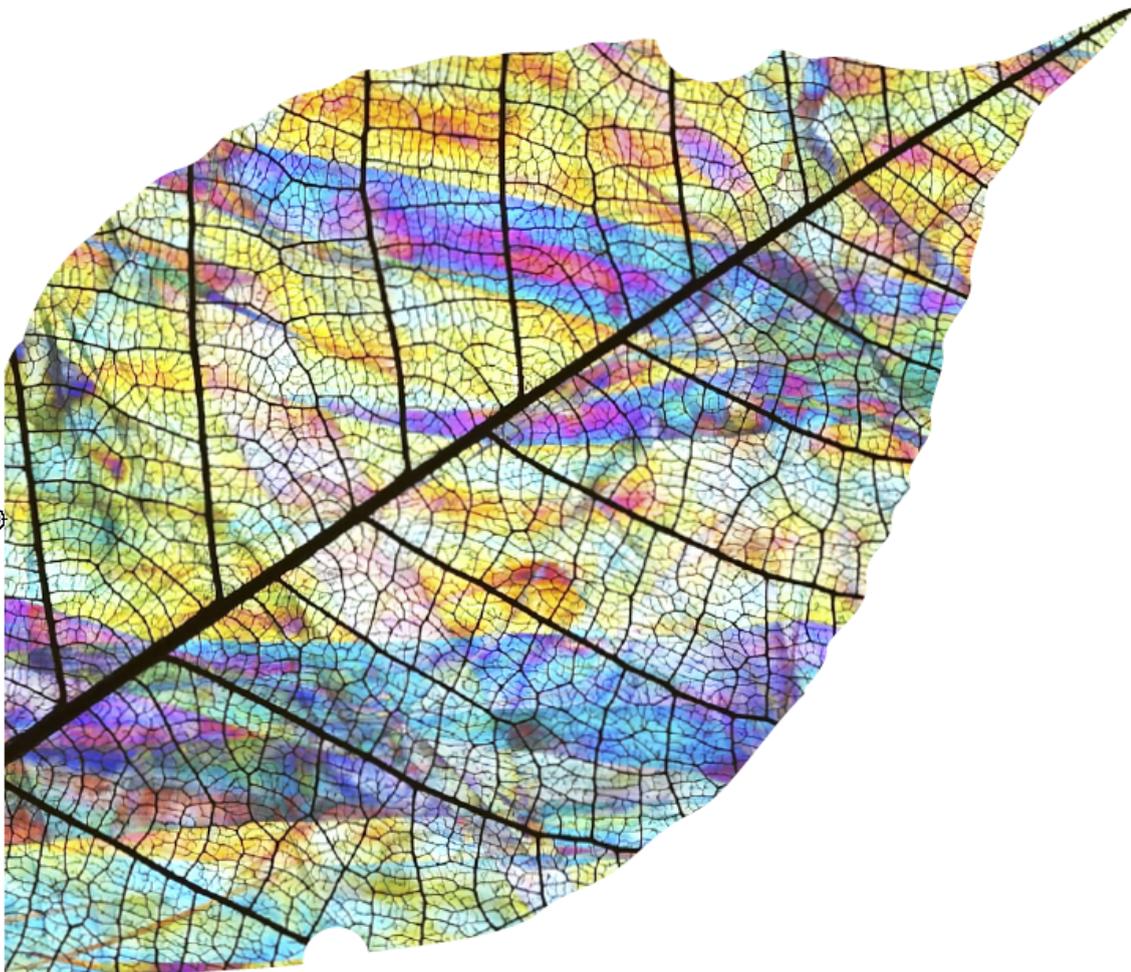


World Universities Comparative Law Project

Legal rating of Portugal

carried out by students at Católica Global School of Law

A production of the Allen & Overy Global Law Intelligence Unit



October 2015

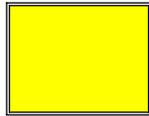
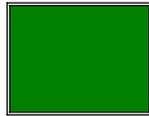
World Universities Comparative Law Project

Legal rating of Portugal

carried out by students at

**Católica Global School of Law, from
Universidade Católica Portuguesa**

October 2015



Produced by the Allen & Overy Global Law Intelligence Unit

World Universities Comparative Law Project

The World Universities Comparative Law Project is a set of legal ratings of selected jurisdictions in the world carried out by students at leading universities in the relevant jurisdictions. This legal rating of Portugal was carried out by students at Católica Global School of Law, from Universidade Católica Portuguesa.

