International Bank and Other Guarantees Handbook

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Europe

Edited by

Yann Aubin
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The Editors would like to also thank **Antonela Purece,** student in the Post Graduate Degree in International Commercial Law at the Paris Ouest University and **Khayala Rzazade**, student in the Post Graduate Degree in Space Activities and Telecommunications of Paris Sud University for their invaluable support.

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Overview

CHAPTER 22
Portugal

Duarte Brito de Goes, André Fernandes Bento & Ana Sofia Rendeiro

I INTRODUCTION

A Description of the Legal System in Portugal

Portugal is a civil law jurisdiction. Accordingly, the relevant rules applicable to Guarantees and contracts are enshrined in the Portuguese Civil Code and other statutory laws.

Articles 627–654 of the Portuguese Civil Code set forth the legal regime applicable to Guarantees in Portugal, establishing the main principles that must govern the relations between the Guarantor, the Beneficiary and the Principal.

There is no rule of judicial precedent in Portugal. Yet, when the law is not clear, the courts are prone to follow solid trends of the jurisprudence of higher courts.

B Use of Guarantees in Portugal

Guarantees are generally used in Portugal, both by banking institutions, who issue them for the benefit of third parties on behalf of their customers (and charge the latter a fee during the Guarantee's validity period), as well as corporations and individuals, which grant Guarantees to third parties in connection with the execution of any kind of agreements.

Several legal issues surrounding the issuance and execution of Guarantees in Portugal have been analysed both by Portuguese authors and jurisprudence, which will be highlighted and analysed in this article.

C Participation of Portugal to International Regimes

1. Is Portugal a party to any multilateral treaties related to guarantees? If so, please provide specific reference and short summary of what the treaty's purpose is.

2. Is Portugal a party to any bilateral treaties related to guarantees? If so, please provide specific reference and short summary of what the treaty's purpose is.

Portugal does not participate in any international regime applicable to Guarantees.

However, as a Member of the European Union (EU), Portugal is subject to a number of Regulations which have an impact on Guarantees, such as the Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (the Rome I Regulation).

Portugal is also a party to the 1930 Genève Convention providing a uniform law for bills of exchange, and the 1931 Genève Convention providing a uniform law for cheques, whose provisions on the 'aval' as a form of Guarantee are directly applicable in Portugal.

Guarantees subject to foreign laws are valid and enforceable in Portugal, provided that they comply with international private law rules.

II GENERAL OVERVIEW

1. In the column 'Type of Guarantee', you will find a list, a brief description and a comparison of the different Guarantees and indemnities available in the chapter's jurisdiction (including comfort letters).

2. In the column 'Legal Source of Guarantee', you will find a list, a brief description of the legal source of the Guarantee (was the Guarantee created by a statute, by case law, etc.?).

3. In the column 'Nature of the Guarantor's Undertaking', you will find information in response to the following questions:

- *Does the Guarantor undertake to pay an amount of money or does he undertake to perform an action?*
- *Is it a performance or a payment Guarantee or both?*
- *If it is a payment Guarantee, does the Guarantor undertake to pay for a certain debt, or does he undertakes to indemnify the Beneficiary against potential damage?*
- *Does the Guarantee create a binding obligation on the Guarantor or does it only show a non-binding moral undertaking (such as some type of comfort letters)?*

4. In the column 'Relationship Between the Guarantee and the Underlying Obligation', you will find information in response to the following questions:

- *Please describe the relationship between the Guarantee and the Underlying Obligation and, in particular, please indicate whether the Guarantee is a secondary obligation that is dependent on the continued validity of the Underlying Obligation or a primary obligation independent from the Underlying Obligation?*
- *Is there an obligation for the Guarantor to pay on first demand of the Beneficiary?*
- *Does the Beneficiary have to provide the Guarantor with some documents when calling for the Guarantee?*
- *Can the Guarantor use all the defences the Principal may have in relation to the underlying contract (e.g., an invalid or void contract, damages, etc.)?*

5. In the column 'Comments', you will find information in response to the following questions:

- *Are there criteria which determine the classification of a Guarantee as one type or another?*
- *If so, what are such criteria?*
- *If so, what are the important elements a judge (or arbitrator) will take into account to interpret a contract and classify it as a particular type of Guarantee?*
- *Please state what are the advantages (flexibility, cost efficiency, clarity of its legal framework, etc.) and defaults (cost, heavy procedures, etc.) of each Guarantee. How often and in which circumstances are they used in your jurisdiction?*

Type of Guarantee	*Legal Source of Guarantee*	*Nature of the Guarantor's Undertaking*	*Relationship Between Guarantee and Underlying Obligation*	*Comments*
1. *Fiança*	Articles 627–654 of the Portuguese Civil Code.	Under a *fiança*, the Guarantor assumes personal liability for performance of an obligation or settlement of a liability by the Principal. Normally the *fiança* is ancillary of a payment obligation, but it may relate to other types of obligations, provided that the Guarantor is able to perform them *in lieu* of the Principal (or an equivalent performance is agreed with the Guarantor). The payment obligation may be in relation to a certain debt, and/or in	A *fiança* is ancillary to the guaranteed obligations/liabilities assumed by the Principal (e.g., the nullity of the Underlying Obligation results in the nullity of the *fiança*, and the legal form of the Guarantee shall be subject to the same requirements applying to the Underlying Obligation). By default, a Guarantor under a *fiança* shall be deemed as a secondary debtor, and hence its assets may only be seized under an enforcement procedure, insofar as the debt cannot be discharged with the judicial sale of the Principal's assets. However, a Guarantor under a *fiança* shall be qualified as a principal debtor, insofar as	*Fianças* are typically requested in connection with various types of transactions, from landlords upon execution of rental agreements, to banks when granting credit to individuals or corporations. It is common practice for parties to expressly state that the Guarantee is a *fiança*, in order to avoid any doubts. In the absence of such qualification, and if there are no references in the document suggesting otherwise, it is generally understood that the *fiança* is the cornerstone type of 'guarantee' existing under Portuguese law, and thus

Type of Guarantee	*Legal Source of Guarantee*	*Nature of the Guarantor's Undertaking*	*Relationship Between Guarantee and Underlying Obligation*	*Comments*
		respect of a compensation or indemnification that can potentially be owed by the Principal to the Guarantor in the future. A *fiança* is binding in nature for the Guarantor.	(i) this is expressly provided in the *fiança*,[1] or (ii) if such Guarantee is connected to financing agreements or certain other types of commercial arrangements.[2] Under a typical *fiança* (and regardless of the Guarantor being deemed as principal or secondary debtor), the Guarantor benefits of any exceptions/defences may be claimed by the Principal.[3] It is, however, being sustained by reputed authors that it is possible to structure a *fiança* 'on first demand'.[4]	the relations between Guarantor and Beneficiary shall be governed by the civil law applicable to the *fiança*. The *fianças* are a flexible type of Guarantee, in that the Guarantor may assume a position as principal or secondary debtor, and regardless of the ancillary nature thereof, the parties may agree that payment shall be made on a first demand basis. They are also subject to a detailed legal regime set forth in the Portuguese Civil Code. Fianças have to be legalised by a notary or lawyer in order to be qualified as enforcement documents, a formality which may lead to commercial difficulties (e.g., Guarantees granted in connection with consumer credit).

Type of Guarantee	*Legal Source of Guarantee*	*Nature of the Guarantor's Undertaking*	*Relationship Between Guarantee and Underlying Obligation*	*Comments*
2. Joint and several liability (*responsabilidade solidária*) for Guarantee purposes and assumption of debt (*assunção cumulativa de dívida*)	Joint and several liability: Articles 512–527 of the Portuguese Civil Code. Assumption of debt: Articles 595–600 of the Portuguese Civil Code.	When joint and several liability is assumed by debtors, the creditor may demand full payment of the debt to each of the debtors. Once the debt is discharged, by default the subrogation rights are construed on the basis that each debtor(s) is (are) liable in equal shares vis-à-vis the other(s), but they may agree otherwise. This type of liability is typical in deals where all the co-debtors are interested in the contracts under which the Underlying Obligation is originated.	If joint and several liability (including in the modality of assumption of debt) is assumed by some of the debtors for Guarantee purposes, it shall be similar to the type of *fiança* where the Guarantor is qualified as principal debtor (analysed in the row above).	Joint and several liability is often assumed under financing agreements and commercial agreements by parties belonging to the same corporate group – it may be identified on the basis that the formula 'joint and several' (*responsabilidade solidária*) is used. Furthermore, if an additional debtor assumes debt (*assunção de dívida*) and the creditor does not provide otherwise, the former and new debtor shall also become jointly and severally liable.

Type of Guarantee	*Legal Source of Guarantee*	*Nature of the Guarantor's Undertaking*	*Relationship Between Guarantee and Underlying Obligation*	*Comments*
		However, if some of the co-debtors are only adhering for purposes of guaranteeing the payment to the Beneficiary (and further agree with the debtor who is envisaging to execute the deal that they have full subrogation rights vis-à-vis him), the joint and several liability is deemed as being used for 'guarantee' purposes.[5] When a debt is assumed by another debtor after its origination date (*assunção cumulativa de dívida*), it becomes joint and severally liable with the original debtor, except if the creditor agrees otherwise.		

Type of Guarantee	*Legal Source of Guarantee*	*Nature of the Guarantor's Undertaking*	*Relationship Between Guarantee and Underlying Obligation*	*Comments*
3. Autonomous Bank Guarantee	Guarantee introduced by banking practice and currently accepted as legal by the judicial courts, in light of the principle of contractual freedom.[6]	The Guarantor undertakes on behalf of the Principal to pay on first demand the amount claimed by the Beneficiary up to the guaranteed value (such amount may relate to a payment obligation or an indemnity).	The Guarantor pays the requested amount by the Beneficiary as soon as it receives a written demand signed by the Beneficiary (sometimes, along with previously agreed documents, such as bills of lading[7]). As soon as the documentary requirements are satisfied, the Guarantee must be immediately honoured without the Guarantor being entitled to claim any defence held by the Principal against the Beneficiary.[8] Guarantors may, notwithstanding, object to payment if: (i) the same is not due in view of exceptions and other clauses in the Guarantee's text, (ii) there are evidences of manifest fraud or abusive behaviour of the	Autonomous Guarantees are usually included in a separate document named 'bank guarantee' (*garantia bancária*), where the Underlying Obligation is identified, and the Guarantor undertakes to pay 'on first demand', 'without invoking any defences or claims'; sometimes other similar formulas are used, with a view to underline the 'autonomous' and 'unchallenging' nature of the Guarantee. These Guarantees are customarily granted by credit institutions against payment of a fee; the bank often requests security for its subrogation rights vis-à-vis the Principal. They have a contractual nature and must be accepted by the Beneficiary

Type of Guarantee	*Legal Source of Guarantee*	*Nature of the Guarantor's Undertaking*	*Relationship Between Guarantee and Underlying Obligation*	*Comments*
			Beneficiary,[9] or (iii) in cases of violation of public order. The Guarantor must gather evidence in order to sustain that a fraud or abusive behaviour has occurred.[10]	(but acceptance may be deemed to be implied – please *see* Section III[B][2] on 'Consent Protection' for more details). Autonomous Guarantees are popular in Portugal, and the largest credit institutions are familiarised with the most common uniformised rules, such as the ones published by ICC. The autonomous Bank Guarantee represents an upside for the Beneficiary, as it will receive payment on first demand from the Guarantor. From the perspective of the Principal, it will involve payment of fees to the bank, and possibly the creation of security. The Guarantee itself will also give the upper hand to the

Type of Guarantee	*Legal Source of Guarantee*	*Nature of the Guarantor's Undertaking*	*Relationship Between Guarantee and Underlying Obligation*	*Comments*
				Guarantor in case a contractual conflict arises, a scenario where a court could uphold an injunction moved by the Principal in order to prevent the Guarantor from honouring the Guarantee with a clear evidence of fraud or abuse.
4. *Aval*	Uniform law on exchange bills and promissory notes / Uniform law on cheques	The *aval* is an endorsement in a cheque, bill of exchange or promissory note whereby the Guarantor guarantees payment of the debt attached to such instruments. This Guarantee is binding in nature.	Guarantor and Principal are jointly and severally liable for the payment of the obligation. Unlike the *fiança*, the *aval* is deemed to be independent from the debt attached to the relevant credit note. In fact, the Guarantor's undertaking shall remain valid, even if the principal obligation is for some reason null and void,[11] unless if there is a nullity resulting from a breach of legal form. The *aval* does not enable the Guarantor to invoke the benefit of the prior seizure	This type of Guarantee is identifiable, since it is written on the negotiable instrument (*título de crédito*) by the Guarantor (or in a paper attached thereto), and is expressed by the formula '*bom para aval*' (in English: 'good for *aval*'). The *aval* may potentially bring upsides, when compared to a *fiança*, since: (i) it has an autonomous nature in relation to the Underlying Obligation, (ii) it does not require legalisation by the notary or lawyer to be

Type of Guarantee	*Legal Source of Guarantee*	*Nature of the Guarantor's Undertaking*	*Relationship Between Guarantee and Underlying Obligation*	*Comments*
			of the Principal's assets under an enforcement proceeding.	qualified as an enforcement title, and (iii) the negotiable instrument where it is recorded may be easily endorsed to third parties. Upon execution of financing agreements, it is common practice for banks to request from borrowers a signed negotiable instrument (normally, a promissory note), with the *aval* of any guarantors recorded in its back page. According to a fill-in agreement connected with the financing agreement, the bank is then authorised to fill in the blank fields of the negotiable instrument in respect of date and value, in a scenario of an event of default occurring under the financing agreement.

