Portuguese law recognise trusts? If not, is there a mechanism whereby collections received by the seller in respect of sold receivables can be held or be deemed to be held separate and apart from the seller's own assets until turned over to the purchaser?

Portuguese law does not generally recognise trusts (nevertheless, Decree-law no. 264/90, of August 31, authorised the incorporation and operation of companies, as well as the opening of branches by existing entities, which sole object was trusts or off-shore trust management. This provision is limited both territorially and materially).

Physical segregation between collections received by the seller arising from assigned receivables (which already belong to the purchaser) and the seller's own assets is normally achieved through the use separate and specific bank accounts.

Moreover, and pursuant to Securitisation Law, the receivables affected to the payment of principal and interest to noteholders, as well as the product of the reimbursements of such receivables and respective income will form autonomous assets. These assets cannot be used to discharge any other debts of the securitisation company until the complete reimbursement of the amounts due to the respective noteholders and the expenses and charges connected with such issue.

The assets which from time to time are included in the autonomous assets allocated to the reimbursement of the notes must be adequately accounted for in segregated accounts of the company and identified under a code form in the issue documents, except in case of tax receivables, in which the confidentiality of the personal data of the tax payers must be ensured, by joint regulation of the Minister of Finance and the relevant government member considering the ownership of the receivables to be assigned for securitisation purposes.

5.7 Bank Accounts. Does Portuguese law recognise escrow accounts? Can security be taken over a bank account located in Portugal? If so, what is the typical method? Would courts in Portugal recognise a foreign-law grant of security (for example, an English law debenture) taken over a bank account located in Portugal?

Portuguese law does not generally recognise escrow accounts.

The most commonly used security over bank accounts is the pledge.

In respect of the recognition by Portuguese courts of foreign-law grant of security please see what is referred to in this respect in questions 5.4 above.

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 Portuguese 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? Would the answer be different if the purchaser is deemed to only be a secured party rather than the owner of the receivables?

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 insolvency estate. Bearing that in mind some legal doctrine defends that in such cases the insolvency official 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.

Under Portuguese law, credits assigned by way of security ("*cessão de créditos com escopo de garantia*") are deemed as effectively purchased by the assignee, irrespectively of the scope of the assignment, therefore being considered as owned by the assignee. Therefore, should the purchaser be deemed as a secured party, in the sense that has purchased such credits assigned by way of security, the assigned receivables shall not form part of the seller's insolvency estate, since they have been incorporated in the assets of the purchaser.

In any case, it can be sustained that the insolvency official, responsible for the management of the seller's assets has the power to decide whether or not to comply with the underlying obligation which is secured through the assignment of credits by way of security.

If the insolvency official chooses to comply and effectively complies with the secured underlying obligation, the assigned receivables should be reinstated to the insolvency estate of the seller.

On the other hand, should the insolvency official decide not to comply with the secured underlying obligation, the purchaser shall be paid through the assigned receivables as collateral for the secured obligation and shall not be deemed as claimant of the seller.

Please note that there is, however, no relevant court decisions taken at this respect.

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 official try to prohibit the purchaser's exercise of rights in relation to the assigned credit rights.

6.3 Suspect Period (Clawback). 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? What are the lengths of the "suspect" or "preference" periods in Portugal for (a) transactions between unrelated parties and (b) transactions between related parties?

Pursuant to Decree-law no. 53/2004, of 18 March, (the "**Insolvency Code**") and in the context of a possible insolvency proceeding affecting the seller, the insolvency official, 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 beginning 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, which 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 or, (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 practiced within the two years preceding the beginning of the insolvency procedure and the person who practiced 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 to act in "*mala fide*" will be diminished.

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

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) render by the seller of security concerning pre-existent obligations;

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

(iv) payments or any other acts that lead to the termination of obligations, made in the 6 months prior to 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 procedure, which stipulate excessive obligations to the company; and

(vi) repayment of shareholder loans.

These typified acts are not applicable in case of termination upon election by the insolvency official of receivables sale agreements under the Securitisation Law since this law always requires that the insolvency official demonstrates the "*mala fide*" of the purchaser and does not allow the insolvency official 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 official 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.

There is, however, a specific rule pursuant to the **Insolvency Code** that applies if the obligor is a natural person and such obligor assigned, prior to the insolvency declaration, future receivables arising from labour agreements or rendering of services agreement and retirement credits or unemployment subsidies. In such cases the assignment is only effective if the credits arise until 24 months after the insolvency declaration.

7 Special Rules

7.1 Securitisation Law. Is there a special securitisation law (and/or special provisions in other laws) in Portugal establishing a legal framework 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 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 Portugal 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 and management 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 Portugal 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 Portugal 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 Portugal 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 should not 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 Portugal, 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 licence or its being subject to regulation as a financial institution in Portugal? Does the answer to the preceding question change if the purchaser does business with other sellers in Portugal?

