

The International Comparative Legal Guide to:

# Securitisation 2005

A practical insight to cross-border Securitisation Law



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# Portugal

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### 1 Choice of Law

**1.1** If the seller and the debtors are resident in your country, and the transactions giving rise to the receivables and the payment of the receivables take place in your country, can the seller and the debtor choose a different country's law to govern the receivable contract and the receivables?

Under article 3 of the Convention on the Law Applicable to Contractual Obligations (the "Rome Convention"), the parties may choose the law which will govern the contractual obligations arising from a receivables contract involving: (i) accounts receivables; (ii) loans; (iii) lessee's lease obligations and, generally speaking, (iv) other rights of a seller to receive payments. Nevertheless, according to article 3, number 3 of the Rome Convention, the fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called "mandatory rules".

In regards to promissory notes, the applicable conflict of law rules are set under the Geneva Convention for the Settlement of Certain Conflicts of Laws in Connection with Bills of Exchange and Promissory Notes, of 7 June 1930 (the "Geneva Convention"). Under the Geneva Convention there is no freedom of choice regarding (i) the capacity of a person to bind himself by a promissory note (ii) the form of any contract arising out of a promissory note; (iii) the effects of the obligations of the drawer of a promissory note; (iv) the effects of the signatures of the other parties liable on a promissory note; (v) the limits of time for the exercise of rights of recourse; (vi) the question of whether there has been an assignment to the holder of the debt which has given rise to the issue of the promissory note; (vii) the question of whether acceptance may be restricted to part of the sum or whether the holder is bound to accept partial payment; (viii) the payment of promissory notes; (ix) the form and limits of time for protest; and (x) the measures necessary to be taken in case of the loss or theft of a promissory note.

Regarding contracts giving rise to mortgage receivables there is no choice of law concerning the *in rem* effects of such contracts, because under the applicable conflict of law rule the legal framework of a guarantee *in rem* such as a

mortgage is governed by the law of the state where the assets are located (*lex rei sitae*). The law chosen by the parties can govern contractual obligations under such contracts. Despite what has been said, a public deed is always required for the perfection of a mortgage contract under Portuguese law.

**1.2** If your country's law governs the receivables, and the seller sells the receivables to a purchaser in another country, can the seller and the purchaser choose the law of the purchaser's country or a third country to govern their sale agreement?

Under articles 3 and 12 of the Rome Convention, the parties can freely choose the law that will govern their mutual obligations as seller and purchaser.

However, Portuguese law, which is the law governing the receivables to which the assignment relates, shall determine:

- a) its assignability;
- b) the relationship between the assignee (purchaser) and the debtor;
- c) the conditions under which the assignment can be invoked against the debtor; and
- d) any question on whether the debtor's obligations have been discharged.

**1.3** In the case described in 1.2 above, will your country's laws apply to determine (i) whether the sale of receivables is effective as between the seller and the purchaser, (ii) whether the sale is perfected, (iii) whether the sale is a true sale, and/or (iv) whether the sale is effective and enforceable against the debtors?

In light of the answer given to question 1.2 above, Portuguese law will be applicable to determine, among others, whether the receivables can be assigned and whether the sale is effective and enforceable against the debtors. To this extent, Portuguese law will also determine whether the sale is a true sale. Portuguese law will not determine whether the sale of the receivables is effective as between the seller and the purchaser. Regarding credit institutions and financial companies, the qualification of a sale as a true sale for capital relief purposes may also depend on the fulfilment of the relevant Portuguese prudential regulatory rules.

## 2 Receivables Contracts

### 2.1 Can a receivable be sold without the debtor's consent if the receivable contract does not prohibit assignment?

The specific regulation for securitisation in Portugal was introduced by Decree-Law 453/99, dated 26 October ("Portuguese Securitisation Law" or "PSL"), as amended from time to time, which allows two types of securitisation vehicles to perform securitisations: (i) the Credit Securitisation Funds ("Fundos de Titularização de Créditos" - "FTC") and (ii) the Credit Securitisation Companies ("Sociedades de Titularização de Créditos" - "STC"), both established under the terms and conditions of the PSL.

Whenever the assignment of receivables is made to a different type of vehicle, other than the two mentioned (e.g. a foreign Special Purpose Vehicle - "SPV"), the PSL is not applicable. In these situations, if the assignment is to be made under Portuguese law, the general assignment regime established by the Portuguese Civil Code ("CC") will apply.

In the light of what has been said above, one must distinguish as follows:

#### Securitisation under the Portuguese Securitisation Law

If the seller is a bank, a financial company, an insurance company, a pension fund or a pension fund management company, no authorisation is required and the assignment of receivables is effective against the relevant debtors at the date it becomes effective between the seller and the buyer, and no acknowledgement of, acceptance or notification to such debtors is required.

