

Loans & Secured Financing

Contributing editor
George E Zobitz



2019

GETTING THE
DEAL THROUGH

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Cravath, Swaine & Moore LLP

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CONTENTS

Brazil	5	Luxembourg	50
Antonio Giglio and Marcelo Ikeziri Demarest Advogados		Peter-Jan Bossuyt and Denis Van den Bulke VANDENBULKE	
British Virgin Islands	12	Mexico	58
Patrick Ormond and Omonike Robinson-Pickering Walkers		Juan Carlos Machorro and Ricardo Orea Santamarina y Steta SC	
Cayman Islands	17	Portugal	64
Caroline Barton and Alexandra Simpson Appleby Cayman		Pedro Ferreira Malaquias and Inês Caria Pinto Basto Uria Menéndez – Proença de Carvalho	
Egypt	22	Spain	70
Mahmoud Bassiouny and Nadia Abdallah Matouk Bassiouny		Toni Barios Cases & Lacambra	
Greece	29	Switzerland	77
Athanasia G Tsene Bernitsas Law Firm		Patrick Hünerwadel and Marcel Tranchet Lenz & Staehelin	
Japan	36	United Kingdom	82
Hiroki Aoyama and Keigo Kubo Mori Hamada & Matsumoto		Azadeh Nassiri and Latifah Mohamed Slaughter and May	
Kenya	42	United States	89
Sonal Sejpal Anjarwalla & Khanna		George E Zobitz and Christopher J Kelly Cravath, Swaine & Moore LLP	
		Uzbekistan	98
		Nail Hassanov and Maxim Dogonkin Kosta Legal	

Preface

Loans & Secured Financing 2019

Fourth edition

Getting the Deal Through is delighted to publish the fourth edition of Loans & Secured Financing, which is available in print, as an e-book, and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Brazil, Cayman Islands, Japan, Mexico and Portugal.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, George E Zobitz, of Cravath, Swaine & Moore LLP, for his continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
July 2018

Portugal

Pedro Ferreira Malaquias and Inês Caria Pinto Basto

Uría Menéndez – Proença de Carvalho

Loans and secured financings

1 What are the primary advantages and disadvantages in your jurisdiction of incurring indebtedness in the form of bank loans versus debt securities?

Portuguese companies have traditionally been more prone to incur indebtedness in the form of bank loans rather than debt securities. In fact, the number of companies in Portugal with access to bank loans is much higher than the number of potential issuers of debt securities, considering that only certain types of companies are entitled to issue debt securities and only companies which meet certain financial ratios (or comply with certain criteria) can access this market. In addition, debt securities financing is usually unsecured.

The primary advantages of bank loans versus debt securities (private placements) are:

- the terms of bank loans are more flexible and can be tailored to the specific needs of the borrowers or projects; and
- the borrower can impose limitations on the assignment of the credits by the original banks.

When compared to debt securities (public offerings), the primary advantages of bank loans are:

- they are not subject to prospectus, registration and listing requirements; and
- it is easier to request and obtain waivers or amendments or to restructure the transaction.

However, debt security financing is not subject to stamp tax and, under certain circumstances, is not subject to withholding tax (unlike bank loans), which makes the former an attractive option in the Portuguese market.

2 What are the most common forms of bank loan facilities? Discuss any other types of facilities commonly made available to the debtor in addition to, or as part of, the bank loan facilities.

The most common forms of bank loan facilities are term loans and credit facilities (either revolving or not). Depending on the transaction, bank loan facilities often include different tranches to meet the specific needs of the borrower.

Other types of facilities in addition to, or as part of, bank loan facilities are not common in Portugal, except for bank guarantees, particularly in project finance deals.

3 Describe the types of investors that participate in bank loan financings and the overlap with the investors that participate in debt securities financings.

Under Portuguese law, lending (secured or otherwise) is considered a banking activity which may only be carried out, on a professional basis, by credit institutions or financial institutions duly authorised (or registered with, in the case of foreign entities acting within the Portuguese territory under the freedom of services basis or under the right of establishment rules) by the Bank of Portugal. For this reason, hedge funds, pension funds and other types of non-licensed players are restricted from participating in direct bank loan financings in Portugal.

Regarding debt securities financing, there is a risk that a Portuguese regulator would consider the subscription of debt securities by a non-licensed entity a circumvention of the banking regulations referred to above. However, there are also grounds to sustain that debt securities financing has a different legal qualification to pure loan financings, and that this risk should be lower if the borrower is a legal entity and not a consumer.