Type of Guarantee	*Legal Source of Guarantee*	*Nature of the Guarantor's Undertaking*	*Relationship Between Guarantee and Underlying Obligation*	*Comments*
5. Comfort Letters	Comfort letters are not regulated by statute in Portugal. It is generally sustained that the provisions of the Portuguese Civil Code on obligations/liability may apply, depending on the type and level of commitments assumed.	When the comfort letter is merely aimed for reliance purposes, the same shall hardly be qualified as being legally binding. Still, it has been sustained that the Guarantor is subject to a general duty of good faith, and thus shall become liable vis-à-vis the Guarantor if any information provided is false, incomplete or misleading (the '**Reliance Comfort Letters**').[12] If the Guarantor assumes undertakings under the comfort letter, authors submit that the grantor is liable to indemnify the Beneficiary against	When the comfort letter falls into the category of Reliance Comfort Letter or Undertaking Comfort Letter, by nature it shall be seen as not being independent from the Underlying Contract entered into with the Principal. Normally a Liability Comfort Letter will be deemed to be equivalent to a *fiança* and not an autonomous Guarantee on first demand, unless if there is an express reference in the Guarantee as to this latter qualification. Hence, as a general rule the Guarantor thereunder can use all the defences the Principal may have in relation to the underlying contract.	Comfort letters' legal nature shall be assessed in view of each particular case. Albeit each type of letter is not subject to a formal text, certain typical statements indicate its legal nature. In the absence of other references, a Reliance Comfort Letter will be deemed to exist when the grantor: (i) acknowledges the existence of a contract between the Beneficiary and the Principal, (ii) confirms its reliance on the subsidiary's management, or (iii) informs that it owns a certain percentage in the Principal's share capital. An Undertaking Comfort Letter will be deemed to exist if the grantor (also) states that it will: (i) endeavour its best efforts in order to ensure that the

Type of Guarantee	*Legal Source of Guarantee*	*Nature of the Guarantor's Undertaking*	*Relationship Between Guarantee and Underlying Obligation*	*Comments*
		potential damage stemming from the breach, provided that such breach has caused the failure of the Principal to discharge the Underlying Obligation (the '**Undertaking Comfort Letters**').[13] Finally, it has also been submitted that, when the grantor of the comfort letter states that it shall be liable for the discharge of the Principal's obligations, the comfort letter shall be qualified as a Guarantee similar to a *fiança*, thus generating legally binding payment obligations vis-à-vis		Principal discharges its debt, (ii) preserve its shareholding position in the Principal, or (iii) provide any necessary financial resources to the Principal. A Liability Comfort Letter will be deemed to exist when the grantor undertakes to pay to the Beneficiary if the Principal fails to satisfy the latter's claim, or to indemnify the Beneficiary in such scenario. Comfort letters normally result of negotiations between the creditor and the grantor of those instruments, and are attractive for the grantors, in that they: (i) are not usually accounted or referred in the financial statements of the issuer, (ii) will not trigger stamp tax duties (though this

Type of Guarantee	*Legal Source of Guarantee*	*Nature of the Guarantor's Undertaking*	*Relationship Between Guarantee and Underlying Obligation*	*Comments*
		the Beneficiary[14] (the '**Liability Comfort Letters**').[15]		shall be the case, if they are Liability Comfort Letters), and (iii) may avoid the breach by grantors of negative covenants under other financing agreements in respect of the creation of additional guarantees/financial liabilities. At the credit institution's end, the comfort letter will normally not have the same value as a *fiança* or autonomous Guarantee. In addition, Portuguese higher courts have previously decided that, unless by it results clear from its text that the grantor assumes liability for the payment of the Principal's debt, the comfort letter shall not be qualified as a Liability Comfort Letter.[16]

1. Article 638 of the Portuguese Civil Code.
2. Article 101 of the Portuguese Commercial Code provides that the guarantor shall be joint and severally liable with the principal if the Underlying Obligation is 'commercial'. A Portuguese higher court has already confirmed that such is the case of an obligation arising under a financing agreement (decision of Court of Appeal of Coimbra, 07.10.2008, proc nr. 4081/06.5YXLSB.C1, available in dgsi.pt).
3. Article 637, nr. 2 of the Portuguese Civil Code.
4. Manuel Januário Costa Gomes, *Assunção Fidejussória de Dívida – Sobre o sentido e o âmbito da vinculação como fiador* (Coimbra: Livraria Almedina, 2000), 741; Pedro Romano Martinez, Pedro Fuzeta da Ponte, *Garantias de Cumprimento*, 5th edition (Coimbra: Almedina, 2006), 110.
5. The use of joint and several liability for guarantee purposes is accepted among Portuguese authors. For example, Manuel Januário Costa Gomes, *Assunção Fidejussória de Dívida – Sobre o sentido e o âmbito da vinculação como fiador* (Coimbra: Livraria Almedina, 2000), 103.
6. Inocêncio Galvão Telles, *Garantia Bancária Autónoma* (Lisboa: Edições Cosmos, 1991), 18.
7. This does not compromise the autonomous nature of the guarantee, since those documents are qualified as a condition precedent for payment. A. Menezes Cordeiro, *Manual de Direito Bancário* (Coimbra: Almedina, 2012), 763.
8. J. Calvão da Silva, *Direito Bancário* (Coimbra: Almedina, 2001), 386. By this token, a court has decided that a guarantor must pay on first demand under a bank guarantee, even if the Beneficiary failed to comply with its contractual obligations towards the principal (Porto's Higher Court, 04.11.2008, available in dgsi.pt).
9. According to a decision from the Supreme Portuguese Court of 27 May 2010, even though, as a rule, an autonomous Bank Guarantee must be paid on first demand, still the guarantor may refuse payment if the Beneficiary is calling it in breach of bona fide principles.
10. Article 343, nr. 2 of Portuguese Civil Code. Interpretation confirmed by L. Miguel Pestana de Vasconcelos, *Direito das Garantias* (Coimbra: Almedina, 2015), 139.
11. Article 32(2) of the Uniform Law of Exchange Bills and Promissory Notes, and Article 27(2) of the Uniform Law of Cheques.
12. André de Navarro de Noronha, *As Cartas de Conforto* (Coimbra Editora, 2005), 169.
13. L. Miguel Pestana de Vasconcelos, *Direito das Garantias* (Coimbra: Almedina, 2015), 153. Noronha, André de Navarro. *As Cartas de Conforto* (Coimbra Editora, 2005), 186.
14. Noronha, André de Navarro. *As Cartas de Conforto* (Coimbra Editora, 2005), 196.
15. The division between Reliance Comfort Letters, Undertaking Comfort Letters and Liability Comfort Letters has been upheld by the Portuguese Higher Courts: decision of the Lisbon Appeal Court dated of 05.12. 2013, proc. nr. 245/13.3TVLSB.L1-6; decision of the Porto Appeal Court dated of 05.12.2013, proc. 1610/12.9TJPRT.P; decision of the Supreme Court of Justice dated of 18.03.2003, proc. nr. 03A057, all available in dgsi.pt.
16. The Appeal Court of Lisbon has decided that a credit institution shall have the burden of ensuring that a Liability Comfort Letter is drafted so that it clearly states that the guarantor assumes payment obligations thereunder. If not, the comfort letter shall be qualified as a Reliance Comfort Letter or Undertaking Comfort Letter – decision dated of 05.12.2013, proc. nr. 245/13.3TVLSB.L1-6, available in dgsi.pt.

III THINGS TO TAKE INTO ACCOUNT WHEN PUTTING IN PLACE A GUARANTEE

A Application of the Guarantee

1 The Quality of the Parties

Any person with legal capacity is, in principle, entitled to issue Guarantees.

Natural persons have legal capacity when they are fully aged, i.e., when they reach 18 years of age (which can be brought to 16 years of age upon a duly authorised marriage). Portuguese courts may forbid or limit the capacity of natural persons if evidencing psychological or physical incapacity to govern their assets.

Private legal entities may be divided between civil partnerships, foundations and corporate companies. Legal entities have legal capacity to act provided such acts are not limited by the relevant by-laws and they are necessary or convenient to comply with their scope.

The granting of Guarantees (*fianças* or *avales*) by public entities is considered exceptional. Public entities must always act in the public interest (only on the basis of clear interest for the national economy whilst respecting the principle of equality and the competition rules), are subject to special approvals and procedures and may be subject to budgetary restrictions or other limits, which prevent or limit the issuance of Guarantees on behalf of other parties. When the Guarantee is issued by a public body or entity, these issues should be assessed on a case-by-case basis.

a) Companies

The Portuguese Companies Code provides that corporate companies cannot Guarantee obligations from third parties, unless: (a) the company has a justified self-interest in issuing it, and/or (b) the Principal is in a control or group relation with the issuing company.[17]

i Concept of *Justified Self-Interest*

The justified self-interest must be a specific circumstance bringing direct or indirect benefits to the company, and is to be assessed objectively.[18]

Without prejudice to each corporations' specific scope, all companies have a final scope of pursuing profit and, therefore, their legal capacity and their capacity of granting Guarantees may be considered limited only by such final scope. Consequently, in several situations, a Guarantee fee is agreed between Principal and Guarantor, assuring the economic interest of the Guarantor in granting the Guarantee.

17. Article 6 of the Portuguese Companies Code.
18. For example, the Porto Appeal Court recently considered that there is a justified self interest if part of the loan is used by the principal to settle pending liabilities of the guarantor (decision dated of 15.09.2014, proc. nr. 1036-A/2002.P1, available in dgsi.pt).

On this subject, the law is unclear on whom the burden of proof shall fall, and the opinion of reputed authors is divided on this subject.[19] The majority of the most recent higher court decisions sustain that the burden falls on the Guarantor, since it is the party with the information necessary to reveal the lack or existence of interest in issuing the Guarantee.[20] However, there is at least one known sentence upholding the argument that the Beneficiary shall demonstrate the self-interest.[21]

In view of this burden of proof rule, it is particularly relevant that the Beneficiary requests to the Guarantor evidence of its interest in granting it, usually through a corporate approval expressly stating and duly explaining the justified self-interest in issuing the Guarantee. Although not being definitive evidence,[22] the Guarantor would have to contradict the words of the members of its corporate bodies in a court proceeding, when attempting to demonstrate the lack of self-interest.

ii Concept of *Control* or *Group Relation*

A control relation exists when a company is able to exercise, alone or jointly with other companies controlled by it, a dominant influence over the controlled company, this relation being presumed if: (i) the parent directly or indirectly holds more than 50% of the controlled company's share capital and/or voting rights, or (ii) it is in any other way entitled to designate more than half of the members of its auditing or management body.[23]

A group relation only exists when there is a control of no less than 90% of a company's share capital.[24] Though this rarely occurs in Portugal, a group relation may also be established if the relevant companies enter into a parity group contract (*contrato de grupo paritário*),[25] under which they accept to submit to a unitary and common direction, or a subordination contract (*contrato de subordinação*),[26] under which the dominated company accepts that its business is managed by the management body of the dominant company.

19. In favour of the burden of proof falling on the Beneficiary's side, for example, Jorge Manuel Coutinho de Abreu, *Curso de Direito Comercial, Volume II – Das Sociedades* (Coimbra: Almedina, 2007), 199, Pereira de Almeida, *Sociedades Comerciais e valores mobiliários* (Coimbra: Coimbra Editora, 2008), 44. In favour of the opposite thesis, for example Menezes Cordeiro, *Código das Sociedades Comerciais Anotado* (Coimbra: Almedina, 2009), 92.
20. Decision of the Supreme Court of Justice dated of 26.11.2014, proc. nr. 1281/10.7TBAMT-A.P1.S1; dated of 28.05.2013, proc. nr. 300/04.TVPRT; dated of 13.05.2013, proc. nr. 03A318. Decision of the Supreme Administrative Court of Justice dated of 13.11.2013, proc. nr. 1460/13. Decision of the Lisbon Appeal Court dated of 12.12.2013, proc. nr. 1522/10.0TLSB, available in dgsi.pt.
21. Decision of the Porto Appeal Court dated of 15.09.2014, proc. nr. 1036-A/2002.P1, available in dgsi.pt.
22. Decision of the Supreme Court of Justice dated of 28.10.2003, proc. nr. 03A2485, available in < dgsi.pt > .
23. Article 483 of the Portuguese Companies Code.
24. Article 488 of the Portuguese Companies Code. The legal concept of 'group' deviates from the most popular meaning given to this expression.
25. Article 492 of the Portuguese Companies Code.
26. Articles 493 to 508 of the Portuguese Companies Code.