The members of the Faculty of Law at Universidade Católica Portuguesa who assisted the students were:

Dr. Evaristo Mendes

Evaristo Mendes is a Senior Lecturer at Católica. His areas of teaching and research are Commercial and Corporate Law. He is co-director of the Master's Programme in Company Law and of the Graduate Programmes in Corporate Law. He has an extensive practice as a Commercial Arbitrator and as a legal consultant. He is member of the editorial board of *Propriedades Intelectuais*, a scientific journal on IP topics. Professor Evaristo Mendes contributed to this project as its academic supervisor, providing constant support and guidance to the students with his vast knowledge and experience.

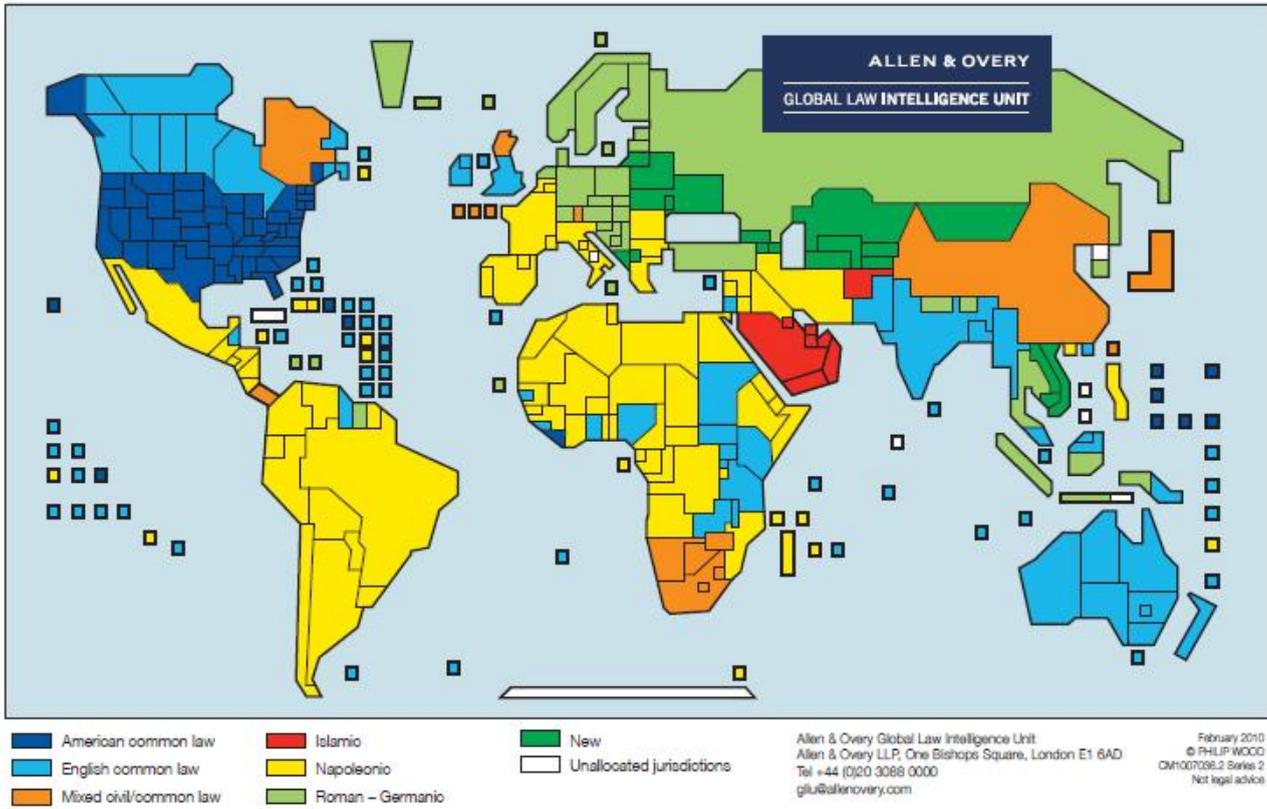
Dr. Luís Barreto Xavier

Luis Barreto Xavier is the Dean of Católica Global School of Law. His area of teaching and research is Private International Law. He clerked for a Judge of the Constitutional Court and he has been a Senior Consultant in the Legal Office of the Prime Minister. He has brought together for this project some of the most promising Católica's students.