Notwithstanding, some alternative solutions to direct lending can be discussed, with different implications at the level of securities and guarantees and enforcement (and costs).

4 How are the terms of a bank loan facility affected by the type of investors participating in such facility?

If a Portuguese bank grants the bank loan facility on a bilateral basis, the Portuguese bank will typically propose its standard transaction documents. If the bank loan facility is granted on a syndicate basis, banks will generally propose transaction documents that include standardised provisions following similar terms to those that one would expect in other European jurisdictions, including the Loan Market Association (LMA) standards.

5 Are bank loan facilities used as 'bridges' to permanent debt security financings? How do the structure and terms of bridge facilities deviate from those of a typical bank loan facility?

It is not common that bank loan facilities are used as 'bridges' to permanent debt security financings in Portugal.

6 What role do agents or trustees play in administering bank loan facilities with multiple investors?

The concept of security trust (that is, the granting of security held by a security trustee on trust for itself and the other financing parties) does not exist under Portuguese law. In rem rights, other than those recognised by the law, cannot be created by an agreement of the parties. As a result, assets held on trust cannot qualify as a segregated, separate estate immune from the other creditors of the security trustee. Additionally, the right of the beneficiaries (that is, the creditors) over the assets on trust cannot be recognised if the security trustee inappropriately disposes of the assets.

Portugal is not a party to the Hague Conference on Private International Law's Convention on the Law Applicable to Trusts and on their Recognition 1985, which increases the unlikelihood of a trust being recognised in Portugal in the case of a conflict of laws.

However, a security agent can have the power to enforce securities on behalf of the financing parties, provided that it is duly empowered for such purpose by means of a power of attorney (apostilled if required).

In addition, this type of structure has been achieved in Portugal, to a certain extent, by having the security agent as the registered beneficiary of the security, and either have the agent benefit from a parallel debt covered by a non-Portuguese loan documentation or by an agreement between the parties, providing that the security agent is a joint-and-several creditor of all of the obligations of the borrower.

7 Describe the primary roles and typical fees of the financial institutions that arrange and syndicate bank loan facilities.

The primary roles and typical fees of the financial institutions that arrange and syndicate bank loan facilities are the following:

- the arranger's fee which will be paid to the arranger as a consideration for structuring the bank loan facilities (it is typically a percentage of the total commitments and it is usually charged up front, on the closing date);
- the facility agent's fee (which will generally depend on the size of the transaction, number of borrowers and lenders or members of the syndicate, and jurisdictions involved, and is usually charged up front, on the closing date, and subsequently on an annual basis); and
- commitment fees on the undrawn or unutilised amount of the loan.

Prepayment or cancellation fees could also be agreed on a case-by-case basis.

These fees are usually set out in separate fee letters, which are called 'finance documents'.

8 In cross-border transactions or secured transactions involving guarantees or collateral from entities organised in multiple jurisdictions, which jurisdiction's laws govern the bank loan documentation?

Cross-border transactions involving guarantees or collateral from entities organised in multiple jurisdictions are not very common in Portugal. However, when Portuguese law is not used, Spanish or English law is often agreed.

From a legal perspective, Portuguese courts would consider as valid and recognise a foreign governing law in bank documentation, subject to the provisions of Regulation (EU) No. 593/2008, of 17 June, on the law applicable to contractual obligations (Rome I). Regarding the security package, in rem securities (such as pledges and mortgages) should be governed by the law of the state where the assets are located.

Regulation

9 Describe how capital and liquidity requirements impact the structure of bank loan facilities, including the availability of related facilities.

Considering that Portugal is a member of the European Union, the capital and liquidity requirements are governed by the Capital Requirements Directive (CRD IV) and the Capital Requirements Regulation (CRR). CRD IV was transposed into Portuguese law by, among others, Decree-Law No. 157/2014, of 28 July, which has amended the Banking Law (Decree-Law No. 486/99, of 13 November) and supplemented by Notices of the Bank of Portugal (including Notice No. 11/2014, of 22 December). These regulations aim to ensure the solvency and financial soundness of credit institutions and, hence, the stability of the financial system.