In all other cases, irrespective of the fact that the receivable contract does not prohibit the assignment, the enforceability of an assignment of receivables against the debtor is subject not to authorisation but to notification to such debtor, such notification (to be made by means of registered letter) is deemed to have occurred on the third business day following registration of the letter in the post office.

#### Securitisation under the Portuguese Civil Code

Under the CC an assignment of debts is effective against the debtor only when notified to it or accepted by it, unless the purchaser can provide evidence of the fact that the debtor was aware of the assignment of debts at the time of the assignment. A registered letter which acknowledges receipt will be deemed to constitute sufficient notice of the assignment of the receivables to the debtor.

### 2.2 If the receivable contract does prohibit assignment, will the sale of receivables be ineffective and/or give the debtor the right to sue the seller and/or the buyer?

#### Securitisation under the Portuguese Securitisation Law

Only receivables that do not prohibit assignment can be assigned for securitisation purposes under the PSL. If notwithstanding this prohibition the assignment is made, the sale of the receivables will be null and void and the debtor (as well as the buyer, if acting in good faith) will have the right to sue the seller. The contracts may foresee the possibility of the FTC or STC acquiring new receivables to substitute the ones wrongly sold.

#### Securitisation under the Portuguese Civil Code

If the assignment of the receivables is made in violation of a non-assignment clause established in the underlying contract the debtor can sue the seller. However, the existence of such clause will be ineffective against the buyer, unless the latter was aware of the existence of such clause by the time of the assignment and consequently acted in bad faith.

### 2.3 Do your country's laws limit rates of interest on consumer credit, loans or other kinds of receivables?

The general rule established in the CC is that rates of interest cannot be superior to the legal rate plus 3%, if there is a security interest in *rem*, or plus 5% if such security does not exist. The legal interest rate is 7% for civil persons and 12% for commercial companies.

However, if the lender is a credit institution or financial company, these entities have freedom to determine the rate of interest applicable to the credit facilities they grant. In this situation, the interest due in case there is a default payment can only be of plus 2%. If a penalty clause is agreed it can go up to 4%.

## 3 Asset Sales

### 3.1 In your country what is necessary generally in order for a seller to sell accounts receivable to a purchaser and for the sale to be perfected?

#### Securitisation under the Portuguese Securitisation Law

According to the PSL, for securitisation purposes, receivables may only be assigned when there are no legal or contractual restrictions to their assignability, provided that such receivables:

- have monetary nature;
- are not subject to any condition; and
- are not encumbered, pledged or seized under litigation.

Future receivables may be securitised provided that the future payment obligations arise from existing legal relationships and the payment amounts are already known or can be predicted.

The PSL expressly establishes the possibility of assigning mortgage loans with subsidised interest.

Notification under the PSL will also be required, in the terms and conditions mentioned in our answer to question 2.1 above.

#### Securitisation Under the Portuguese Civil Code

As referred above, the assignment of debts to an entity, which is not a FTC or a STC as defined in the PSL (for instance, a foreign SPV), must be made under the general assignment regime established by the CC.

The assignment can take place unless prohibited by law or agreement. If the receivable is *intuitus personae*, the assignment cannot take place, unless authorised by the debtor.

If the assignment is made in violation of an agreement which

prohibits it, the sale will, nevertheless be effective between assignor and assignee, unless the assignee was aware of the existence of such prohibition by the time of the assignment.

However, we should point out that an assignment of debts will only be effective against the debtor when notified to it or accepted by it, as mentioned in our answer to question 2.1. above.

Under the general regime set in the CC, future debts can be assigned.

The general regime further establishes that the assignment of debts must observe the same form, formality and requirements of the underlying contract.

Certain type of assets, such as mortgage loans or car receivables arising from financial leasing contracts, may be subject to some registry requirements.

### 3.2 What additional or different requirements apply to sales of promissory notes, mortgage loans, or marketable debt securities?

Promissory notes are assigned by way of endorsement, under article 11 et seq. of the Geneva Convention Providing for a Uniform Law for Bills of Exchange and Promissory Notes (applicable ex vi article 77 of the same Convention). A promissory note, even if not expressly drawn to order, may be transferred by means of endorsement. When the drawer has inserted in the promissory note the words “not to order” or an equivalent expression, the promissory note can only be transferred according to the form and with the effects, of an ordinary assignment under the CC.

Under the PSL the assignment of mortgage debts will not have to be made by means of a notarial deed and a private document duly signed by the parties is sufficient for the assignment to be valid and enforceable, although the mortgage will have to be registered with the relevant Real Estate Registry. Differently, a mortgage-backed securitisation under the general regime will determine extra costs and administrative work and paperwork since said assignment will have to be done by public deed as required for the underlying mortgage contracts. The assignment of the mortgage will have to be registered with the relevant Real Estate Registry.

In what concerns marketable debt securities, the sale of such instruments must follow the rules of the Portuguese Securities Code.