The Allen & Overy Global Law Intelligence Unit produced this survey and is most grateful to the above for the work they did in bringing the survey to fruition.

All of those involved congratulate the students who carried out the work.

Families of law



Foreword

Católica Global School of Law of Universidade Católica Portuguesa, located in Lisbon, is devoted to innovative teaching and research in law within a global context. It is therefore with great joy that we contribute to this project.

At Católica, we believe that we have anticipated the challenges that an evolving global economy presents to the legal services market. Our unique curriculum was developed to provide lawyers with the additional skills that changing markets require today.

Law firms are seeking innovators – lawyers who can pursue new partnerships and generate new sources of income. Abilities such as keen negotiation and management skills, sharp business acumen and data analysis, a comprehensive understanding of different legal frameworks and practices, and a cutting-edge knowledge of the most prevalent global legal issues have become paramount to a successful international legal career. We have tailored our state of the art programmes (LL.M. Law in a European and Global Context, Advanced LL.M. in International Business Law and Global Ph.D. Programme in Law) to provide the students with these skills.

With our growing focus on international legal education, our Law School has become an important centre of graduate teaching and research, attracting students and lawyers from all over the world. Our faculty comprises acclaimed legal scholars and leaders in their respective fields. Our sponsors consist, among others, of several top tiered law firms committed to our project and relying on us not only to train their lawyers but also to provide them with new talents.

Católica Global School of Law is delighted to present its normative assessment of the Legal Risk Rating of Portugal. You will find the colour-coded methodology and the technique of selecting symbolic and resonant legal indicators to be an expressive and creative way of signalling some of the main contours of wholesale financial, corporate and related law in Portugal.

Before we proceed, a minor caveat is warranted regarding Portugal's classification under the traditional "Families of Law" map (represented on page 5 of this report). Up until the end of the 19th century, Portugal's legal framework was highly influenced and shaped by the French legal system, being rightly classified at that time under the Napoleonic Family of Law. In the early twentieth century, however, in great part due to the works of Guilherme Moreira on Civil Law, a shift occurred. Since then, and for the most part, German Law has shaped our legal system.

In regards to our report on the Legal Risk Rating of Portugal, it is important to highlight the country's commitment to positive legal reform in this area. Key legislative initiatives, which have recently been enacted, have had a positive effect in reducing legal risk. All of the 23 indicators – common to all countries in this report – have been subject to direct or indirect legal reform in the last decade. Furthermore, six of these indicators (8, 14, 16, 19, 20 and 22) have been affected by legislative initiatives in the last two years alone. The results presented in this study already reflect these recent legislative changes.

Professor Evaristo Mendes

Description of the legal rating method

Introduction

This paper assesses aspects of the law in Portugal with a view to rating the law in the relevant areas. The survey is concerned primarily with wholesale financial and corporate law and transactions, not with retail law.

Legal risk has increased globally because of the enormous growth of law; because of its intensity; because many businesses are global but the law is national; because nearly all countries are now part of the world economy; and because the law is considered to play a very significant role in the fortunes of our societies. Liabilities can be very large and reputational losses severe.

The survey was carried out by students at Católica Global School of Law. The survey was designed by the Allen & Overy Global Law Intelligence Unit.

The students were requested to express their views freely and in their own way. The views expressed are their views, not necessarily those of, the Catholic University of Portugal and its Global School of Law, the members of the Practitioner Expert Panel or the Global Law Intelligence Unit, the members of Allen & Overy.

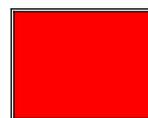
Methodology

The survey uses colour-coding as follows:

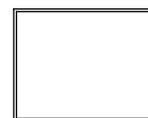
True



False



Can't say



Blue generally means that the law does not intervene and the parties are free, ie the law is liberal and open.

Red generally means that there is intense legal intervention, usually in the form of a prohibition.

Green and yellow are in-between.

The purpose of this colour-coding is to synthesise and distil information in a dramatic way, rather than a legal treatise. The colours correspond to a rating of 1, 2, 3 or 4, or A, B, C or D.

The cross in the relevant box signifies the view of the students carrying out this assessment of the position of Portugal. This is followed by a brief comment, e.g. pointing out qualifications or expanding the point. These comments were written by the students.