There have been authors sustaining that the control or group relation exception shall only apply in relation to downstream Guarantees issued by the controlling company in respect of its controlled company's debts, but not in relation to upstream Guarantees. The argument is that a controlling company will have a corporate interest in guaranteeing its controlled company's debts since it will indirectly bear its business profits and losses, whereas the opposite does not necessarily applies, thus subsidiaries should only be permitted to guarantee the controlling company's debts under the 'justified corporate interest' test.[27]

Others have also expressed doubts as to whether the control or group relation exception could apply if the Guarantor or the Principal are incorporated outside Portugal. Article 6 of the Portuguese Companies Code refers to 'control or group relation', without making any distinction or cross-reference. However, the meaning of those concepts is further explained in Title VI of Portuguese Companies Code, which, save for a few exceptions, is limited to relations between companies incorporated in Portugal. These authors argue that Article 6 of the Portuguese Companies Code contains an implied cross-reference not only to the concepts of control and group relations contained in Title VI, but also to the conflict of law provision included in that Title, which limits these rules to Portuguese companies.

In conclusion, despite the law referring only to 'control or group relation', these are precise concepts which may need to be interpreted in some restrictive ways. Therefore, in case of doubt the recommended route is to always ensure that the corporate Guarantor has a justified self-interest in granting the Guarantee, regardless of the control or group relation.

b) Prohibitions Applying to Holding Companies (the Portuguese SGPS)

Portuguese holding companies, identified as *sociedades gestoras de participações sociais* or *SGPS* (hereinafter, '**SGPS**'), have the main corporate purpose of conducting an economic activity on an indirect basis, through the management of holdings in other companies.[28]

One of the operations which an SGPS is prohibited from executing is the 'granting of credit', save if for the benefit of:

(i) companies controlled[29] by it; or
(ii) companies in which they hold at least 10% of the voting rights, provided that the corresponding shares are kept for more than one year, or, if less, there is the purpose of preserving them on a permanent basis; or

27. Jorge Manuel Coutinho de Abreu, *Curso de Direito Comercial, Volume II – Das Sociedades* (Coimbra: Almedina, 2007), 200. There is a middle ground thesis adopted by another author, according to which the upstream guarantee shall only be valid if a 'group' relation exists, but not when the subsidiary is merely 'controlled', in such latter case only being valid if there is 'justified corporate interest' – Alexandre Soveral Martins, *Código das Sociedades Comerciais em Comentário* (Coimbra: Almedina, 2010), 118.
28. Article 1 of the SGPS Act.
29. Please *see* Section III[A][1][a] on legal capacity for a full explanation of the legal meaning of 'control'.

(iii) companies in which they hold share capital representing less than 10% of the voting rights, provided that the acquisition value thereof is not less than EUR 4,987,978.97, or the acquisition has resulted of merger or spin-off of the held company.

In relation to the companies described in (ii) and (iii), the credit may only be granted up to the value of the shares held in each of them as accounted in the last SGPS' balance sheet.

Though the relevant legal provision only refers to a prohibition on 'granting of credit', the Appeal Court of Lisbon has recently decided that when an SGPS issues a Guarantee on behalf of a company held by it, it is, for the purposes of such provision, 'granting credit'.[30] In this decision, it was further concluded that no room existed for the 'justified self-interest' or 'control/group' tests set forth in Article 6 of the Companies Code, on the basis that the Guarantee was in breach of a specific provision limiting the activity of the SGPS, and thus should be deemed null and void.

This is a recent and not particularly well-founded decision, which content is debatable. It is yet to be seen if the courts will be influenced by it in the future.

i Banking Licence Requirements

Only licensed credit institutions are permitted to carry out a business involving issuance of Guarantees to third parties obligations.

ii Insolvent Guarantors

In Portugal, an insolvency administrator is entitled to terminate for the benefit of the insolvency estate any insolvent's transactions taking place two years before the beginning of the insolvency procedure, to the extent that they are detrimental to the insolvency estate and the third party (if any) which benefited from them has acted in bad faith.

For the purposes of this rule:

(i) The actions and transactions are deemed as 'detrimental to the insolvency estate' insofar as they reduce, frustrate, difficult, endanger or delay the satisfaction of the insolvency estate's creditors – in addition, any of the two actions listed in the next paragraph shall be always deemed as 'detrimental to the insolvency estate', even if taking place out of the periods mentioned in such list.

(ii) A third party is deemed as being in 'bad faith' when it is aware at the time of the deal or action of any of the following: (a) the person was insolvent; (b) the action was detrimental and the person was in the verge of insolvency; (c) the insolvency procedure had already begun.

30. Decision of the Lisbon Appeal Court dated of 17.12.2014, proc. nr. 1286/14.9TVLSB.L1, available in dgsi.pt.

(iii) There is a presumption of bad faith in respect of the deals or actions taking place two years before the beginning of the insolvency procedure where a person specially connected with the insolvent debtor participates in or benefits from the deal or action.

Furthermore, there is a list of transactions which by themselves are deemed as prejudicial to the insolvency estate and thus may be terminated by the insolvency administrator without the need to prove the detriment to the insolvency estate or bad faith, among which the following should be highlighted:

(i) Gratuitous acts performed by the debtor within the two years preceding the opening of the insolvency procedures.
(ii) Personal Guarantee, *aval* or other type of Guarantees entered into by the insolvent in the six months prior to the opening of insolvency procedure whose Underlying Obligation did not represent a real interest for the Guarantor.
(iii) Actions and contracts entered into by the insolvent within one year prior to the commencement of the insolvency proceedings when the obligations assumed manifestly exceed the obligations assumed by the counterparty by way of consideration.

In order to mitigate risks of a Guarantee being terminated by the insolvency administrator within an insolvency hardening period, it is relevant for the Beneficiary to confirm that the Guarantor is in good financial standing (e.g., examination of its latest financial statements).

2 Nature of the Underlying Obligation

The Portuguese Companies Code provides that companies may grant Guarantees in respect of any legal and valid obligations, independently of its nature being civil or commercial, private or public.

There are some limitations in relation to the Underlying Obligation, which are described below.

a) The Need to Specify the Underlying Obligation

Portuguese law requires that the object of a contract must be capable of being determined, otherwise such contract shall be deemed null and void.[31] Consequently, *omnibus* Guarantees – guaranteeing the payment of all debts (without specifying) of a specific debtor –, which have been frequently used in the past, including for the benefit of financial institutions, are not permitted under Portuguese law.

31. Article 400 of the Portuguese Civil Code.

However, a Guarantee will be deemed to be valid if its scope is limited to all the debts of the Principal as of the date of its granting, provided that those debts are possible to be determined, and the assessment thereof may be achieved via a due diligence conducted on the Guarantor.

Likewise, future and conditional obligations may be covered by a Guarantee provided that they are capable of being determined. A Guarantee of future or conditional obligations must set forth the criteria allowing the Guarantor to assess the limits of the obligations undertaken by it. Such guarantees must be carefully drafted and interpreted as there is a thin line between *omnibus* Guarantees and Guarantees of future obligations.

The Portuguese Supreme Court of Justice has decided, as a mandatory precedent rule, that 'a Guarantee of future obligations shall be null and void, due to the non-determinability of its object, if the Guarantor guarantees all the liabilities arising from any operation consented by law, without an express reference to its origin or nature and independently of the capacity under which the principal acts'.[32]

b) Guarantee Issued by a Company Whose Principal Is Its Director(s)

Portuguese law expressly provides that Guarantees granted by companies whose Principal are directors of such Guarantor (or of other controlling or controlled companies or in group relation) are usually not permitted or require specific prior procedures, in order to reduce the possibility of granting directors special unjustified benefits.[33]

c) Limitations on Financial Assistance

Portuguese companies of the type *sociedade anónima* are also prevented from granting Guarantees that may be considered financial assistance for the acquisition of shares representative of its share capital, and therefore cannot grant loans, issue Guarantees or create security in order for a third party[34] to subscribe, or by any other way purchase, shares in that company.[35,36]

32. Decision of the Supreme Court of Justice nr. 4/2001, of 23 January 2001, published in the *Diário da República*, I Série A, nr. º 57, of 8 March 2001.
33. Article 397 of the Portuguese Companies Code.
34. The expression 'in order for a third party (…)' is to be construed as requiring that the provider and Beneficiary commonly determine that the financial assistance will be destined for the subscription or purchase of its shares (*see* Inês Pinto Leite, *Proibição de Assistência Financeira – O Caso Particular dos Leveraged Buy Outs*, *Volume 5*, Year 3 of *Direito das Sociedades em Revista* (Coimbra, 2011), 152; Margarida Costa Andrade, *Volume 5* of *Código das Sociedades Comerciais em Comentário* (Almedina, 2012), 448).
35. Article 322 of the Portuguese Companies Code. Portugal has not yet implemented the Directive 2006/68/EC of 6 September 2006, which amended the Directive 77/91/EEC on the matters of financial assistance.
36. There are exceptions to this rule applying to: (i) operations of financial assistance normally conducted by a bank or other financial institution in respect of the acquisition of their own shares, and (ii) transactions aimed at the acquisition of shares by, or in favour of, the company's

The prohibition applies as well when the financial assistance is granted by a company with a view to ensure the subscription or purchase of its direct or indirect parent's own shares.

A Guarantee issued in breach of the financial assistance restriction is null and void. Directors who conduct unlawful financial assistance transactions incur in a criminal offence and may be subject to civil liability.

In order to circumvent this prohibition, some of the known adopted strategies are the following:

(i) Creation of (or transformation into) a company of the type *sociedade por quotas* in order for it to issue the Guarantee.[37]
(ii) Leveraged Buy Outs (LBO) operations where the SPV undertakes before the financing institutions to merge with the target once acquired, thus indirectly affecting the assets of the latter to the repayment of the loan granted for the acquisition.[38]
(iii) Split the Underlying Obligation in tranches, so that the Guarantee only relates to the ones that do not breach the financial assistance prohibition.

d) Limitations Applying to Guarantees Granted by Public Bodies (Avales do Estado ou Outras Entidades Públicas)

The issuance of personal Guarantees (*fianças* or *avales*) by public entities must comply with the Legal Regime for the Granting of Personal Guarantees by the State, otherwise it will be considered null and void. Such Guarantees are designed to ensure the implementation of credit or other financial operations, national or international, which the Beneficiaries are public entities, national companies or other companies who legally enjoy equal treatment, and should meet a number of cumulative conditions.

The loans secured shall have seven years maximum use periods and shall be fully reimbursed within a maximum period fifty years from the dates of the respective

employees or employees of a company which belongs to the same corporate group. These exceptions shall however only apply if, as a result of the issuance of the guarantee, the net assets of the guarantor do not become lower than the amount of its subscribed capital accrued of non-distributable reserves.

37. There has been some discussion on whether financial assistance limitations shall apply to companies of the type *sociedade por quotas*, on the basis that the provision is only included in a chapter applicable to *sociedades anónimas* and there may exist other systematic arguments to justify this – so far there are no known decisions of higher courts on this subject (*see* João Labareda, *Direito Societário Português – Algumas Questões* (Lisboa: Editora Quid Juris, 1998), 189); against it: Mota, Bernardo Abreu, *Proibição de Assistência Financeira. Notas para a sua interpretação e aplicação (Parte II)*, in *Actualidad Jurídica Uría Menéndez* (15) (2006), 91, Inês Pinto Leite, *Proibição de Assistência Financeira – O Caso Particular dos Leveraged Buy Outs*, *Volume 5*, Year 3 of *Direito das Sociedades em Revista* (Coimbra, 2011), 130.
38. Parties should tread carefully when following this route. In favour of the application of the prohibition if the merger's objective is to allocate the target company's balance sheet to the repayment of the acquisition financing debt: Inês Pinto Leite, *Proibição de Assistência Financeira – O Caso Particular dos Leveraged Buy Outs*, *Volume 5*, Year 3 of Direito das Sociedades em Revista (Coimbra, 2011), 176.

contracts, under penalty of expiration of the Guarantee.[39] The enforced recovery of debts resulting from the granting of personal Guarantees adopts the form of the tax execution procedure.