It is common for banks to request and negotiate on bank loan facilities provisions on increased costs, allowing lenders to demand borrowers reimburse them for any additional costs incurred as a result of the implementation, application and/or compliance with Basel III, CRD IV and CRR regulations. There are some recommendations made in this regard by the Bank of Portugal, under the Circular Letter No. 32/2011/DSC, of 17 May, which should be considered when drafting this type of provision.

10 For public company debtors, are there disclosure requirements applicable to bank loan facilities?

Portuguese law does not set out specific disclosure requirements applicable to bank loan facilities entered into by public company debtors, other than in the context of regular financing reporting obligations or a capital markets transaction.

In general, a bank loan facility must only be disclosed to the market as a relevant fact if it is qualified as inside information (ie, information of a precise nature, which has not been made public, relating to an issuer that if it were made public would be likely to have significant effect on the prices of the financial instruments of the public company).

11 How is the use of bank loan proceeds by the debtor regulated? What liability could investors be exposed to if the debtor uses the proceeds contrary to regulations? Can investors mitigate their liability?

Under the principle of contractual freedom, the parties can agree on the use of the bank loan proceeds and such use is specified in the loan facilities agreement.

The Portuguese regulations on the prevention of money laundering and terrorist financing (including Law No. 83/2017, of 18 August, which has been partially transposed in Portugal Directives 2015/849/UE and 2016/2258) require credit institutions to establish adequate bodies and proceedings in order to prevent any transactions that may involve money laundering and terrorism financing, such as the development of internal policies in order to know their costumers, their activities and the origin of the funds in their accounts. Furthermore, credit institutions must report suspicions of money laundering or terrorist financing to the competent authorities. A breach of the anti-laundering and terrorism finance rules is deemed as an administrative offence.

Loan facilities agreements generally include specific provisions covering anti-corruption, anti-money laundering and counter-terrorist financing and relevant representations and warranties by the debtor on that matter. In addition, it is generally provided that banks are entitled but not bound to monitor or verify the application of any amounts borrowed pursuant to the loan facilities agreement.

12 Are there regulations that limit an investor's ability to extend credit to debtors organised or operating in particular jurisdictions? What liability are investors exposed to if they lend to such debtors? Can the investors mitigate their liability?

Pursuant to the Portuguese regulations on the prevention of money laundering and terrorist financing, credit institutions shall apply enhanced identification and due diligence procedures and measures according to the risk level of the relevant debtor and transaction. Certain debtors (including debtors with head offices in high-risk third countries) and transactions are specifically identified by the law as entailing a higher risk of being linked to money laundering or terrorist financing.

In addition, credit institutions must, on their own initiative, report immediately to the Central Bureau of Investigation and Prosecution and to the Portuguese Financial Intelligence Unit any proposed, attempted, ongoing or already executed transaction, or specific funds or assets, regardless of the amount, that they know or suspect derive from criminal activities or are related to money laundering or terrorism financing.

Pursuant to the Banking Law, a breach of the rules on the granting of credit to such debtors shall be deemed as an administrative offence.

13 Are there limitations on an investor's ability to extend credit to a debtor based on the debtor's leverage profile?

Credit institutions must have a risk management system capable of evaluating the risk of the borrower's credit. They should also consider the remoteness of the debtor's insolvency, considering that certain transactions and security interests may involve a clawback risk, if they are entered into within the suspect periods foreseen in the law.

There is also specific legislation, in light of the type of credit, that imposes specific duties to credit institutions based on the debtor's leveraged profile. For instance, regarding the granting of credit relating to residential immovable property, credit secured by mortgage or equivalent security and consumer credit, a credit institution must evaluate the customer's creditworthiness before granting the credit, according to the provisions of Decree-Law No. 74-A/2017, of 23 June and Bank of Portugal Notice No. 4/2017, of 22 of September. Recently the Bank of Portugal has approved a recommendation introducing limits to some of the criteria used in the assessment of customer's creditworthiness of the said credits. The recommendation is applicable to the contracts concluded as of 1 July 2018, and sets out three types of limits regarding the ratio between the loan amount and the value of the property pledged as collateral (LTV), the ratio between the monthly instalment amount calculated with all the borrower's loans and its income (debt service-to-income), and limits on the original maturity of the loan.

14 Do regulations limit the rate of interest that can be charged on bank loans?

Parties are free to agree on the rate of interest that can be charged on bank loans subject to certain restrictions.