Under the Portuguese Securities Code, book entry securities are transferred by entry in the purchaser’s account. In what concerns the transfer of securities incorporated in titles, one must distinguish as follows:

- a) Bearer securities are transferred by handing over the title to the transferee or the depository indicated by the same, unless the securities have already been deposited, in which case the transfer takes place through entry in the purchaser’s account.
- b) Nominative securities are transferred by a declaration of transfer, written on the security, in favour of the purchaser, followed by registration by the issuer or by a financial intermediary representing the issuer.

### 3.3 Must the seller or the purchaser notify debtors of the sale of receivables in order for the sale to be effective against the debtors, that is (i) to allow the purchaser to enforce the debts directly against the debtors, (ii) to prevent the debtor and the seller from amending the receivable contract without the purchaser’s consent, (iii) to prevent the debtor from setting off receivables against any obligations of the seller to the debtor, or (iv) to require the debtors to pay the purchaser rather than the seller?

It depends, please see answers to questions 2.1 and 3.1, above.

In what concerns setting off please be further advised that according to article 6, paragraph 6 of the PSL, if a ‘fact’ giving rise to a right of set-off occurred before the assignment of the credit became effective between the assignor and the assignee, an obligor would be able to exercise such a right against the assignee as purchaser. If such a ‘fact’ only arises after the assignment has become effective, obligors have no legal right to set-off in any circumstance.

Regarding question (ii), please be advised that upon the assignment (and irrespective of any notification being made to the debtor) the seller loses the possibility to amend the receivables contract, without the purchaser’s consent, in a way that will have impact on the receivables assigned, because he no longer is the owner of such receivables. However it is common practice to foresee a set of “permitted variations” that are usually put in place between seller and purchaser to allow the seller to comply at least with some of the existing clauses in the receivables contracts that allow such variations to be made.

## 4 True Sale

### 4.1 In general, what is necessary for a sale of receivables to be a true sale? Among other things, to what extent may the seller retain credit risk, interest rate risk, or control of collections on receivables?

#### Securitisation under the Portuguese Securitisation Law

An assignment of receivables characterised as a “true sale” for securitisation purposes, may not be subject to any condition.

Furthermore, the seller is not allowed to grant any security interest or undertake any obligations in respect of the assigned receivables, without prejudice to the applicability of section 1 of article 587 of the CC in what concerns existing receivables, which states that the seller, when assigning the receivables, guarantees that the receivables exist and are due.

As regards credit institutions and financial companies, the applicable prudential rules enacted by the Portuguese Central Bank state that, for capital relief purposes, all the risks inherent to the receivables (credit risk and interest rate risk) must be definitively transferred to the purchaser, not only in what concerns the seller but also in what relates to any companies which the seller dominates or that are in a group relation with it. The existence of a true sale for

solvency ratio purposes must also be confirmed by a legal opinion of an independent expert.

Taking into account the above referred, the seller (whether a credit institution, financial company or other entity) cannot retain credit or interest risk on the receivables assigned for securitisation purposes in order to meet the true sale criteria set under the legal framework.

With regard to the control of collection of receivables, one must distinguish as follows:

- a) if the seller is a bank, a financial company, an insurance company, pension funds or pension funds management company, the assignment must be executed together with an agreement which will determine that the seller or, in the case of the pension funds the respective management company, must take, in the name and on behalf of the purchaser, all actions required to manage the debts and, if applicable, their respective guarantees, as well as to ensure collection services, administration services with respect to such debts, the relationships with the debtors and, when applicable, any conservatory actions, to extinguish or modify, that may be required in relation to the guarantee;
- b) if the seller is the Portuguese State or the Social Security, the servicing has to be assured by the seller or by the Direcção Geral dos Impostos in representation of the Portuguese State; and
- c) in all other cases, the custody and collection of debts may be undertaken by either the seller, the purchaser, or by a qualified third party.

#### Securitisation under the Portuguese Civil Code

If an assignment of debts is made under the general regime, the true sale concept is no longer an issue.

Generally speaking, under the CC the terms of the assignment agreement must reflect the parties' intention to fully and definitively transfer the ownership of the receivables to the purchaser. Furthermore, if the consideration given for the assignments of the receivables is considered to be fair, the risk of the assignment not being considered a true sale will be reduced. As already mentioned in the previous subheading, article 587 section 1 of the CC establishes that the seller guarantees that the receivable exists and is due at the time the assignment is made. Further, section 2 of the referred article sets forth that the seller only guarantees the debtor's solvency if so undertaken under the assignment agreement.

As regards the control of collection of receivables, there is no provision regarding this matter. Parties also have contractual freedom to establish the regime, which better fits their interests.