However, according to Local Finance Law, and except as otherwise expressly permitted by law, local authorities ('*autarquias locais*', defined as parishes and municipalities) may not grant any kind of Guarantees.[40]

Notwithstanding other statutory limitations, public sector companies shall require a prior authorisation of the public shareholder in order to grant any Guarantees, failing which civil, financial and criminal liability may arise for the members of their managing bodies.[41] In any case, local public sector companies may not grant any kind of Guarantees.[42]

B Formation of the Contract

1 Form of the Contract

The Guarantee's form requirements shall be the same as the ones applying to the Underlying Obligation. As such, in Portugal, the Guarantee may be granted verbally, in a simple written document or in a document executed with a notary (either through the simple legalisation of the signatures or in a notarial deed), depending on the formality legally required for the Underlying Obligation.

Even when it is not legally required, the Beneficiary may request the signatures on the Guarantee to be legalised and the powers of the signatories confirmed by a notary or a lawyer in order to qualify the document as an enforcement document.[43] This legalisation also allows the Beneficiary to evidence in court the authenticity of the signatures and prevent any challenge by the Guarantor or by the Principal.

The Guarantee is not subject to any language requirements. However, to enforce the Guarantee in Portugal, Portuguese Courts have the right to require a sworn translation into Portuguese of any documents presented in a foreign language. To prevent the need of having the document translated in a later (and litigation) stage, and anticipating any possible discussions between the parties as to the translation (which may delay the enforcement of the Guarantee), it is usual to agree the wording of the Guarantee in both foreign and Portuguese languages.

Portuguese Guarantees are not subject to any kind of registration in order to be valid and enforceable.

However, if the Guarantee falls under Portuguese law (i.e., has any connection with the Portuguese territory), it will attract stamp duty calculated as a percentage of the amount guaranteed of the Underlying Obligations, which shall imply the disclosure thereof to the Tax Authorities.

Stamp duty percentage is dependent on the duration of the Guarantee, as follows:

39. When used for different purposes than the ones approved the guarantees shall expire.
40. Articles 49 nr. 7 and 55 nr. 7 of the Local Finance Law.
41. Article 25 nr. 5 of the Legal Regime of the Corporate Public Sector.
42. Article 41 nr. 2 of the Legal Regime for the Local Business Sector.
43. Please refer to Section V[B][1][b] below.

(1) If the Guarantee has a duration of less than one year, the percentage will be of 0.04% per each month or fraction of month.
(2) If the Guarantee has a duration of one year or more but less than five years, the percentage will be of 0.5%.
(3) If the Guarantee has a duration of five years or more, the percentage will be of 0.6%.[44]

Guarantees that fall within the scope of Portuguese law shall not be subject to stamp duty if: (a) the Underlying Obligation is subject to stamp duty, and (b) the Guarantee is granted on a simultaneous and ancillary basis in relation to the Underlying Obligation. An example of this is a Guarantee in respect of the obligations arising under a financing agreement: since the financing agreement triggers stamp tax according to the same rules, the Guarantee, as its ancillary, is not subject to the same tax, provided that both documents are executed on the same date.

There are other exceptions, and there is a complex set of rules, which must be assessed on a case-by-case basis.

The (non-) payment of the stamp duty has no hearings on the validity and enforceability of the Guarantee. However, should the Guarantee be presented to any public authority, including to a Court to have it enforced, payment of stamp duty will have to be evidenced.

2 Consent Protection

Under Portuguese law, the party's consent must be a voluntary and express behaviour with the intention to, consciously, communicate a certain statement to another determined or undetermined party. As such, the consent is effective upon being received by the recipient (or as soon as it might have been received but was not due exclusively to the recipient's fault).

In relation to guarantees, despite their contractual nature, it has been widely accepted that they may be stated in documents unilaterally signed by the Guarantor, provided that there is an implied acceptance thereof by the Guarantor, which is deemed to occur when the duty to grant a Guarantee had been set forth in contract under which the Underlying Obligation was originated, and the Guarantee is provided to the Beneficiary.[45]

If the consent is granted as a result of a mistake or a misrepresentation, consequences may arise provided that the discrepancy proves to be essential for the relevant party:

(a) If the mistake relates to its subject or contents, the Guarantee shall be voidable.[46]

44. Article 10 of the Table Annexed to the Portuguese Stamp Tax Code.
45. Pedro Romano Martinez, Pedro Fuzeta da Ponte, *Garantias de Cumprimento*, 5th edition (Coimbra: Almedina, 2006), 90.
46. Article 251 of the Portuguese Civil Code.

(b) If the mistake relates to the purpose of the Guarantee, it will be voidable but only if such purpose has been expressly accepted by the parties involved.[47]
(c) If the mistake relates to the circumstances that led to the decision of agreeing in the Guarantee, the affected party may be entitled to request the amendment or the termination of the Guarantee.[48]

Independently of any existing mistake, if there is a material change in the circumstances under which the parties have based their decision to contract the Guarantee, the affected party may be entitled to request its amendment or termination.[49]

3 The Guarantor's Benefit/Consideration

Generally, the validity and enforceability of a Guarantee shall not depend on the Guarantor having obtained any benefit in return. However, guarantees granted by corporate companies to Underlying Obligations from third parties shall be null and void, except if the Guarantor has a justified corporate interest or if the Beneficiary is controlled or in a group relation with the Guarantor.[50]

Likewise, if the Guarantor is a governmental entity, a public interest in the Guarantee is mandatory, otherwise it can be considered null and void. Guarantees granted by public entities are subject to a previous confirmation (*visto prévio*) from the Portuguese Audit Court (*Tribunal de Contas*) if the amount exceeds the one set forth annually (EUR 350,000.00, in 2015), being, as a rule, ineffective with respect to financial effects until such confirmation is granted; however, when the total amount of the act or contract exceeds EUR 950,000.00 no effects will be produced until the previous confirmation is issued.[51] In the event the Guarantee is issued by a public body or entity, this issue should be assessed on a case-by-case basis.

4 Authorisation

If the Guarantor is a legal entity, and except if its by-laws provide otherwise or the granting of guarantees is expressly included in the company's purposes (e.g., a bank), Portuguese law requires that the management board decides the granting of any guarantees.[52] The management decisions must be expressed in written minutes, which must be recorded in corporate registries kept at the company's registered offices.

47. Article 252, nr. 1 of the Portuguese Civil Code.
48. Article 252, nr. 2 of the Portuguese Civil Code.
49. Article 437 of the Portuguese Civil Code.
50. Please refer to Section III[A][1][a] above.
51. Article 45 of the Organisation and Procedural Law of the Audit Court.
52. Article 406 of the Portuguese Companies Code.

5 Authority

Natural persons with full legal capacity have the authority to grant guarantees without requiring the consent from any other party. However, if the Guarantor is married, the assets that are distrainable for such liability may depend on the marriage regime and on the purpose of the Guarantee. Each Guarantee may be assessed on a case-by-case basis in order to confirm if the spouse consent will be required in order to confirm if the assets owned by the couple are distrainable.

Legal persons are represented by the relevant management body. In *sociedades anónimas*, the by-laws may allow the management body to delegate power to grant guarantees to one of the directors.[53] Sometimes, the management body appoints an attorney in fact to execute the Guarantee contract on behalf of the company.[54]

If the signatories have the power to represent the company, their signature shall bind the company notwithstanding a lack of authority (except if the Beneficiary was aware of such flaw).[55] In order to prevent future discussions, it is usual for Beneficiaries to require a written decision from the Guarantor's competent corporate body granting powers for the execution of the Guarantee contract.

C Terms of the Contract

1 Public Order Provisions

Guarantees subject to Portuguese law cannot contain provisions which are contrary to the law. Further, the Underlying Obligation must be capable of being determined[56] and cannot be contrary to the public order or good practices.

The Guarantee (*fiança*) legal regime foreseen in the Portuguese Civil Code sets forth the main terms and conditions applicable to guarantees, some being mandatory and others being supplementary if the parties do not agree otherwise.

The guarantees regime specifically details the rules that should govern the relations between Beneficiary and Guarantor (Articles 634–643) and between Principal and Guarantor (Articles 644 and 648).

2 Main Provisions of the Contract

a) Duration of the Guarantee

The Guarantee is usually ancillary to the Underlying Obligation and therefore, in principle, both have the same duration. In fact, if the Underlying Obligation is fully

53. Articles 407 and 408 of the Portuguese Companies Code.
54. Article 391, nr. 7 of the Portuguese Companies Code.
55. Article 409 of the Portuguese Companies Code.
56. Decision of the Portuguese Supreme Court of Justice dated of 6.12.2011, proc. nr. 669/07.5TBPTM-A.E1.S1, available in dgsi.pt.

performed, the Guarantee shall automatically terminate. However, there are some exceptions to this principle:

(1) The parties may agree a limitation to the duration of the Guarantee, which may end previously to the termination of the Underlying Obligation.
(2) If the Underlying Obligation is voidable, due to lack of capacity or mistake in the intention of the Principal, the Guarantee shall remain valid and in force if the Guarantor was aware of the voidability cause when the Guarantee was granted.[57]

If the Underlying Obligation has an unlimited duration, the Guarantee may also have an unlimited duration but after the first five years the Guarantor shall be entitled to request the Principal (but not the Beneficiary) to cancel the Guarantee or to grant collateral to secure its subrogation rights against the Principal.[58]

The Guarantor may cancel the Guarantee granted for future obligations if such obligations are not created within five years (or any other period agreed between the parties) or if the financial situation of the Principal deteriorates in such a manner that may jeopardise the Guarantor's rights against it.[59]

Finally, Portuguese law does not accept perpetual obligations, especially in obligations such as those arising from a Guarantee. Therefore, if a Guarantee does not have a limit date and covers a generic set of obligations, either it may be consider null and void or, if not, the Guarantor shall, as a result of the aforementioned principle, be entitled to terminate the Guarantee with a reasonable prior notice to the Beneficiary.

In this sense, there has been jurisprudence sustaining that, if the Underlying Obligation is legally renewed, without requiring the consent of both parties, the Guarantor may request the cancellation of the Guarantee, on the basis that the Guarantor shall not be forced to be bound to the Guarantee 'ad aeternum'.[60]

b) Amount of the Guarantee

Without prejudice to the parties being entitled to agree on a limitation of the amount of the Guarantee, general law sets forth that the Guarantee has the same content of the Underlying Obligations and is in respect of the same legal and contractual consequences of the delay or default of the Principal. Consequently, the Guarantee and the Underlying Obligations are of the same amount; if the Underlying Obligation has an

57. Article 632, nr. 2 of the Portuguese Civil Code.
58. Article 648(e) of the Portuguese Civil Code.
59. Article 654 of the Portuguese Civil Code.
60. The Supreme Court of Justice has decided that, when an aval has been granted in relation to a credit facility agreement foreseeing six months renewable periods, which remained in force during four years and a half, the guarantor was entitled to terminate the aval (i.e., the fill-in agreement in respect of the aval stated in the promissory note drawn in favour of the bank by the borrower) (decision dated of 02.12.2008 in the proc. nr. 08A3600, available in < dgsi.pt >).

unlimited amount, so will have the Guarantee; if the Underlying Obligation is paid, partially or in full, so will the Guarantee be reduced, partially or in full.

The Guarantor usually is interested in limiting the maximum amount of the Guarantee, also to avoid running risks arising from the misbehaviour of the Principal, which may result in indemnities and additional liabilities. Such maximum amount, if not otherwise agreed, shall include all amounts resulting from the Underlying Obligation (including interests, default interests, compensations due to breach). However, the Guarantee cannot in any circumstance exceed the amount of the Underlying Obligation.

If a maximum amount is agreed, each amount paid under the Guarantee shall reduce such maximum amount. However, if the Guarantor only sets forth a limit to each claim, no reduction will apply to the overall amount of the Guarantee. The wording of any amount limitation must be carefully drafted in order to avoid such different interpretations.

c) Plurality of Guarantors

If there is a plurality of guarantors, Portuguese law sets forth a different regime depending if the guarantees have been created jointly or separately.

If the guarantees have been granted separately, each Guarantor will be liable for the full Underlying Obligation, except if otherwise agreed with the Beneficiary. Any Guarantor paying the full amount of the Underlying Obligation shall be entitled to claim the repayment in full from the Principal but also the relevant share from the other guarantors.[61]

If the Guarantees have been granted jointly, even if in different moments, each Guarantor shall only be liable for its share and for the pro rata share of any other Guarantor that may have become insolvent.[62] If, within a judicial claim, a joint guarantor pays the full amount of the Underlying Obligation, or a part higher than its share, it shall be entitled to claim the repayment in full from the Principal but also the relevant share from the other guarantors.