Portuguese law provides a general prohibition on usury. In light of that general prohibition, the rate of interest remuneration cannot exceed the legal rate, plus 3 per cent or 5 per cent, depending on whether the credit is secured by a security interest. The legal rate is established by ministerial order of the Ministers of Justice and Finance. There are also some specific rules applicable to certain types of credit, such as consumer credit or loans for the acquisition of a primary home secured by mortgages.

Regarding default interests, banks can charge a maximum annual surcharge of 3 per cent, on top of the rate of interest remuneration agreed by the parties. If higher, the rate is automatically reduced to said ceiling (according to Decree-Law No. 58/2013, of 8 May).

15 What limitations are there on investors funding bank loans in a currency other than the local currency?

There are no regulatory restrictions regarding the use of local or foreign currency for financing purposes (according to Decree-Law No. 295/2003, of 21 November). However on credit agreements for consumers relating to residential immovable property the borrowers have the benefit of specific information duties (under Decree-Law No. 74-A/2017, of 23 June).

16 Describe any other regulatory requirements that have an impact on the structuring or the availability of bank loan facilities.

There are no other regulatory requirements that have an impact on the structuring or the availability of bank loan facilities that should be highlighted.

Security interests and guarantees

17 Which entities in the organisational structure typically provide collateral and guarantee support for bank loan financings? Are there limitations on which entities in the organisational structure are permitted to provide such support?

It is usual that the borrower itself, the parent company and its subsidiaries provide collateral and guarantee support for bank loan financings, although this will ultimately depend on the specific terms of the transaction.

Regarding Portuguese law limitations, please see question 28.

18 What types of obligations typically share with the bank loan obligations in the collateral and guarantee support? If so, are all such obligations equally and ratably covered by the collateral and guarantee support?

In general, security is granted in favour of all banks involved in the transaction (including those entering into the hedging arrangement, if different than the lender). Thus, the hedging arrangement may be secured by the same mortgage securing the loan or credit facility.

Notwithstanding, this will depend on the particulars of the transaction and on the banks and hedging providers.

19 Which categories of assets are commonly pledged to secure bank loan financings? Describe any limitations on the pledge of assets.

The most common assets pledged to secure bank loan financing are shares of public limited companies or shares (quotas) of companies limited by shares and other securities, cash deposits in bank accounts, contractual rights (including receivables and rights under insurance policies), intellectual property rights and tangible assets (not subject to registration). The granting of a mortgage of a real estate property or a movable asset subject to registration as a security is also common.

Regarding Portuguese law limitations, please see question 28.

20 Describe the method of creating or attaching a security interest on the main categories of assets.

The method of creating a security depends on the asset given as a security.

Mortgages can be granted over real estate or movable assets subject to registration, whereas pledges can be granted over movable assets or other credits or rights which cannot be secured by a mortgage.

A mortgage over a real estate property must be granted by means of a written agreement, which must take the form of a public deed and be registered with the competent Land Registry Office for it to be effective both between the parties and vis-à-vis third parties. A mortgage over movable assets should also be registered with the competent Registry Office.

The formal requirements for the creation of a shares pledge depend on the type of securities concerned. A pledge over registered shares represented by certificates is created by registering the pledge in the share certificates and the company's share registry book. A pledge over registered shares represented by book entries is created by registering the pledge in the individual ownership account where the securities are deposited.

Financial pledges are governed Decree-Law No. 105/2004, of 8 May. Under a financial pledge, securities and monies are granted as financial collateral, provided that certain conditions are met, notably that at least one of the parties is a credit institution or equivalent. Financial pledges enable the pledgee to, among other matters, appropriate the pledged assets or rights upon acceleration, provided that this enforcement mechanism has been agreed between the parties. Alternatively, the pledgee is entitled to sell the pledged assets in order to obtain payment without the need resort to court.

Quotas are pledged by means of a written agreement and registration with the competent Commercial Registry Office.

Under a pledge of rights, the guarantor pledges a right in favour of the creditor. The creation and perfection of a pledge of rights is subject to the same requirements of form and publicity as the creation and perfection of the pledged right. In particular, the pledge of a credit right is further subject to the notification to the debtor for it to be effective vis-à-vis the latter.

A financial pledge over cash deposits in bank accounts is not qualified as a pledge over the cash itself but as a pledge over the credit to receive an amount equivalent to the one deposited in the cash account. The pledge has to be granted by means of a written document and must be notified to the account bank and registered with the relevant account bank. It is usually construed as a floating pledge, which means that the pledge shall not cease to exist even if some monies are withdrawn from the bank account. Usually the pledgor undertakes to keep a minimum amount standing to the credit of such bank account, to avoid termination of the pledge resulting from termination of the pledged credit of the bank account.