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- 4.2 Can there be a true sale of receivables that do not yet exist (as in a "future flow" securitisation), so that a single sale on a certain date results in the purchaser automatically being the owner of the "sold" receivables immediately when they come into existence?
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#### Securitisation under the Portuguese Securitisation Law

The PSL establishes that future receivables may be securitised, provided that the amount of the receivables to be

assigned is established or quantifiable at the moment of the assignment and that they emerge from contractual relationships existing at the moment of the assignment. The purchaser will become the owner of the "sold" receivables immediately when they come into existence. The future receivables to be securitised must comply with the general requirements set under the PSL, which means that such future receivables must be of monetary nature, must not be encumbered, pledged, seized or under litigation, may not be subject to any condition and the respective transfer may not be subject to any legal or contractual restrictions. Any registration requirements must be complied with, if applicable.

#### Securitisation under the Portuguese Civil Code

The assignment of future debts is also possible under the CC and it can be done by contract. The future receivables will be transferred to the purchaser the moment they become actual receivables, no further agreements being required. Any registration requirements must, nevertheless, be complied with, if applicable.

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- 4.3 Do your country's laws have any "safe harbour" provision for treating a sale as a true sale? If so, what is required?
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#### Securitisation under the Portuguese Securitisation Law

Please see our reply to question 4.1 (Securitisation transaction made under the PSL, Credit risk and interest rate risk) above.

#### Securitisation under the Portuguese Civil Code

There is no safe harbour provision under the general regime of assignment. As mentioned above, the terms of the assignment agreement must reflect the parties' intention to fully and definitively transfer the ownership of the receivables to the purchaser.

## 5 Security Interests

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- 5.1 What is necessary for the purchaser to grant a security interest in accounts receivable under the laws of your country and for the security interest to be perfected?
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A purchaser for securitisation purposes may be a FTC or a STC, if the PSL is to apply, or another company, if the CC is to apply, so one must distinguish as follows:

#### FTCs

A FTC cannot, under the PSL, grant a security interest over the accounts receivables. Nevertheless, the sole function of the fund is to purchase certain types of receivables for the purpose of securitisation and due to a certain number of features the fund is itself construed as to represent some sort of security for the unit holders, for instance:

- a) Once purchased, the receivables are owned by the fund and there are no circumstances under which the receivables can be used to offset the debts of fund participants or its managing entity, and, provided that a 'true sale' has been confirmed for the receivables, of the originator.

- b) Subsequent to purchase, the fund issues units representing ownership of the fund's assets, for the ultimate benefit of the note holders.
- c) A separate fund must be established for each securitisation transaction.

Furthermore, please be advised that although not a legal requirement, a non-Portuguese special purpose vehicle (SPV) has been included in all FTC securitisation transactions completed to date in Portugal. This SPV acts as issuer and can only be used for a single transaction. The issuer will typically be an insolvency remote entity whose share capital is owned by a charitable trust. Its main role is the purchase of 100% of the units issued by the FTC, and to fund this purchase via the issuance of global bearer notes to investors. The purchase of the units conveys an undivided ownership interest in the fund's assets onto the issuer, as sole unit holder. Security (by way of a beneficial ownership in the units granted by the issuer to the trustee on behalf of the note holders) is usually created over the global bearer notes issued by the SPV, and is subject to a foreign law. The trustee can enforce security if an event of default occurs, if the law requires it, or if note holders vote in favour of this course of action. In this event, a receiver or administrative receiver can be appointed over the issuer, and the trustee can take possession of, sell, or foreclose on the security. These actions can take place without the need of the prior confirmation of the courts.

#### STCs

If the Purchaser is an STC, please be advised of the following:

- a) Although the same STC may be used concurrently for an unlimited number of separate transactions; each issuance of securitisation notes is segregated to a ring-fenced pool of assets and the PSL clearly provides that different pools of assets purchased by the STC are fully segregated. In the light of this there is a complete segregation of assets, and cross-collateralisation across separate issuances is not possible.
- b) Furthermore, the note holders benefit from a legal security by way of a priority right over the assets ("*privilegio creditório especial*"), which at any moment make up the separate, ring-fenced, assets allocated to the respective issuance. Under the legal priority right granted to the note holders they shall be reimbursed before the remaining creditors of the STC. The priority right referred to above is not subject to registration. In light of this, if the purchaser is an STC, it makes no sense for additional security to be granted.

#### Other SPVs

If the purchaser is another company and the security is to be granted under Portuguese law, the general legal framework for security granting must be complied with.

##### Security Granted to the Receivables Assigned

A different issue from the ones discussed above is the one related to the security granted to the receivables. The general rule is that the security will follow the receivable, which means that the security (for instance a pledge, a mortgage, etc.) will be assigned with the receivable.

#### 5.2 What additional or different requirements apply to security interests in promissory notes, mortgage loans, or marketable debt securities?