If the excess payment is made voluntarily, such joint guarantor shall be entitled to request repayment from the other guarantors only after having seized all the Principal's assets.

Except if agreed otherwise, guarantees granted by several corporate entities shall also be considered joint and several, even if granted jointly.[63]

d) Immediate Recourse Against the Guarantor

The Guarantor has the right to refuse the performance of its obligations arising from the Guarantee while the Beneficiary has not exhausted its remedies against the Principal (*benefício da excussão*), either because:

61. Article 649, nr. 1 of the Portuguese Civil Code.
62. Article 649, nr. 2 of the Portuguese Civil Code.
63. Article 101 of the Portuguese Commercial Code.

(1) All the assets of the Principal have still not been seized.
(2) The Guarantor evidences that the Underlying Obligation has not been fulfilled due to the Beneficiary's fault, even after the seizure of all of the Principal's assets.
(3) Any in rem security granted by a third party previously or simultaneously to the Guarantee, as security to the same Underlying Obligation, has not been enforced.

The Guarantor's right to demand any of the prior acts above shall not apply if the Guarantor waives to such right or if it has assumed the Underlying Obligation as primary obligor. Also, such right shall not apply if the Principal or the third party, as applicable, cannot be served or be judicially enforced in Portugal due to any fact or circumstance which occurred after the Guarantee having been created. In this case, the Guarantor may request the Principal to cancel the Guarantee or to grant collateral securing the rights to which he may be subrogated against the Principal.

D. Obligations of the Beneficiary

A Guarantor will be released from its obligations arising from the Guarantee if the Beneficiary practices or refrains from practicing any acts that may prevent the Guarantor from being subrogated to the Beneficiary's rights against the Principal (*benefitium excussionis personale*).[64]

Other than this onus and the general obligation of acting in good faith and without abusing of its rights, the Beneficiary shall not have any further specific obligation. Even if there are other co-guarantors (whose Guarantee has been granted separately) or security created in respect of the same Underlying Obligation, no specific duties are required from the Beneficiary. In fact, if such other guarantees or securities are relevant to the Guarantor, it should set forth in the Guarantee agreement any special obligations that it may require related therewith.

Finally, if the limitation period of the Underlying Obligation is interrupted or suspended by the Beneficiary against the Principal, it must also notify the Guarantor of such interruption so that it also affects the Guarantor's limitation period.

64. Article 638, nr. 2 of the Portuguese Civil Code.

IV THINGS TO THINK ABOUT WHEN THE GUARANTEE IS IN FORCE

A Modification of the Guaranteed Obligation or of the Parties to the Underlying Obligation

1 Modification of the Underlying Contract

Portuguese law is not clear on whether a change in the terms and conditions of the Underlying Contract entered into between Principal and Beneficiary may negatively impact the validity or enforceability of the Guarantee.

According to the most up to date decisions of the higher courts, an amendment to the contract under which the Underlying Obligations arise shall have to be consented by the Guarantor in order for the latter to continue to be bound by the Guarantee, especially if the amendment results in more onerous terms to the Principal (e.g., increase of payment obligations, more demanding covenants) or is an extension of the Underlying Obligation's maturity date.[65]

In order to circumvent this limitation, guarantees often include a clause under which the Guarantor gives its consent to any amendments of the Principal's Underlying Obligations. However, such clause has been deemed null and void, as a result of breach of a civil law principle according to which guarantees shall reasonably specify the obligations in relation to which they are granted.[66]

As for an acceleration of the Underlying Obligation, it shall not affect the validity and enforceability of the Guarantee.

2 Change of the Parties to the Underlying Obligation or to the Guarantee

Change of any of the parties involved in a Guarantee shall require previous consent from the other parties or, in some cases, implement some procedures set forth in the law, in order to safeguard all parties interests.

a) Changes of the Parties as a Result of Contractual Assignment/Transfer

Unlike in other jurisdictions, it is possible under Portuguese law to fully transfer not only rights under a contract by way of assignment (*cessão de créditos*) but also the full contractual position by way of assignment of contractual position (*cessão da posição contratual*).[67] Normally the assignment of rights does not require prior consent of the

65. Decision of the Appeal Court of Lisbon dated of 15.05.2014, proc nr. 1232/11.1TBCSC-A.L1-2, available in dgsi.pt.
66. Lisbon Appeal Court, 31.01.2012, proc. nr. 1979/09.2TBTVD-A.L1-1, available in < dgsi.pt > . Please *see* more details in Section III[A][2][a] above.
67. The transfer by way of subjective novation (*novação subjectiva*) is also accepted, but it is rarely followed, since it may have negative impacts: guarantees/security may be automatically extinguished if the guarantee/security provider does not give its consent to their preservation; additional stamp tax may be triggered on the renewed guarantee/security; insolvency hardening periods may be restarted.

debtor, but the assignment of contractual position requires the consent of the counterparty. The debtor may also transfer the debt to another party (*assunção de dívida*), subject to the prior consent of the creditor.

Below is an analysis of the impacts of these types of transfers in the Guarantee, on the assumption that the terms and conditions of the Guarantee do not limit the transfer thereof.

When the assignment is in relation to the debt or contractual position held by the Principal under an agreement, the transfer of the Guarantee along with the debt shall require a prior consent from the Guarantor.[68]

When the Guarantee is subject to standard clauses to which the Guarantor adheres without prior negotiation (typical in consumer finance), any consent given by the Guarantor in relation to the assignment of debt or of contractual position by the Principal to third parties must specify the transferees, and such clause must be duly disclosed to and agreed by the Guarantor. If these requirements are breached, the clause permitting such assignment will be deemed null and void.[69]

In relation to the Guarantor, the assignment of its obligation towards the Beneficiary shall depend on the latter's prior consent[70] (which, if given in breach of the requirements described in the previous paragraph, will be deemed null and void).

Changes in the position of the Beneficiary resulting of an assignment of receivables (*cessão de créditos*) or of the contractual position (*cessão da posição contratual*)[71] under the agreement between it and the Principal shall result in an automatic transfer of the Guarantee to the new Beneficiary.[72] The outcome may be different in other situations similar to the Guarantee:

(1) Autonomous Guarantee: it is generally understood that the Guarantee benefit is transferable by the Beneficiary along with the Underlying Obligation, but some authors sustain that such transfer must be expressly agreed between the Beneficiary and the transferee, given the autonomous nature of the Guarantee.[73]

68. Article 599, nr. 2 of the Portuguese Civil Code.
69. Articles 8 and 18, para. l) of the Standard Clauses Act.
70. Article 595 of Portuguese Civil Code.
71. There is an author raising doubts on whether the express consent of the counterparty is required in order for a guarantee to be transferred along with the contractual position, since the same includes receivables and also debts – Mota Pinto, *Cessão da Posição Contratual* (Coimbra: Almedina, 1982), 489. However, the most reasonable approach as far as the guarantee is concerned is not to differentiate this modality of transfer from the assignment of receivables, since the guarantee will only be in respect of the receivables transferred, and not the debt: Manuel Januário Costa Gomes, *Assunção Fidejussória de Dívida – Sobre o sentido e o âmbito da vinculação como fiador* (Coimbra: Livraria Almedina, 2000), 780.
72. Article 582 of the Portuguese Civil Code. Menezes Cordeiro, *Tratado de Direito Civil, IX – Direito das Obrigações* (Coimbra:Almedina, 2014), 219.
73. In favour of the automatic transfer, Menezes Leitão, *Cessão de Créditos* (Coimbra: Livraria Almedina, 2005), 328, and Pedro Romano Martinez, *Garantias Bancárias*, in *Estudos em Homenagem ao Professor Doutor I. Galvão Telles* (Coimbra: Almedina, 2002), 278. There is a decision of the Supreme Court favouring this approach, dated of 11.12.2002 in the proc. nr. 03B1466, available in < dgsi.pt > . In favour of the transfer having to be expressly agreed: Fátima Gomes, *Garantia Bancária à Primeira Solicitação* in *Revista Direito e Justiça*, Volume VIII, tomo

(2) Comfort letters: it may result from the comfort letter that the same has been issued *intuitu personae*, case in which it will not be transferable – in addition and similar to autonomous guarantees, it is also recommended that the transfer thereof is expressly agreed.
(3) *Aval*: the *aval* may be transferred, provided that the parties endorse the respective negotiable instrument in favour of the transferee;[74] but if the negotiable instrument's fields are not yet filled in, the contractual position under any fill-in agreement between Beneficiary, Principal and Guarantor must be transferred as well and consent from the relevant parties may be required for such transfer.[75]

b) Change of a Corporate Party as a Aesult of a Merger

Under Portuguese law, a merger of a corporation may take place either via: (i) global transfer of the assets and liabilities of one entity to the other, accompanied by the winding up and dissolution of the transferor, or (ii) creation of a new company, to whom the assets/liabilities of the two merged entities are transferred, accompanied with the winding up of both merged entities.[76]

If the Guarantee's terms and conditions qualify the merger of any of the Beneficiary, Principal or Guarantor as a termination event, then the Guarantee shall terminate upon such merger.

If such clause is not included in the Guarantee, then:

(1) In case the merger involves the Beneficiary, its rights vis-à-vis the Guarantor shall be transferred by operation of law as a result of the merger.[77]
(2) In case the merger involves the Guarantor:

    (i) The Beneficiary of the Guarantee (along with other creditors of the Guarantor) will be entitled to start a creditor safeguard procedure within thirty days as from the publication of the registration of the merger's

2 (1994), 185; Mónica Jardim, *Garantia Autónoma* (Coimbra: Almedina, 2002), 133; Manuel Januário Costa Gomes, *Sobre a Circulabilidade do Crédito Emergente da Garantia Bancária Autónoma ao Primeiro Pedido* in *Estudos de Direito das Garantias, Volume II* (Coimbra: Almedina, 2010), 159.

74. However, if the guarantee is in the form of an aval, the transferor remains liable for the guarantee resulting of the aval, unless if he expressly exempts itself in the endorsement – Article 15 of the Uniform Law on Letters of Credit and Promissory Notes. Article 18 of the Uniform Law on Cheques.
75. Normally the fill-in agreements are incorporated in, or annexes to, the financing agreement, and the latter contemplates a clause where the borrower gives its consent for the transfer of the contractual position in favour of third parties.
76. Article 97 of the Portuguese Companies Code.
77. Article 112 of the Portuguese Companies Code.

project[78] – within this procedure, the court will deny the merger, provided that (A) the Beneficiary (or other creditor) demonstrates that the merger is prejudicial to its rights (resulting from the subrogation arising upon enforcement of the Guarantee), and (B) the Beneficiary has submitted a request to the Guarantor to: (i) pay the Underlying Obligation, or (ii) create an adequate Guarantee/security for such obligation (the '**Creditor Safeguard Procedure**'), and such request remains unattended for at least fifteen days.[79]

(ii) Upon expiration of the deadline for the Creditor Safeguard Procedure (or, if it has been opened, upon completion thereof without the court upholding the Beneficiary or other creditor's claim), the merger may take place, in which case, if the Guarantor is the wound up company, its contractual position shall be transferred to the remaining company.

(3) In case the merger involves the Principal:

(i) The Beneficiary, the Guarantor (in relation to the credit resulting of its subrogation right if the Guarantee is paid) and any other creditors of the Principal will be entitled to start the Creditor Safeguard Procedure in relation to the merger as described in Section [b] above.

(ii) Upon expiration of the deadline for the Creditor Safeguard Procedure (or, if it has been opened, upon completion thereof without the court upholding the creditor's claim), the merger may take place.

c) Change of the Parties as a Result of a Spin-Off

Independently of the type of spin-off,[80] the creditors of the company participating in it are entitled to start the Creditor Safeguard Procedure, in equivalent terms as the ones described above for the merger process.[81]

The creditors of split companies are also granted the following protection (the '**Post Spin-Off Creditor Safeguard**'):

78. A project with detailed information in respect of the merger, which shall be approved by the participating entities registered with the Commercial Registry Office and published in the Portuguese official gazette.
79. Article 101-A of the Portuguese Companies Code.
80. Under Portuguese law, a spin-off may take place in many ways, including: (i) separation of a part of asset/liabilities of a company in order to create another company or companies; (ii) winding up of a company, separation of all its assets/liabilities, and transfer thereof to two newly created separate companies; (iii) winding-up of a company, separation of all its assets/liabilities, and transfer thereof to two already existing separate companies (or the assets/liabilities transferred from another company according to the same process, thus creating a new company); (iv) separation of two or more portions of its assets/liabilities, with a view to transfer each of those portions to already existing companies (or the assets/liabilities transferred from another company according to the same process, thus creating a new company).
81. Articles 101-A and 120 of the Portuguese Companies Code.