The pledge of intellectual property rights must be registered with the Portuguese National Intellectual Property Institute.

21 What steps are necessary to perfect a security interest on the main categories of assets? What are the consequences of failing to perfect a security interest?

See question 20 for the steps necessary to perfect a security interest.

If the security interest is not perfected, the security is invalid and unenforceable, therefore borrower shall rank *pari passu* with the rest of the ordinary creditors.

22 Can security interests extend to future-acquired assets? Can security interests secure future-incurred obligations?

Although its admissibility is not a clear-cut issue, some legal scholars argue that the pledge of future credits is admissible, subject to the fulfilment of certain conditions. The pledged credit shall be determinable accordingly to the criteria set out in the pledge agreement, shall be certain (ie, that does not require any further actions from either the pledgor or the pledgee to be identified in the future), and the perfection of the pledge of future credits requires the pledged future right to come into existence.

23 Describe any maintenance requirements to avoid the automatic termination or expiration of security interests.

Security interests terminate by operation of law once the secured obligations are discharged in full. However, if those security interests are registered (in a public registry or otherwise), the release of such security interests should also be registered.

In case of amendment of the secured obligations, it is advisable to amend and/or ratify the security.

24 Are security interests on an asset automatically released following its sale by the debtor? If so, are the releases mandated by law or contract?

According to Portuguese law, in rem security interests remain connected to the asset in spite of its sale by the debtor. It is also not possible to provide that the debtor is forbidden to sell, transfer or encumber (notably, by means of a second ranking mortgage) a mortgaged asset. Such a clause would be void. Nevertheless, the parties may set forth that the sale, transfer or encumbrance of a mortgaged asset is considered to be an event of default, hence entitling the mortgage creditor to accelerate the loan or credit facility.

25 What defences does a guarantor have against claims for non-fulfilment of guarantee obligations? Can such defences be waived?

The guarantor's means of defences will depend of the type of guarantee provided. If the guarantee is an autonomous guarantee, the guarantor will have very limited defences (mainly connected to abuse of right). If the guarantee is ancillary, the guarantor will be able to invoke against the creditor all the defences of the main debtor from the underlying relationship. Under Portuguese law, the waiver of any defences by the debtor is not effective against the guarantor.

26 Describe any parallel debt or similar requirements applicable in a secured bank loan financing where an agent acts for multiple investors.

Please see question 6.

27 What are the most common methods of enforcing security interests? What are the limitations on enforcement?

As a general principle, it is not possible to enforce securities out of court, due to the concept of *jus imperii* of the state and the exclusive delegation of the state's enforcement powers to the courts. Notwithstanding, when the relevant requirements are fulfilled, the sale of seized assets within a judicial enforcement proceeding may be performed by means of a private sale and purchase agreement. Furthermore, a secured creditor is generally not entitled to appropriate the secured asset.

Two exceptions should be highlighted:

- Financial pledges governed by Decree-Law No. 105/2004, of 8 May which enable the pledgee to, among other matters, appropriate the pledged assets or rights upon acceleration, provided that this enforcement mechanism has been agreed between the parties. Alternatively, the pledgee is entitled to sell the pledged assets in order to obtain payment without the need resort to court.
- Pledges governed by the recently enacted Decree-Law No. 75/2017, of 27 June, pursuant to which the parties to a commercial pledge become entitled to appropriate the pledged collateral by an amount determined by an evaluation made after the relevant debt is enforced, provided that, on the relevant pledge agreement (which should be made in writing and with the signatures certified by a notary or a lawyer), parties have foreseen such possibility and right and have agreed on the type of evaluation and its criteria.

The enforcement of security interests can be made through (judicial) declaratory or enforcement proceedings (which are more expeditious).

As a general rule, creditors need to hold an enforceable title to bring judicial enforcement proceedings against a debtor. In order to be granted enforceability before the court in the case of judicial enforcement proceedings, loan agreements should be entered into in the form of a public deed, or a private certified document.

The declaration of insolvency suspends all enforcement proceedings against the debtor which may affect the debtor's estate, and prevents the filing of new enforcement proceedings. The bank must enforce its credits within the insolvency proceedings.