Under the Geneva Convention Providing for a Uniform Law for Bills of Exchange and Promissory Notes, the payment of a promissory note may be guaranteed by an "aval" as to the whole or part of its amount. This personal guarantee may be given by a third person or by the person who has signed as a party to the promissory note. The "aval" is given either on the promissory note or on an "allonge", it is expressed by the words "good as aval" or by any other equivalent formula and is signed by the giver of the "aval". An "aval" is deemed to be granted by the mere signature of the giver of the "aval" placed on the face of the promissory note, except in the case of the signature of the drawee or of the drawer.

In what concerns mortgage loans, the assignment of such receivables for securitisation purposes must always be executed in writing, and such written assignment agreement is, under the PSL, deemed sufficient title for the purpose of registration of the assignment of mortgages, or of any other guarantees which may be subject to registration, provided the signatures on the assignment agreement have been duly certified by a public notary or by the companies' secretary, should the companies have one.

Regarding marketable debt securities the matter is regulated under the Portuguese Securities Code. Under the said Code, a guarantee over book-entry marketable debt securities will be made by an entry in the securities owner's account, indicating the amount of securities given as security, the obligation guaranteed and the beneficiary's entity. In this situation, if not otherwise agreed, the rights inherent to the securities given as security are to be exercised by the securities owner. The granting of security over securities incorporated in a title is made by declaration to that effect, written on the title indicating the security's beneficiary, followed by registration with the issuer or with the financial intermediary that represents the issuer.

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

The answer to this question will depend on the type of security to be granted. Generally speaking, provided that the applicable conflict of law rules are complied with, the granting of a security interest under a law other than Portuguese law would be treated as valid and perfected in Portugal.

Differently, the granting of security by way of a trust - which is a common feature of Portuguese securitisation transactions involving FTCs - and which usually involves the assignment of the benefit of each unit by a foreign SPV to a Trustee under a security deed would, according to the general opinion, qualify as a mere contractual arrangement causing the transfer of such benefit to occur, from the SPV to the Trustee on the terms provided for under such deed. Accordingly, and from a Portuguese law perspective, this contractual arrangement would not create *erga omnes* effects, grant priority over third parties' entitlements or

cause additional assets to be caught thereby and could be hindered by the rights that bona fide third parties might have acquired in respect of the same assets prior to perfection of the assignment.

Since the concept of trust is not recognised as such under Portuguese law, the foregoing corresponds to our views in respect of how these contractual arrangements would be construed under Portuguese law. We wish to note however that there is no recorded specific authority in respect of the foregoing and therefore there remains some degree of legal uncertainty in this regard.

## 6 Insolvency Laws

**6.1** If after the sale of receivables the seller becomes subject to an insolvency proceeding, will your country's insolvency laws prohibit the purchaser from collecting, transferring or otherwise exercising ownership rights over the receivables ("automatic stay")? Does the answer to this question (or the questions below) depend on whether the sale is a true sale?

### Securitisation under the Portuguese Securitisation Law

If, after the sale of the receivables, the seller becomes subject to an insolvency proceeding the purchaser will not, under Portuguese laws, be prohibited from collecting, transferring or otherwise exercising ownership rights over the receivables, provided that the sale is a true sale.

In what concerns the seller, the PSL specifically states that any receivables assigned will not form part of the seller's insolvency estate and any payments made to the seller in respect of receivables that were assigned before the insolvency was declared, shall not form part of the seller's estate even when the maturity date of such payments occurs after such declaration.

In case of insolvency of the servicer of the receivables (that, under certain circumstances, can also be the seller, please see our answer to question 4.1 above) in a FTC structure, the PSL specifically states that any amounts in the servicer's possession as payment related to the assigned debts for purposes of securitisation shall not be deemed part of the bankruptcy estate.

### Securitisation under the Portuguese Civil Code

Again, if after the sale of the receivables, the seller becomes subject to an insolvency proceeding the purchaser will not, under Portuguese laws, be prohibited from collecting, transferring or otherwise exercising ownership rights over the receivables, provided that the sale is a true sale.

**6.2** If there is no automatic stay, could the insolvency official prohibit exercise of rights by the purchaser by means of injunction, stay order or other action?

Provided that a true sale occurred, no.

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

Under the Portuguese Insolvency Code, an insolvency court cannot consolidate the assets of two companies and there is no concept similar to the United States law concept of "substantive consolidation".

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

### Securitisation under the Portuguese Securitisation Law

The insolvency official can only rescind transactions assigning receivables to the purchaser for the benefit of the seller's insolvency estate, if the purchaser and the seller acted in bad faith when assigning the receivables.

Furthermore, the assignment of receivables for securitisation purposes can only be subject to an "actio pauliana" (defence against fraudulent acts performed by the debtor in order to diminish the guarantees of its creditors), if the creditor (plaintiff) is able to provide evidence (among others) of the depletion of the seller's assets and of bad faith in the transaction. The legal presumption of bad faith established in the Insolvency Code is not applicable.