(1) In case of a partial spin-off (independently of the assets/liabilities being transferred to a pre-existing or newly created company), the transferor shall remain jointly and severally liable in relation to the transferred liabilities (and when the transferor discharges those liabilities, it becomes subrogated in the creditors' rights vis-à-vis the spun-off company).[82]

(2) In case of a global spin-off[83] involving transfer of assets/liabilities to more than one company, the spun-off companies shall be jointly and severally liable for the liabilities of the transferor, provided that:

(i) This joint and several liability is limited to the debts that have been originated until the registration of the spin-off with the Commercial Registry.

(ii) The spun-off companies shall only be liable up to the value of the net assets transferred to each of them.

(iii) Though by default the liability is joint and several (*solidária*), the spin-off project may establish that the liability is only several (*conjunta*) – the terms in which the joint and several liability is determined do not result clearly from the law.

If the Guarantee's terms and conditions qualify the spin-off of any of the Beneficiary, Principal or Guarantor as a termination event, then the Guarantee shall terminate upon such spin-off.

If such clause is not included in the Guarantee, then:

(3) In case the spin-off involves the Beneficiary:

(i) There will not be a basis for the Guarantor or the Principal to start a Creditor Safeguard Procedure, at least in view of their position under the Guarantee, since they are not creditors vis-à-vis the Beneficiary.

(ii) When the Beneficiary's rights vis-à-vis the Guarantor are to be transferred as a result of the spin-off, such transfer shall occur by operation of law without the need for any consent.

(4) In case the spin-off involves the Guarantor:

(i) The Beneficiary of the Guarantee will have the right to start the Creditor Safeguard Procedure.

82. Article 122, nr. 1 of the Portuguese Companies Code.

83. There is a debate among Portuguese authors on whether a partial spin-off may result in the transfer of assets/liabilities to more than one company. In favour of this possibility: Elda Marques, *Código das Sociedades Comerciais em Comentário, Volume II* (Coimbra: Almedina, 2011), 434; Joana Vasconcelos, *A Cisão de Sociedades* (2001) (UCP), 144–147. Against this possibility, Raúl Ventura, *Fusão, Cisão e Transformação de Sociedades – Comentário ao Código das Sociedades Comerciais* (Coimbra: Almedina, 2006), 379. The authors favouring this merger modality submit that the spun-off companies shall also be jointly and severally liable for the debts originated by the transferor until the registration of the spin-off – Elda Marques, *Código das Sociedades Comerciais em Comentário, Volume II* (Coimbra: Almedina, 2011), 436.

(ii) Upon expiration of the deadline for the Creditor Safeguard Procedure (or, if it has been opened, upon completion thereof without the court upholding the creditor's claim), when the Guarantor's position under the Guarantee is to be transferred, the transferee will become the Guarantor under the Guarantee.

(iii) The Beneficiary may benefit of the Post Spin-Off Creditor Safeguards, as described above.

(5) In case the spin-off involves the Principal:

(i) The Beneficiary of the Guarantee and the Guarantor (in relation to its credit resulting of its subrogation right if the Guarantee is paid) will be entitled to start the Creditor Safeguard Procedure.

(ii) Upon expiration of the deadline for the Creditor Safeguard Procedure (or, if it has been opened, upon completion thereof without the court upholding the creditor's claim), the spin-off may take place, case in which, depending on its scope, the Guarantor will have a ground to sustain that the spin-off caused the termination of its obligations under the Guarantee vis-à-vis the Beneficiary, on the basis that there was a change in the identity of the debtor in relation to which the Guarantee has been issued.

(iii) The Beneficiary and the Guarantor may benefit of the Post Spin-Off Creditor Safeguards, as described above.

d) Changes of the Parties as a Result of Death

The death of the Beneficiary shall not result in the extinction of the Guarantee, unless if the same has been granted *intuito personae*.[84]

An issue may arise if the Guarantee is in the form of an *aval* stated in a negotiable instrument which fields are to be partially or wholly filled-in at a later stage by the Beneficiary according to a fill-in agreement. Such agreement shall, as a result of the grantor's death, become automatically terminated.[85]

The impact of the death of the Principal in the Guarantee is not expressly regulated under Portuguese law – it has been submitted that the Guarantor shall be liable for the Underlying Obligation originated until the death of the Principal;

84. In relation to the *fiança*, though this matter is not expressly foreseen in the Portuguese Civil Code, it has been sustained by a reputed author: Manuel Januário Costa Gomes, *Assunção Fidejussória de Dívida – Sobre o sentido e o âmbito da vinculação como fiador* (Coimbra: Livraria Almedina, 2000), 782.

85. Article 1176 of the Portuguese Civil Code.

however, at least when the Guarantee is *intuitus personae*, following the Principal's death, any debt originated in the future should not be covered by the Guarantee (e.g., rental agreement).[86]

The impact of the death of the Guarantor is also not covered under Portuguese law. It has been submitted that the Guarantor's heirs, provided they accept the inheritance, shall be liable for the debt originated until the death of the Principal;[87] however, at least when the Guarantee is *intuitus personae*, any debt originated in the future under the guaranteed contract should not be covered by the Guarantee after the Guarantor's death.[88]

e) Guarantor Ceasing to Be Director and/or Shareholder of the Principal

If the Guarantor was a director or shareholder of the borrower when the Guarantee was granted, the fact that it ceases to serve as director or transfers its shares to a third party does not entitle the Guarantor to terminate the Guarantee, unless if the Guarantee provides otherwise.[89]

B Release of the Guarantee

1 Duration of the Guarantee

The Guarantee is ancillary to the Underlying Obligations and therefore, except if otherwise agreed between the parties or otherwise set forth in the law, both Guarantee and Underlying Obligations will terminate simultaneously.[90]

In order to prevent different interpretations, the Guarantee should clearly specify its duration, which may usually be: (i) a fixed term, (ii) a renewable term, or (iii) a non-fixed term. The decision should be taken essentially based on commercial considerations, but the Beneficiary is to ensure that the Guarantee's validity period matches the maturity date of the Underlying Obligation. On the other hand, the Principal wishes to ensure that the Guarantee is swiftly terminated as soon as it is no longer required, in order to avoid payment of unnecessary fees (if existing) to the Guarantor.

Guarantors have the right to refuse the performance of their obligations while the Beneficiary has not exhausted its remedies against the Principal (*benefício da excussão*) and may also terminate their guarantees in two specific situations:

86. Manuel Januário Costa Gomes, *Assunção Fidejussória de Dívida – Sobre o sentido e o âmbito da vinculação como fiador* (Coimbra: Livraria Almedina, 2000), 792.
87. This has been confirmed in a decision of the Supreme Court dated of 18.02.2003, proc. 02A4615, available in dgsi.pt.
88. Manuel Januário Costa Gomes, *Assunção Fidejussória de Dívida – Sobre o sentido e o âmbito da vinculação como fiador* (Coimbra: Livraria Almedina, 2000), 803.
89. As decided by the Coimbra Appeal Court on 29.03.2011, proc. 448/07.0TBCBR-A.C2, available in dgsi.pt.
90. Please refer to Section III[C][2][a] above.

(a) If the Guarantor serves a notice to the Beneficiary to demand the enforcement of the debtor within two months after the Underlying Obligation becomes due and payable (one month having to elapse, however, after notice having been served).[91]
(b) If the Guarantor serves a notice to the Beneficiary to demand payment to the debtor (if such demand is necessary to have the Underlying Obligation due and payable), and provided that more than one year has elapsed since the Guarantee has been granted.[92]

Finally, the Guarantee may also be terminated by the Guarantors if their right to be subrogated to the Beneficiary's rights ceased due to a positive or negative action from the Beneficiary (e.g., if the Beneficiary does not claim the Underlying Obligation in the Principal's insolvency procedure).[93]

2 Release of the Guarantee

No specific formalities are required under Portuguese law in order to release the Guarantor from the Guarantee, the parties being entirely free to regulate this matter in the Guarantee's terms and conditions.

In order to safeguard the Guarantor's position, it is preferable to state in the Guarantee that the same shall automatically terminate upon discharge of the Underlying Obligations.

However, if the Guarantee does not have a specific and express term, the Guarantee should be released through a written statement either executed by the Beneficiary and the Guarantor or, at least by the Beneficiary.

The release instrument is subject to the same formality as the Guarantee. Except if otherwise agreed between the parties, the Guarantee original does not have to be returned to the Guarantor.

V ENFORCEMENT OF THE GUARANTEES

A The Call Mechanism

1 The Call Procedure

a) Conditions of the Call

The Guarantee can be called only after the Underlying Obligations becoming due and payable, either because it achieved its term or due to an acceleration of the term pursuant to the contract or the law.

91. Article 652 nr. 1 of the Portuguese Civil Code.
92. Article 652 nr. 2 of the Portuguese Civil Code.
93. Decision of the Lisbon Appeal Court dated 04.02.2010, proc. nr. 5022/07.8TVLSB.L1-8, available in dgsi.pt.

Some Guarantees are also subject to the verification of some conditions precedent, such as documents evidencing the claims or third parties decisions.

Anyway, except in the Beneficiary has immediate recourse against the Guarantor, as referred to in Section III[C][2][d] above, the Beneficiary must exhaust all its remedies against the Principal before being entitled to enforce the Guarantee.

b) Form of the Call

Except if otherwise set forth in the Guarantee contract, the calling of Guarantees does not require any formalities. The Beneficiary must request payment from the Guarantor in the same way the Principal would be requested to pay.

Some Guarantee contracts have attached an agreed form of payment request to be used on enforcement of the Guarantee.

If the Beneficiary claims judicially its credits against the Principal, it may also serve the claim against the Guarantor, even if all the Principal's assets must be previously seized. If the judicial claim is presented solely against the Guarantor, the latter may request the Principal to be called to join the judicial procedure, otherwise it may be considered as a waiver to the right of requesting the Principal's prior assets seizure (if existing).

c) Time of Calls

As referred above, the Guarantees can be called as soon as the Underlying Obligations are due and payable.

If the Guarantee was granted jointly by several Guarantors, each Guarantor may require the division of the liability between all the guarantors and only pay its share.

The Guarantor benefits of the Principal's limitation of period rights and therefore the Guarantee should be called before the limitation period has elapsed. However, the interruption or suspension of the Principal's limitation period does not interrupt or suspend the Guarantor's limitation period, except if the Beneficiary informs the Guarantor of such fact. Likewise, the waiver to the elapsing of the limitation period by the Principal shall not affect the Guarantor's rights.

d) Limitation on the Right to Payment

Any amendment to the Underlying Obligation, without the express acceptance from the Guarantor, may be sufficient for the Guarantor to challenge the call of the Guarantee, especially if the amendment changes the terms and conditions or the risk of the Underlying Obligations in the benefit of the Beneficiary.[94] As such, an extension of the term of the Underlying Obligations agreed between the Principal and the Beneficiary

94. Please refer to Section IV[A][1] above.

shall not result automatically in an extension of the Guarantee and of the Guarantor's obligations, except if the possibility of such extension was already agreed between the parties and accepted by the Guarantor.[95]

Likewise, an increase of the Underlying Obligations without the prior Guarantor's consent shall limit its liabilities to the amounts due under the original guaranteed obligations.[96]

Portuguese law also sets forth that the Guarantor may refuse any payments under the Guarantee while the Principal has the right to challenge the agreement from which the Underlying Obligation arise.[97] In fact, the law has been cautious by not imposing payments by the Guarantor while it is not clear or certain that the Underlying Obligations are due. Otherwise, the Guarantor would have to bear the Principal's risk in circumstances that he might not be committed to.

2 Defences of the Guarantor

a) The Guarantor's Own Counter-Claims

The Guarantor has the right to present its defence against any action from the Beneficiary: (i) by filing a judicial procedure claiming its rights, (ii) by contesting the validity of the Guarantee, (iii) or by contesting the calling of the Guarantee by the Beneficiary, should it be considered abusive or fraudulent.