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 Servicing. Does the seller require any licences, etc., in order to continue to enforce and collect receivables following their sale to the purchaser, including to appear before a court? Does a third party replacement servicer require any licences, etc., in order to enforce and collect sold receivables?

Please see what is referred to in this respect in question 8.1 above.

In any case, and to the extent that the sale of the receivables has been notified or accepted by the debtor and is enforceable towards the debtor and third parties, in order for the seller to have legitimacy ("*legitimidade processual*") to appear in court and enforce the receivables, it might have to demonstrate sufficient title to do so (*e.g.* its capacity as servicer, a power of attorney granted by the purchase) if such legitimacy is contested in court by the enforced party.

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

Yes, and these laws apply only to consumer obligors and not to companies.

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

Please see what is referred to in this respect in question 1.2 above.

8.5 Currency Restrictions. Does Portugal have laws restricting the exchange of Portugese currency for other currencies or the making of payments in Portugese 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 settlement of economic and financial operations with foreign entities (i.e. the acts and contracts, irrespectively of its nature, which result or may result in receipts or payments between resident and non-resident persons or entities or transfers of funds from or to outside Portugal) can be freely made. Furthermore, payments between resident and non-resident persons or entities, related to economic and financial operations with foreign entities, as defined in the foregoing paragraph, can be effected directly through any means of payment expressed in a foreign currency.

Persons travelling into, or from Portugal, coming from, or into, a non-EU country carrying net moneys in an amount equal to or in excess of €10,000, must report that fact to the Portuguese custom authorities. For these purposes the following assets are, amongst others, deemed as net moneys: (i) payment means in bearer form, including monetary instruments, traveller's cheque and negotiable securities, such as cheques, promissory notes and other payment orders; (ii) cash; (iii) banknotes or hard money with legal tender in the respective issuing states; and (iv) banknotes or hard money without legal tender (although still in the period of time in which such banknotes or hard money are accepted for exchange).

Banks (also including, rural cooperative banks and savings banks) must report to the Bank of Portugal any transactions with foreign entities made on their own account or on behalf of their clients. However, when providing information on behalf of their clients, banks may benefit from an exemption threshold up to the amount of €50,000.00, in relation to payments made within the European Union, if they previously inform the Bank of Portugal of their intention to benefit from the exemption. In these cases, banks must provide the Bank of Portugal with a list of all the clients who performed transactions with foreign entities, during the relevant year (irrespectively of the amounts involved), as well as the global amount of payments and receipts in relation to each client.

In addition, direct declarants (all economic agents) performing transactions with foreign entities without involving a resident bank, must inform the Bank of Portugal of the following: (i) opening and termination of foreign bank accounts or settlement of current account with non-resident entities; and (ii) transactions with foreign entities without involving a resident bank.

General direct declarants (economic agents), as designated by the Bank of Portugal, must inform this entity of all operations performed with non-resident entities, including those intermediated by resident banks.

The entities referred to above must report said information within ten business days after the end of the month in which the completion of such operations occurred.

9 Taxation

9.1 Withholding Taxes. Will any part of payments on receivables by the obligors to the seller or the purchaser be subject to withholding taxes in Portugal? 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 21.5% 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 Portugal 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 Portugal 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 (see above), 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, and 5 or more years.

Stamp duty is exempted if the assignment is made to another licensed 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 (23%) 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, and 5 or more years respectively.

9.4 Value Added Taxes. Does Portugal 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 what is referred to in this respect in 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 for the unpaid tax against the purchaser or against the sold receivables or collections?

The liability for the payment of the stamp tax to the Portuguese State is of the seller. In case the seller does not deliver the stamp tax due, the tax authorities may claim such payment from the purchaser.

9.6 Doing Business. Assuming that the purchaser conducts no other business in Portugal, 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 obligors, make it liable to tax in Portugal?

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 an income obtained in Portugal).

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In the area of securities law he has acted as legal advisor in the first and unique securitisation ever made in Portugal of tax and social security non-performing claims of the Portuguese Republic and on the setting up of the first synthetic securitization in Portugal, both of these transactions concluded in 2004. He has acted as legal advisor in the setting up of the financing arrangements for the largest takeover bid ever made in Portugal, during the years of 2006 and 2007. He has also acted as legal advisor in the setting up of several initial public offers, during the years of 2007 and 2008, including the largest initial public offer ever made in Portugal and the largest in Europe during 2008. In 2009 he has acted as legal advisor in the setting up of the first private equity fund in Portugal exclusively dedicated to the recovery of companies (turn-around fund), which is currently the largest Portuguese private equity fund. He regularly acts as legal advisor in several securitization transactions (mortgage loans, consumer loans and small and medium size companies' loans), in the setting up of and day-to-day regulatory advice to private equity funds and on the setting up of several offers for issues of medium terms notes (EMTN) in the international markets.
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