In the most unlikely event that the insolvency administrator includes an assigned Commercial Receivable in the insolvency estate, the purchaser is entitled to obtain the separation of the receivable from such estate, under relevant provisions of the Portuguese Insolvency Code.

### Securitisation under the Portuguese Civil Code

Regarding securitisations made under the CC, the suspect period is, normally, 4 years counted back from the date of the beginning of the insolvency proceedings and it covers any acts or omissions that, according to the Portuguese Insolvency Code, can be deemed detrimental to the insolvency estate. Any such acts performed by the insolvent company can be reverted for the benefit of the insolvency estate.

Some acts can be resolved to the benefit of the insolvency estate, regardless of other conditions (except if exceptional legislation establishes otherwise), such as, for example, gifts (and other acts without consideration) made during the 2-year period before the beginning of the insolvency proceedings.

Contracts executed by the insolvent company against consideration with a company which is in a control relationship and/or in a group relationship, with the insolvent company (such concepts having the meaning ascribed to them in article 21 of the Portuguese Securities Code), if entered into within the 2 years prior to the beginning of the insolvency proceedings, can be rescinded for the benefit of the insolvency estate, because the law assumes that such contracts were signed in bad faith. This assumption is, nevertheless, rebuttable.

Additionally, any intentionally prejudicial transfers can also be reverted for the benefit of the insolvency estate under the

general provisions of fraudulent conveyances (*actio pauliana*).

#### 6.5 Can an insolvency official reject or rescind any of the seller's obligations (such as warranties) under receivable contracts (thus potentially giving rise to claims against the seller that could be set off against the receivables)?

No, the insolvency official has no such powers under the Portuguese Insolvency Code. Furthermore, please be advised that according to article 6, paragraph 6 of the PSL, if the situation giving rise to a right of set-off occurs after the assignment of the credit becomes effective between the assignor and the assignee, the obligors will have no legal right to set-off against the purchaser (which is the lawful owner of the receivables as of that moment).

## 7 Special Purpose Entities

### 7.1 Does your country have laws specifically providing for establishment of special purpose entities for securitisation? If so, then what is required and what legal attributes and benefits will the entity have?

#### Establishment of FTCs and STCs

Yes, the PSL establishes that there can only be two types of special purpose entities for securitisation purposes in Portugal: the securitisation funds ("FTC") and the securitisation companies ("STC").

The setting-up of each FTC is subject to authorisation by the Portuguese Securities Market Commission ("CMVM") who also supervises the respective on role activity. The FTC's setting-up is also subject to the Bank of Portugal's favourable decision whenever the originator is a credit institution or a financial company. FTC's are managed by special companies, which are called securitisation fund management companies ("SGFTC"). The incorporation of the SGFTC is subject to authorisation by the Bank of Portugal and CMVM and its minimum share capital required by law is €250.000.

The incorporation of the STC is subject to authorisation by CMVM who also supervises the respective on role activity. The minimum share capital of an STC is €250.000.

#### Legal Attributes and Benefits

The main characteristics of these special purpose entities are the following:

##### FTCs

- It's a tripartite structure: (i) SGFTC, (ii) FTC and (iii) custodian.
- Issues fund units.
- The fund assets must be held by a custodian, which has to be a credit institution having its head office in Portugal or, if the respective head office is in another EU member state, it must be established in Portugal through a branch.
- There are no ownership limitations for SGFTC. However ownership or effective control by the originator (if a credit institution or financial company)

may affect the assignment's qualification as a true sale, for prudential purposes.

- Bank of Portugal must approve SGFTC shareholding structure.
- A SGFTC may manage several FTCs. However, in principle, each FTC is only used for one transaction.
- The FTC structure covers two jurisdictions in a two-step transaction; a foreign SPV and a Trustee are used in a second jurisdiction.

##### STCs

- It's a simple structure: only the STC is required.
- Each issuance of notes is subject to prior registration with the CMVM for public placements or subsequent communication to the CMVM, for private placements.
- A single shareholder may incorporate STCs. There are no ownership limitations for STC. However shareholding structure must be approved by CMVM.
- A STC may be used for several transactions. Receivables allocated to each issue are deemed as separate pool of assets.
- The STC structure does not incorporate a Trustee as it covers only the Portuguese jurisdiction. Security over the securitised portfolio is granted by the PSL.

As regards their legal attributes:

##### FTCs

The PSL defines FTCs as funds for the securitisation of debts which are co-ownership vehicles, governed by the special provisions applicable to co-ownership property, owned by several individuals or companies, which are not, in any event, liable for the debts of the fund participants or of the entities which, pursuant to the law, are responsible for managing the funds or of sellers of the debts acquired by the fund.