As such, and as referred above, the Guarantor may have, as own counter-claims, the right to require the prior seizure of all the Principal's assets,[98] the right to refuse payment while the Beneficiary has the right to set-off its rights against the Principal's (and vice versa),[99] the right to claim that the Underlying Obligations were not performed due to the creditors' fault (*benefitium excussionis personale*),[100] the right to claim any res judicata favourable court decision (between Principal and Beneficiary) on the Underlying Obligation,[101] the right to claim the elapse of the limitation period,[102] the right to claim the performance of the Underlying Obligation by set-off[103] and the right to require the Beneficiary to demand payment against the Principal and/or to request payment from the Principal within a certain timeframe upon the Underlying Obligation becoming due and payable.[104]

95. The postponement of the limit of the guarantee may attract new stamp duty, calculated pursuant to the terms referred in Section III[B][1] above.
96. Decision of the Lisbon Appeal Court dated of 31.01.2012, proc. nr. 1979/09.2TBTVD-A.L1-1, available in dgsi.pt.
97. Article 642, nr. 2 of the Portuguese Civil Code.
98. Please refer to Section III[C][d]) above.
99. Please refer to Section [c] below.
100. Please refer to Section III[D] above.
101. Article 635, nr. 1 of the Portuguese Civil Code, which only makes an exception to decisions due to personal circumstances of the principal that do not exclude the guarantor's liabilities.
102. Article 304 of the Portuguese Civil Code.
103. Please refer to Section [b] below.
104. Please refer to Section IV[B][1] above.

b) Counter-Claims Derived from the Underlying Obligation

The Guarantee, being ancillary to the Underlying Obligations, must benefit from the defences derived therefrom. As such, without prejudice to its own rights of defence, the Guarantor has also the right to challenge the Beneficiary's rights with all the Principal's rights of defence, whichever they are, provided that they do not conflict with its obligation as a Guarantor (e.g., the Guarantor cannot claim the insolvency of the Principal or the decrease of the Principal's assets to oppose to the enforcement of the Guarantee).[105]

The Guarantor shall also continue to benefit from any defence right that may have been waived by the Principal without the Guarantor's consent.[106] As above referred, the variation of the Underlying Obligation shall only be reflected in the Guarantee if not prejudicial to the Guarantor, otherwise it will not affect the terms and conditions of the Guarantee and may even justify its termination.

Portuguese law sets forth that the Principal shall not be entitled to use against the subrogated Guarantor any defence rights it may have if it fails to inform the Guarantor of such defence rights upon having consented the performance of the Underlying Obligation by the Guarantor or if, upon having been informed by the Guarantor of the enforcement of the Guarantee, it has not disclosed such defence rights.[107] The disclosure of such rights should be considered as an obligation from the Principal not only during all the life of the Guarantee, but especially as soon as the Principal is informed of the enforcement of the Guarantee. Therefore, failure to comply with such disclosure obligation may grant the Guarantor the right to request an indemnity claim from the Principal.

Portuguese law further expressly sets forth that the Guarantor may refuse the payment of the Underlying Obligations while the Beneficiary is entitled to require the setting-off of its credit with a credit of the Principal, or if the latter is still entitled to require the setting-off of its debt against a debt from the Beneficiary.[108] In this case, Portuguese law has set its preferences in having the creditor and the Beneficiary settling their rights and obligations between themselves, before allowing a third party to be called into the relation, which would create unnecessarily new legal relations with new rights and obligations.

It is quite usual the parties to subject, in some cases, the Guarantee to an autonomous regime and/or to a *first demand* regime, the Guarantor waiving to its rights, upon the Guarantee being called, to assess if the Underlying Obligation is valid and/or if the Underlying Obligation has been in fact breached or if there is any act, omission, matter or thing which may reduce, release or prejudice the Underlying Obligations. However, Portuguese courts have been considering that, even if such cases of autonomous/first demand guarantees, the Guarantor may refuse to comply

105. Article 637, nr. 1 of the Portuguese Civil Code.
106. Article 637, nr. 2 of the Portuguese Civil Code.
107. Article 647 of the Portuguese Civil Code.
108. Article 642, nr. 2 of the Portuguese Civil Code.

with its obligations provided that there is a liquid and undoubtful evidence of manifest fraud or abuse of rights by the Beneficiary.[109]

c) Other Defences

The Guarantor is entitled to use any kind of defence that may be used against the Guarantee, the Beneficiary or the Underlying Obligations, either directly or through the Principal, except when such defence would conflict with its obligations as a Guarantor.

As referred above, in some cases, the Guarantor, although not being entitled to terminate the Guarantee, may refuse the performance of the obligations arising therefrom. In fact, Portuguese law expressly sets forth that the Guarantor may refuse any payments due under the Guarantee while: (i) the Beneficiary's credit can be satisfied by set-off against a Principal's credit; (ii) the Principal is entitled to set-off the Underlying Obligation with a credit over the Beneficiary; or (iii) the Principal is entitled to challenge the agreement that origin the Underlying Obligation (in such a way that would prejudice the Guarantor's obligations arising from the Guarantee). In these cases, the Guarantor shall not be entitled to exercise the Beneficiary's or the Principal's rights, as applicable, on their behalf, but will not be forced to perform its obligations while it is not clear if the Underlying Obligations will be performed by set-off or have been successfully challenged.

3 Consequences of the Opening of an Insolvency Proceeding Against the Principal

Stay of Actions Against the Principal

While the insolvency proceeding is pending, there is a stay of all seizures, other enforcement measures, enforcement proceedings or injunctions filed by the creditors affecting the assets included in the Principal's insolvency estate. Moreover, the filing of new enforcement proceedings by the creditors is not allowed.[110]

Arbitral proceedings pending before the opening of the insolvency proceeding are not suspended; nevertheless, the creditor shall also submit the claim against the Principal in the insolvency proceeding (also under the Portuguese Insolvency Code, the effects of any arbitration clauses in agreements entered into with the Principal are suspended whenever the result of the arbitration should be able to influence the insolvency estate).[111]

109. Decision of the Portuguese Supreme Court of Justice, proc. nr. 04B2883, of 14.10.2004, available in dgsi.pt.
110. Article 88, nr. 1 of the Portuguese Insolvency Code.
111. Article 87 of the Portuguese Insolvency Code.

Impact of Principal's Insolvency on the Guarantee

The Guarantee shall remain valid and effective despite the insolvency of the Principal, even if it has been called on prior to the commencement of the insolvency proceedings.[112]

Under the Principal's insolvency proceedings, the creditors may decide to approve an insolvency plan contemplating a reduction of the Principal's debt, which, if approved with the required majorities and homologated by the court, shall be binding to all the creditors. A reduction of the Principal debt's value shall not affect the value of the creditors' claim vis-à-vis the Guarantor; however, the Guarantor's claim vis-à-vis the Principal, within the insolvency proceedings, shall be reduced to the amount of the Principal's debt as set out in the insolvency plan.[113] An insolvency plan may also contemplate an extension of the debt's maturity date; the law is not clear on this subject, but, in our view, the same rational should apply, i.e., the extension of the debt's maturity date shall not have an impact on any Guarantee's specified maturity date.[114]

In a nutshell, any variation to the Underlying Obligation resulting from the insolvency proceeding shall not have consequences in the Guarantee, which may cause the Guarantor to pay the full amount guaranteed but be subrogated only to the credit resulting from the insolvency procedure (which may consequently be reduced or even cancelled). The risk of insolvency of the Principal is therefore assumed by the Guarantor.

Rights of the Guarantor vis-à-vis the Principal in the Insolvency Proceeding

The Guarantor is allowed to submit a claim in the insolvency proceeding prior to the call of the Guarantee, unless the creditor himself has already submitted a claim in the insolvency proceeding for that same debt.[115] The claim shall, however, be conditional upon call of the Guarantee, and if and when the Beneficiary serves a notice after the commencement of the insolvency proceedings and the Guarantor pays accordingly, the condition precedent is then fulfilled.

112. The same rule is applicable to the special revitalisation procedure (*processo especial de revitalização*), set up by Portuguese Law in 2012. The revitalisation procedure is aimed only at recovering companies (which are not in a current situation of insolvency), by means of the approval of a revitalisation agreement entered into between the company and its creditors. The procedure (for instance the submission of claims and the approval of a plan) is similar to an insolvency proceeding and it is set forth in the Portuguese Insolvency Code. Under the revitalisation procedure there is a stay of actions for the collection of debt against the debtor.
113. Article 217, nr. 4 of the Portuguese Insolvency Code.
114. As regards to the *aval*, there is some relevant case law on this matter. The Supreme Court, in the decision rendered in proc. nr. 597/11.0TBSSB-A.L1.S1 on 26 February 2013, decided as follows: 'the approval of an insolvency plan, with an extension of the maturity date granted to the maker of the promissory note, cannot be invoked by the guarantor (*avalista*)'.
115. In that case, should the guarantee is called and the guarantor pays accordingly, the guarantor shall be allowed to take the creditor's place in the insolvency proceedings (Articles 95, nr. 2 and 47, nr. 3 of the Portuguese Insolvency Code).

The claim must be filed by means of an application addressed to the liquidator (which is designated by the court upon declaration of insolvency of the debtor) until the end of the term specified in such decision (usually thirty days from the date of its publication).

If the condition precedent is not fulfilled prior to the final distribution of the proceeds of the realisation of assets, the liquidator must assess the probability of fulfilment of the condition as follows: (i) if such condition is deemed unlikely to be fulfilled, all the amounts are distributed to the other creditors, according to their ranking; (ii) if such condition is not deemed unlikely to be fulfilled, the amounts are deposited in escrow to be distributed once the condition is fulfilled.[116]

If the Guarantor does not file the conditional claim within this deadline, then it still will be permitted to start a judicial procedure (less straightforward than the insolvency proceeding) within six months from the date when the declaration of the Principal's insolvency becomes res judicata.[117] Creditors are also entitled to start the same procedure within three months following the origination of their claim, but it is disputable whether the reimbursement claim vis-à-vis the Principal is originated upon payment or when the Guarantee is issued, and for that reason it is recommended that the Guarantor lodges its conditional claim under the insolvency proceeding according to the procedure described in the preceding paragraph.

4 Claim Against the Principal, Before Payment

Without prejudice to the right of the Guarantor to require the Beneficiary to demand payment against the Principal and/or to enforce the Principal assets within a certain timeframe upon the Underlying Obligation becoming due and payable,[118] the Guarantor may require the Principal to release the Guarantee or to collateralise the rights to which it will be subrogated upon complying with its Guarantor's obligations, in the following situations:

(a) If the Beneficiary obtains an enforceable court decision against the Guarantor.
(b) If the risks of the Guarantee materially increase.
(c) If, after the Guarantee having been granted, the Principal can no longer be served or enforced in the Portuguese territory.
(d) If the Principal has undertaken to release the Guarantor within a certain time period or upon the occurrence of an event, if such time period has elapsed or the event has occurred.
(e) Upon five years if the Underlying Obligation does not have a term or if such term has been legally postponed.[119]

116. Article 181 of the Portuguese Insolvency Code.
117. Article 146, nr. 2, para. b) of the Portuguese Insolvency Code.
118. Please refer to Section IV[B][A] above.
119. Article 648 of the Portuguese Civil Code.

5 Claim Against the Principal, after Payment

The Guarantor that performs its obligations under a Guarantee shall be subrogated in the Beneficiary's rights, in the exact terms of the Underlying Obligation. This subrogation is mandatory by law and therefore it cannot be replaced by another regime by agreement between the parties. However, if the parties do not agree on specific terms and conditions to be applicable to the subrogation regime, the Guarantor shall be entitled to waive to its rights arising from the subrogation, provided that it has the legal capacity to do so.

Priority over other creditors cannot be agreed between the debtor and a specific creditor (without such other creditors accepting the corresponding subordination) and therefore the priority ranking of the Guarantor will be the same as the Beneficiary's. If agreed, a Guarantor may, nevertheless, benefit from additional security granted by the Principal over certain assets, which would grant priority over such assets.

If, for any reason, the subrogation is not possible, the Guarantor shall remain with a generic right of recourse over the Principal, in the same terms as a joint and several obligor would have upon payment of a joint and severally guaranteed obligation.

B Judicial Enforcement

1 Obtaining a Local Judgment

a) Judicial Competency

Portugal is a Member State of the EU, thus the Council Regulation (EC) No. 44/2001 of 22 December 2000 is applicable to the determination/choice of jurisdiction where one of the parties is Portuguese.

Normally the Guarantees include a jurisdiction clause, where the parties choose a court of a Member State to have jurisdiction over any disputes arising thereunder. The choice of law should be upheld, though the Regulation sets forth a few limitations in this respect (e.g., contracts with consumers) that could potentially apply to a Guarantee.[120]

If the parties choose a jurisdiction which is not a Member State of the EU, or none of the Parties is domiciled in a Member State, the jurisdiction shall be governed by the Portuguese procedural laws. Under the Portuguese Civil Procedure Code, parties are allowed to choose the courts of a foreign country provided that: (i) the matter is connected with more than one legal system; (ii) the matter does not fall within the scope of Portuguese Courts exclusive jurisdiction; (iii) such choice is founded in a serious interest of both parties or one of them (provided that there is not any serious inconvenient to the other party); (iv) the law of the designated court recognises its

120. In the absence of a choice of a jurisdiction clause, the Regulation provides that the competent court shall be the one where the obligation – in this case, the payment obligation resulting of the guarantee – shall be (or was) discharged – Article 5 of the Regulation.

jurisdiction; and (v) the choice is made in writing or confirmed in writing – specific reference to the competent jurisdiction shall be made.[121]

In the absence of choice by the parties, the Portuguese Civil Code provides certain criteria in order to establish jurisdiction of Portuguese courts (e.g., if the obligation shall be fulfilled in Portugal, or the lawsuit is based in facts that were performed in Portugal).[122]

By way of exception to the rules set forth in the Regulation (EC) No. 44/2001, and with relevance to guarantees, it should be noted that: (i) Portuguese courts shall be competent in relation to enforcement procedures targeting immovable assets located in Portugal; (ii) the determination/choice of jurisdiction in relation to insolvency proceedings connected to debtors located in the EU shall be subject to the Regulation (EC) No. 2015/848,[123] according to which the competent courts shall be the ones where the debtor has its centre of main interests.