28 Describe the impact of fraudulent conveyance, financial assistance, thin capitalisation, corporate benefit and similar doctrines on the structure of bank loan financings.

Fraudulent conveyance

The Portuguese Insolvency law (Decree-Law No. 53/2004, of 18 March) provides for clawback actions within certain suspect periods preceding the declaration of insolvency. In addition, under the Portuguese Civil Code (Decree-Law No. 47 344, of 25 November 1966), creditors are able to initiate a fraudulent conveyance action (a defence against fraudulent acts performed by the debtor in order to diminish the guarantees of its creditors) if the creditor (claimant) is able to provide evidence (among other matters) of the depletion of the debtor's assets and of bad faith.

Financial assistance

Pursuant to the Portuguese Companies Code (Decree-Law No. 262/86, of 2 September), public limited companies cannot grant loans or by any other means grant funding or security to a third party to acquire or by any other means subscribe to its own shares. Additionally, public limited companies cannot grant financial assistance to third parties for the acquisition of the shares of a company within the same group of companies. Any actions that fall within the scope of the restrictions on financial assistance must be deemed null and void. The majority of Portuguese scholars argue that financial assistance prohibition rules only apply to public limited companies and not to companies limited by shares, as there is no specific prohibition of financial assistance for this type of company.

Thin capitalisation

As to thin capitalisation, the Portuguese rules on the matter were revoked in 2013 and replaced by interest stripping rules limiting the tax deductibility of financial expenses.

Corporate benefit

According to the Portuguese Companies Code, the granting of a guarantee to secure debts of other companies is considered to be against the interest of the company, unless there is a justifiable corporate benefit of the guarantor(s) in granting the personal or in rem guarantee to secure the debt, or the companies are in a 'control or group relation' (as defined in the Portuguese Companies Code). If none of the requirements are fulfilled the guarantee is deemed to be void. In order to minimise the impact of these restrictions, companies can have subsidiaries wholly owned by a parent, as this situation is less likely to raise issues with regard to the assessment of the corporate benefit; or obtain a shareholders' resolution or a detailed board resolution setting out guarantee limitations or a specific economic compensation, and which explains the relevant corporate benefit.

Intercreditor matters

29 What types of payment or lien subordination arrangements, or both, are common where the debtor has obligations owing to more than one class of creditors?

In Portugal, subordination in bank loan transactions is typically implemented through contractual subordination. Contractual subordination provisions are usually included in intercreditor arrangements, under which certain (junior) creditors agree to rank behind other (senior) creditors in the priority for collecting repayment from the debtor.

In case of default or insolvency of the debtor, credit claims must be ranked according to statutory rules (for example, secured claims rank above common and subordinated claims).

30 What creditor groups are typically included as parties to the intercreditor agreement? Are all creditor groups treated the same under the intercreditor agreement?

In general, all lenders (including junior and senior lenders) as well as hedging counterparties are parties to the intercreditor agreement. In some cases intra-group lenders and shareholders (if shareholders' loans are granted) are also included.

The treatment of each group of creditors (including voting rights, consent rights, purchase options, etc) will depend on the particulars of the transaction.

31 Are junior creditors typically stayed from enforcing remedies until senior creditors have been repaid? What enforcement rights do junior creditors have prior to the repayment of senior debt?

Intercreditor agreements often include a provision to prevent junior debt creditors enforcing actions against collateral upon default for a certain period of time once the notice of the default is given to senior creditors (a standstill period). In some cases, with the consent of senior creditors, junior creditors may accelerate or take enforcement actions prior to the end of the standstill period.

The aim of standstill clauses is to provide senior class creditors with time to decide how to act before a default (either through enforcement actions or debt restructuring). If senior creditors choose to take enforcement actions, junior creditors are usually able to join such strategy, by taking an equivalent action.

32 What rights do junior creditors have during a bankruptcy or insolvency proceeding involving the debtor?

Once the court declares a debtor is insolvent, creditors may submit their claims by lodging a proof of claim with the insolvency administrator. Those credits will be subject to a classification by the insolvency administrator. The Portuguese Insolvency Code states that credits/claims must be ranked as follows, from the highest to the lowest priority of payment:

- credits to insolvency state;
- guaranteed claims;
- privileged claims;
- common claims; and
- subordinated claims.

Such classification of junior creditors' claims will determine their priority of satisfaction. Once their claims are ranked within the insolvency proceedings (along with the claims of all the remaining creditors of the debtor), junior creditors' payment will be determined in the light of the intercreditor agreement.