The SGFTC acts exclusively on behalf of the holders of the securitisation units of the fund and must undertake all acts of management and conduct all necessary or convenient transactions for the effective management of the funds, in accordance with high standards of diligence and professional competence.

The SGFTC cannot:

- Enter into loan agreements on their own behalf.
- Establish any charges, liens or encumbrances or in any case sell the debts comprised in the assets of the fund, save for the provisions of section 5 and 6 of article 12 of the PLC.
- Acquire on their own behalf any securities, except national or foreign or public funds or similar securities.
- Grant loans, including the granting of guarantees on their own behalf or on behalf of the funds they manage.
- Acquire real estate on their own behalf, in addition to the facilities required for the functioning and management of the fund.

##### STCs

The PSL establishes that STCs must have as sole purpose securitisation transactions, by means of acquisition,



management and transfer of debts, and the issue of bonds for payment of the acquired debts.

Save some exceptions provided in the PSL, the STC may only finance its activity with own funds and by issuing notes.

The secured bondholders and entities which provided services related with the bond issue, benefit, under the PSL, from a priority right over the assets, which at any moment make up the separate assets allocated to the issuance, under which right they shall be reimbursed before the remaining creditors.

Finally, in what concerns benefits, it should be mentioned that both structures benefit from the PSL regime and from the special tax regime for the interest paid on notes, the services provided to the vehicle and the asset transfer.

**7.2 If an agreement with a special purpose entity provides that the other parties will not take legal action against it or that they will not commence an insolvency proceeding against it, is that provision valid and enforceable?**

No. Under the CC, any provision under which the creditor previously renounces its rights is null and void.

**7.3 If the organisational documents or agreements of a special purpose entity provide that the directors or managers will not commence an insolvency proceeding involving the entity unless required under applicable law, is that provision valid and enforceable?**

A provision establishing that the directors or managers will not commence an insolvency proceeding involving the entity unless required under applicable law will be valid and enforceable.

However, please note that under the Portuguese Insolvency Code the directors and managers of a company are requested to present the company before the courts for insolvency proceedings, within 60 days after knowing of the insolvency situation. Non-compliance with this obligation will subject such persons to liability proceedings.

## 8 Regulatory Issues

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

Yes, Law no.67/98, October 26, which transposed Directive 95/46/EC and regulates the use and transfer of personal data in what concerns singular persons.

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

Law 24/96, 31 July, establishes the consumer protection legal regime. However, since the assignment of the

receivables does not include the assignment of any contractual relationship existing between the seller and the debtor, the purchaser has no contractual relationship with the debtor/consumer and this law will only apply (before and after the assignment) to the seller in relation to its debtors. If the purchaser acts as servicer, it will have to comply with the consumer rights of the debtor arising from the contract signed between the latter and the seller.

**8.3 Assuming that the purchaser does no other business in your country, will its purchase and ownership or its collection and enforcement of receivables result in its being required to qualify to do business or to obtain any license or its being subject to regulation as a financial institution in your country?**

According to the Portuguese Credit Institutions and Financial Companies Legal Framework ("PCIFC"), there is the principle of exclusiveness, which establishes that only credit institutions and financial companies may carry out professional banking activities, such as lending, on regular basis.

Please note that the PSL allows credit institutions and/or financial companies to assign receivables to FTC's or to STCs, which are special purpose entities incorporated in Portugal to carry out securitisation transaction.

Before the existence of the PSL, the securitisation transactions with Portuguese originators were carried out with foreign SPV's with the knowledge of the Portuguese Central Bank and there was no obstacle to the assignment of such receivables. We are not aware if such clearance by the Central Bank was due to their conviction that in the securitisation there is no lending transaction at stake. Nevertheless, such foreign SPV's were not required to qualify to do business or to obtain any license.

Differently, the above-mentioned special purpose entities need a specific authorisation for the acquisition of receivables - they must comply with the PSL requirements and obtain the proper authorisations from the CMVM (and the Portuguese Central Bank, when applicable) to pursue their object.

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

With the freedom of capitals movement within the European Union, the regulations regarding this matter are only for statistical reasons: all transactions listed in Bank of Portugal Notice no. 5/93 in the amount of EUR 12,500 or higher must be reported to the Bank of Portugal for statistical purposes.

## 9 Taxation

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

According to Portuguese Tax Law, some income payments may be subject to withholding tax, depending (i) on their nature, (ii) on the nature of the beneficiary and (iii) also where the beneficiary is located. For instance, the payment of interest on a loan is generally subject to withholding tax. This withholding tax, at a rate of 15%, has the nature of payment on account in case the beneficiary is resident in Portugal for tax purposes, or has a permanent establishment in this territory to which such income is imputable. However, if the beneficiary is resident bank or financial institution such withholding will not be applied. If the beneficiary is not qualified as resident in Portugal, the withholding tax rate applied is of 20%, and it has a definitive nature.