As for interim measures, the Regulation (EC) No. 44/2001 provides that a party may apply for such measures before any Member State as may be available under the law of that State, even if, under such Regulation, the courts of another Member State have jurisdiction to settle the main lawsuit.[124]

b) Emergency Interim Proceedings

Enforcement Proceedings

In order to bring enforcement proceedings (*processo executivo*) against a debtor before Portuguese courts, the plaintiff shall hold a so-called enforcement document (*título executivo*), which must be one of the following: (i) a cheque, promissory note or bill of exchange; (ii) another type of document drawn up/authenticated before a legal practitioner duly entitled, who are normally Portuguese notaries and lawyers, provided that it originates or acknowledges a debt/payment obligation; or (iii) a judicial sentence of a competent court.[125]

In view of the above, the *aval* stated in the negotiable instrument will be enforceable before Portuguese courts. However, the *fianças* and other types of Guarantee may only be qualified as enforcement documents, to the extent that they have been drawn up/authenticated before a lawyer or a notary. Comfort letters will rarely be eligible as enforcement documents, since either the grantor normally does not settle this formality, or the comfort letter does not result in the assumption of a debt/payment obligation by the grantor.

In case the Guarantee is not an enforcement document, the Beneficiary will normally need to start a proceeding before the competent courts, with a view to obtain

121. Article 94 of the Portuguese Civil Procedure Code.
122. Article 62 of Portuguese Civil Code.
123. This regulation repeals Regulation (EC) nr. 1346/2000. However for the most part, the revised regulation only come into force in June 2017 and Regulation (EC) nr. 1346/2000 mostly remains applicable up to that date.
124. Article 31 of the Regulation.
125. Article 703 of the Civil Procedure Code.

a judicial sentence condemning the Guarantor/debtor to pay, which shall then be qualified as an enforcement document. Such procedure may take between one and three years, the timing varying depending on the competent court and the level of resistance presented by the Guarantor/debtor.

A faster route to ensure that an enforcement procedure is swiftly started is to attempt to obtain an order (*injunção*) for payment from the court. The *injunção* is applicable where the creditor holds a pecuniary credit based on a contract, provided that the value thereof does not exceed EUR 15,000.00[126] or, if it does exceed, provided that it refers to the consideration of a commercial transaction.[127] The relevant procedure is rather straightforward, and insofar as the debtor does not challenge the petition, an order for payment may be obtained within three to six months. However, if the debtor does challenge the petition, the proceeding described in the preceding paragraph must follow.

Enforcement proceedings may take around six months in order to be completed, though significant delays may occur depending on various factors. It is noteworthy to state that, when the enforcement document is not a judicial sentence, the defendant is free to challenge the petition by invoking any defences and exceptions to which it would be entitled in a normal proceeding. If this route is taken by the defendant, the procedure may take one to three years to be completed.

Emergency Interim Relief Measures

There are emergency interim relief measures available in Portuguese civil procedural rules.[128]

A party may apply for an interim measure before a Portuguese Court, either in the course of an ongoing lawsuit or prior to filing the main lawsuit. All interim measures are regarded as urgent and the measures ordered by the courts are binding. The breach of such measures may constitute a crime.

As a preliminary remark, a court shall accept an interim measure, insofar as the plaintiff provides evidence of: (i) a high likelihood of the right claimed by the applicant existing, and (ii) a grounded prediction that, should no preventive measure be ordered by the court prior to the final award, the claimed right might become seriously impaired, and it would be difficult to hold the Beneficiary harmless thereafter. Even if these conditions are met, the court shall, by way of exception, refuse to order the interim measure when the damage to the defendant is significantly greater than the loss which the applicant wishes to avoid.

In relation to interim measures connected to bank guarantees, the most frequent in Portugal is the one submitted by the Principal, where the court is requested to order

126. Decree-Law nr. 269/98, of 1 September 1998, lastly amended by Decree-Law nr. 226/2008, of 20 November 2008.
127. Articles 2 and 3 of Decree-Law nr. 62/2013, of 10 May 2013, provides the definition of 'commercial transaction' as a transaction between companies or companies and public entities, referring to the supply of goods or the rendering of services in return for payment of a consideration. Consumer contracts and compensation for damage based on civil liability are not included.
128. Articles 362–409 of the Portuguese Civil Procedure Code.

the Beneficiary not to call a Bank Guarantee on first demand, with a view to prevent the Guarantor from honouring such instrument. It has been generally understood by reputed authors and decisions of higher courts[129] that the interim measures may be ordered when the Principal demonstrates that the Beneficiary is acting in breach of bona fide duties or in a fraudulent way. In reality, these measures were ordered by the court in a few cases, since the courts are requesting strong evidence of the abuse or fraud.[130]

Arbitral Tribunals are also provided with the powers to grant emergency interim relief measures, once the hearing of the opposing party is ensured. Only preliminary orders, that expire in twenty days and are not be subject to enforcement by a state court, may be granted without hearing the counterparty. An interim measure issued by an arbitral tribunal shall be binding on the parties and, unless otherwise provided by the arbitral tribunal, shall be enforced upon application to the competent state court. However, under certain circumstances recognition or enforcement of an interim measure ordered by an arbitral tribunal may be refused by a state court.[131]

c) Preservation of the Guarantee

As a general rule, the Guarantee in itself shall remain valid and effective for the period of duration of the agreement, without the need for the Beneficiary to take any measures in order to ensure its preservation.

There are a few measures available in Portuguese legislation aimed at preventing attempts of the Guarantor to dissipate assets, such as: (i) interim orders towards attachment of Guarantor's assets (*arresto*);[132] (ii) the *impugnação pauliana*,[133] which is a specific civil procedure aimed at terminating any acts or contracts entered into with a view to reduce a debtor's assets or increase its liabilities, with the goal of preventing payment of certain obligations (certain conditions must be met); (iii) the termination by the liquidator of any acts or contracts performed or entered during hardening periods upon the Guarantor's insolvency.[134]

129. Pedro Romano Martinez, Pedro Fuzeta da Ponte, *Garantias de Cumprimento* (Coimbra: Almedina, 2006), 144–181; Inocêncio Galvão Telles, *Garantia Bancária Autónoma*, *Volume 5* III/IV Year 120 of *O Direito* (1988), 92; Mónica Jardim, *A Garantia* Autónoma (Coimbra: Almedina, 2002), 291. Portuguese Supreme Court of Justice, proc. nr. 458/09.2YFLSB, of 21 April 2010; Lisbon Court of Appeal, proc. nr. 1482/12.3TVLSB-B.L1-6, of 25 October 2012; Oporto Court of Appeal, proc. nr. 2898/11.8YYPRT-A.P1, of 9 December 2013, all available in dgsi.pt.
130. Lisbon Court of Appeal, proc. nr. 2304/10.5TVLSB-A.L1-2, of 16 June 2011, available in dgsi.pt.
131. Articles 20–29 of the Portuguese Voluntary Arbitration Law.
132. Article 391–396 of the Portuguese Civil Procedure Code.
133. Article 610–618 of the Portuguese Civil Code.
134. Please *see* more details in Section III[1] above.

2 Enforcing a Foreign Judgment/Decision

a) Applicable Law

Normally the parties add a choice of law clause to the Guarantee, where they elect the law chosen to govern its substance.

If all elements relevant to the situation are located in a country other than the one whose law has been chosen at the time of the Guarantee issuance, the law chosen by the parties shall still apply, though any mandatory laws of that other country shall supersede the chosen laws.[135]

Moreover, where the obligations arising out of the Guarantee have to be or have been performed in another country, any overriding provisions of the law of that country rendering the contracts unlawful may apply.[136]

In the absence of choice, the contract shall be governed by the law of the country where the party required to render the 'characteristic performance' of the contract has its usual residence or by the law of the country with which it is most closely connected.

There are some exceptions provided in Rome I Regulation, in particular in relation to contracts entered into with consumers.

b) Recognition of Foreign Judgments and Arbitral Awards

Rules on the recognition and enforcement in Portugal of judgments issued by the Member States of the EU (except for Denmark) are set forth in the Council Regulation (EC) No. 44/2001.

Under such Regulation, in order to be enforceable in another Member State, it is enough that the judgment is declared enforceable by the court of the country where it was issued.[137] The judgment shall be declared enforceable immediately on completion of the formalities provided in the Regulation, without any need of review of the merits of the judgment.

Still, such judgment shall not be recognised if: (i) such recognition is manifestly contrary to public policy in the Member State in which recognition is sought; (ii) where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so; (iii) it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought; (iv) it is irreconcilable with an earlier judgment given in another Member State or in a third

135. Article 3 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ('**Rome 1 Regulation**').
136. Article 9 of Rome 1 Regulation.
137. Articles 53 et seq. of the Regulation. Except for United Kingdom, where a register for enforcement on such country is required.

State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

In order for a judgment obtained in a court of a jurisdiction ('**Non-EU Jurisdiction**') not bound by Regulation (EC) No. 44/2001 to be enforceable in the courts of Portugal,[138] it must be confirmed by a Portuguese Appeal Court under a special procedure, for which purpose it is required that: (i) the relevant judgment is final; (ii) no doubts exist about the authenticity of the document evidencing the relevant judgment or about the intelligibility thereof; (iii) there is no *fraus legis* in the submission of the proceedings to the courts of a non-EU Jurisdiction or the subject of the relevant judgment does not fall within the exclusive jurisdiction of Portuguese courts; (iv) the relevant judgment is not manifestly contrary to public policy principles in Portugal; (v) the defendant has been regularly summoned in accordance with the laws of the country where proceedings were instituted and has had the opportunity to arrange for his defence; (vi) the judgment is not irreconcilable with a judgment given in a dispute between the same parties in Portugal; (vii) the judgment is not irreconcilable with a pending proceeding in Portugal involving the same cause of action and between the same parties, unless the court of a non-EU Jurisdiction has first seized jurisdiction.

The recognition of decisions rendered within insolvency proceedings by a Member State of the EU is governed by Regulation (EU) No. 2015/848, of 20 May 2015.

It should also be highlighted that Portugal is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) – the 'New York Convention' –, which is applicable subject to reciprocity, as well as to other treaties and international conventions on arbitration.

Without prejudice to the mandatory provisions of such international treaties and conventions, Portuguese Voluntary Arbitration Law provides some additional rules applicable to the recognition of awards made in arbitrations seated abroad by a competent Portuguese state court.

Portuguese Voluntary Arbitration Law's provisions on recognition are applicable where no international treaties and conventions are applicable or where the Portuguese Arbitration Law is more favourable to the recognition of the arbitral award than the rules laid down by the applicable international instruments. Also, the Portuguese Arbitration Law provides the procedural rules applied by the Portuguese Courts to recognise an arbitral award.

Under Portuguese Arbitration Law the grounds for refusing recognition and enforcement of an arbitral award made in an arbitration taking place in a foreign country are very similar to the ones set forth in the New York Convention.

For seeking recognition of a foreign arbitral award in Portugal the party shall provide the competent *Tribunal da Relação* with duly authenticated original award or

138. Or a party to the 1968 Brussels Convention on the Jurisdiction and the Enforcement in Civil and Commercial Matters or the 2007 Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.

a duly certified copy thereof, as well as the original of the arbitration agreement or a duly authenticated copy thereof. The opposing party is provided with the right to submit an opposition.

VI ANNEXES

A References

1 Primary Documentation

a) Statutory Legislation

International Convention of Genève dated of 7 June 1930 providing for a uniform law for bills of exchange and promissory notes, as approved in Portugal by the Decree-Law nr. 23721, of 29 March 1934.

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2 Secondary Documentation

a) Internet Sites

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https://publicacoes.mj.pt/Pesquisa.aspx (it contains the official publications of corporate acts and occurrences in respect of Portuguese companies, such as incorporation of companies, mergers and spin-offs, appointment of members of corporate bodies).

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