33 How do the terms of the intercreditor arrangement change if creditor groups will be secured on a pari passu basis?

Since there will be no priority payment regimes, priority of claim or enforcement rights for some classes of creditors, the parties will focus negotiations on the determination criteria of voting rights or on the thresholds for enforcement actions.

Loan document terms

34 What forms or standardised terms are commonly used to prepare the bank loan documentation?

Financing agreements in the Portuguese market do not typically follow an industry standard format (such as the LMA documentation in the United Kingdom market). However, many of the customary features of Portuguese financing documentation replicate LMA standards.

35 What are the customary pricing or interest rate structures for bank loans? Do the pricing or interest rate structures change if the bank loan is denominated in a currency other than the domestic currency?

In Portugal, most bank loans provide for a floating interest rate associated with a hedging strategy (either a swap or a cap).

EURIBOR is the standard benchmark interest rate. It is not common for a bank loan in Portugal to be denominated in a currency other than the euro.

36 Have any procedures been adopted in bank loan documentation in your jurisdiction to replace LIBOR as a benchmark interest rate for loans?

Although LIBOR is not the standard benchmark interest rate, the Portuguese market is aware of the phasing out of LIBOR in 2021. In light of this, we are already seeing in the market some banks (especially foreign banks) requesting some particular fallback provisions to be included in the bank loan documentation (either in the form of risk factors when dealing with debt securities offerings or clauses tackling the replacement of the benchmark interest rates).

37 What other bank loan yield determinants are commonly used?

In Portugal, the practice of setting out a zero interest rate floor for EURIBOR is common among banks.

38 Describe any yield protection provisions typically included in the bank loan documentation.

Yield protection provisions typically included in Portuguese bank loan documentation are increased cost provisions, break and prepayment cost provisions, tax gross-up and tax indemnity provisions.

39 Do bank loan agreements typically allow additional debt that is secured on a pari passu basis with the senior secured bank loans?

In general, additional debt secured on a pari passu basis with the senior secured bank loans is not permitted, since it is usually restricted by financial covenants.

40 What types of financial maintenance covenants are commonly included in bank loan documentation, and how are such covenants calculated?

Although the choice of the specific maintenance covenants is related to the risk and type of the business, and to the purpose of the loan, in Portugal the most common types of financial maintenance covenants in bank loan agreements are:

- the leverage ratio – total net debt to EBITDA (earnings before interest, taxes, depreciation and amortisation); and
- the interest coverage ratio – EBITDA to interest expenses.

There are other coverage or leverage ratios which can be used, depending on the business model of the borrower. On the other hand, cash sweep mechanisms, which provide for the mandatory use by the borrower of excess free cash flows to prepay the loan, are also frequent.

41 Describe any other covenants restricting the operation of the debtor's business commonly included in the bank loan documentation.

Typically, Portuguese bank loan agreements include traditional restricting covenants, which may refer to:

- payment of dividends;
- capital reductions;
- reimbursements of shareholders' loans;
- disposal of assets;
- corporate transactions (ie, mergers and acquisitions, joint ventures, change of control, changes to the nature of the business, etc); and
- incurrence of additional debt and negative pledges.

The choice and extent of the restricting covenants is dependent on the particulars of each transaction.

42 What types of events typically trigger mandatory prepayment requirements? May the debtor reinvest asset sale or casualty event proceeds in its business in lieu of prepaying the bank loans? Describe other common exceptions to the mandatory prepayment requirements.

The following are common examples of mandatory prepayment triggers:

- illegality;
- change of control;
- disposal of assets;
- insurance proceeds;
- receipt of payments under warranties in transactions; and
- excess cash flow.

It is possible that the parties agree certain exceptions to the mandatory prepayments regarding, for instance, the reinvestment of certain proceeds in the ordinary course of business. Usually, the bank loan agreements provide for a defined period for the borrower to reinvest the proceeds in activities and assets, which are also specified in the bank loan documentation.

43 Describe generally the debtor's indemnification and expense reimbursement obligations, referencing any common exceptions to these obligations.

Bank loan agreements generally provide that the borrower will indemnify the lenders for losses, liabilities and related costs and expenses they incur from litigation or other claims related to the loan or the borrower. On the other hand, bank loan agreements may also provide for increased costs and other indemnities (for instance, tax indemnity, currency indemnity and agent's indemnities).

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