According to the Portuguese Securitisation Tax Law - Decree-Law 219/2001, 4 August, as amended by Decree-law 303/2003, December 5th - the income derived from the receivables assigned is not subject to withholding tax.

**9.2 Does your country impose stamp duty or other documentary taxes on sales of receivables?**

According to the Portuguese Stamp Duty Code, the assignment of receivables is only subject to taxation if the assignment is construed with the purpose of financing the assignee (for instance, when the payment of the price for the assignment occurs after the payment of the receivables assigned).

Nonetheless, the Portuguese Securitisation Tax Law sets a specific exemption from Stamp Duty on the sale of receivables for securitisation purposes.

**9.3 Does your country impose value added tax, sales tax or other similar taxes on sales of goods or services, on sales of receivables or on fees for collection agent services?**

As with any other country of the EU, the sale of goods or services in Portugal is, as a general rule, subject to VAT, at a normal rate of 19%.

Nonetheless, the VAT Code sets an exemption for financial operations and services, such as sales of receivables and fees for collection agent services. These types of financial operations may, however, be subject to Stamp Duty (on the sales of receivables see question 9.2).

The Portuguese Securitisation Tax sets a specific exemption from Stamp Duty and VAT on the sale of receivables for securitisation purposes, and the fees for collection agent services.

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

Under Portuguese tax law, the liability for taxes due is not transferable to third parties, namely the purchaser. Thus if the seller does not pay the taxes due, the purchaser is not obliged to pay such debts. Furthermore, the tax authorities may not make claims on the receivables assigned or collections, because they have been transferred to the purchaser and are no longer credits of the seller.

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

In order for a non-resident entity to be qualified as a resident entity in Portugal for tax purposes it must have its head office or its effective management located in the Portuguese territory. Otherwise, the non-resident entity shall only be liable for Portuguese Income tax on the income derived from the Portuguese territory, according with the territorial rules set out in the Portuguese Corporate Income Tax Code. Thus, the liability for Portuguese income tax will depend on the type of income derived from the receivables (for example: if the income relates to interests paid by resident entities, the purchaser will be subject to Portuguese Corporate Income Tax on the amounts collected).



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Pedro Ferreira Malaquias is responsible for the banking and insurance department of Uría & Menéndez Portugal. Before joining the firm, he worked in the Legal Department of Banco Português do Atlântico, S.A., carried out duties in the General Directorate of Competition of the European Commission between 1986 and 1988, and headed the Legal Department of BCP Investimento - Banco Comercial Português de Investimento, S.A. between 1995 and 2001. He has been legal adviser to the Portuguese Banking Association since 1988, representing this association on the Legal Committee and the Consumer Committee of the European Banking Federation. He is a member of the European Financial Markets Lawyers Group sponsored by the European Central Bank.



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Sofia Leite Borges worked for several years at the Portuguese Securities Market Commission (Comissão do Mercado de Valores Mobiliários) in the Markets Division. She represented the Commission, as financial expert, in a number of international fora, such as the OCDE, CESR, FATF and OGBS. She attended the "International Seminar for Financial Regulators", promoted by the UK Financial Services Authority in 2000 and took postgraduate degrees in Law (2002) and Securities (1998), at the College of Law of the Lisbon University, where she was a teacher between 1997 and 1999.

**URÍA & MENÉNDEZ**  
*Abogados*

On November 2004, the Portuguese law firm Vasconcelos, F.Sá Carneiro, Fontes & Associados was integrated in Uría & Menéndez Portugal. Up to then, both firms were closely involved in the development of the growing securitisation market in Portugal, having advised on various transactions in a number of different capacities.

Of particular relevance on our joint experience is the advice rendered to one of the largest international rating companies on the legal and practical matters and implications of the setting up and incorporation of the first securitisation company in Portugal - Sagres - Sociedade de Titularização de Créditos, S.A. - and in the securitisation, through the use of Sagres, of tax and social security debts by the Portuguese Government.

In addition, we have acted as legal adviser to customer banks in several Real Estate Mortgage Securitisation Transactions, in the arranging, drafting and negotiation of finance and securitisation agreements under Portuguese law relating to rentals from real estate leases and in the analysis of securitisation agreements relating to auto loans from a major national bank.

We have also acted as legal advisers of one of the largest international rating companies in the analysis of legal opinions and securitisation agreements under Portuguese law relating to the securitisation of mortgage loans in more than 10 RMBS securitisation transactions.

The areas of advice most commonly addressed are those dealing with the rights and obligations of the Originator, the transfer of the receivables or securitised assets, the "true sale" nature of the assignment and the validity of the assignment under Portuguese insolvency scenarios. Similarly, Uría & Menéndez advises on all relevant tax matters, like those dealing with withholding tax, stamp duty and Value Added Tax which may impact the structure of the transaction and financial flows.