The colour-coding does not usually express a view about what is good or bad. Whether the law should intervene in a particular arena is a matter of opinion. The scale is from low legal intervention to intense legal intervention or control. This is not a policy or value judgment as to whether or not the law should or should not intervene. Jurisdictions often disagree on whether the law should intervene and how much. So one of the main purposes of this survey is to endeavour to identify some of the points of difference so as to promote fruitful debate.

Black letter law and how it is applied

This survey measures two aspects of law. The first is black letter law, ie what the law says or the written law or law in the books.

The second measure is how the law is applied in practice, regardless of what it says. Thus, the law of Congo Kinshasa and Belgium has similar roots but its application is different.

Although there is a continuum, these two measures have to be kept separate. Otherwise we may end up with just a blur or noise or some bland platitude, eg that the law depends upon GDP per capita.

In fact, only the last two questions deal with legal infrastructure and how the law is applied. All of the others deal with the written law, without regard to enforcement or application.

Key indicators

The survey uses key indicators to carry out the assessment. It is not feasible to measure all the laws or even a tiny fraction of them. The law of most jurisdictions is vast and fills whole libraries.

The key indicators are intended to be symptomatic or symbolic of the general approach of the jurisdiction. To qualify as useful, the indicator must usually be (1) important in economic terms, (2) representative or symbolic and (3) measurable. In addition, the indicators seek to measure topics where jurisdictions are in conflict. There is less need for measuring topics where everybody agrees.

An important question is whether this method is useful or not, and, if it is, whether the indicators are relevant.

Legal families of the world

Most of the 320 jurisdictions in the world, spread just under 200 sovereign states, can be grouped into legal families. The three most important of these are: (1) the common law group, originally championed by England; (2) the Napoleonic group, originally championed by France; and (3) the Roman-Germanic group, originally championed by Germany, with major contributions from other countries.

The balance of jurisdictions is made up of mixed, Islamic, new and unallocated jurisdictions.

Many aspects of private law are determined primarily by the family group, but this is not true of regulatory or economic law.

Excluded topics

This survey does not cover:

- transactions involving individuals
- personal law, such as family law or succession
- competition or antitrust law
- intellectual property
- auditing
- general taxation
- macroeconomic conditions, such as inflation, government debt, credit rating or savings rates
- human development, such as education, public health or life expectancy
- infrastructure, such as roads, ports, water supply, electricity supply
- personal security, such as crime rates, civil disorder or terrorism.

Banking and finance

Introduction

Banks and bondholders (typically also banks, but also insurance companies, pension funds and mutual funds) provide credit or capital. Their main risk is the insolvency of the debtor and therefore the key indicators intended to measure whether the law supports those habitual creditors or debtors, such as large corporations as borrowers, when it matters, ie on bankruptcy. This is when commercial law is at its most ruthless in deciding who survives and who drowns.

This debtor or creditor decision is implemented mainly through the bankruptcy ladder of priorities. A feature of common law systems is the presence of super-priority creditors who are paid before anyone else - creditors with a set-off or a security interest and beneficiaries under a trust. For example, if a bank has universal security over all the assets of a company, the bank is paid before all other creditors, including employees and trade creditors. This regime therefore protects significant creditors who such as banks.

Jurisdictions based on the English common law model give super-priority to all three claimants. Traditional Napoleonic jurisdictions typically do not allow insolvency set-off, have narrower security interests and do not recognise the trust. Their bankruptcy ladder favours greater equality of creditors. Most traditional Roman-Germanic jurisdictions are in-between. They allow insolvency set-off and have quite wide security but most do not recognise the trust. There are wide exceptions to these generalisations.

Insolvency set-off

Generally If set-off of mutual debts is allowed on insolvency, the creditor is paid. If it is not allowed, then effectively the creditor is not paid. Very large amounts are involved in markets for foreign exchange, securities, derivatives, commodities and the like, so that the question of whether exposures should be gross or net is a matter of policy as to who the law should protect.

Q1 In Portugal, creditors can set off mutual debts on the insolvency of a debtor if they are incurred before notice of the insolvency.

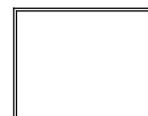
True



False



Can't say



Comment:

Under the Portuguese Insolvency Code 2004, insolvency set-off is allowed. Subject to some limitations, the general rule is that set-off which was available to a creditor prior to the initiation of insolvency proceedings remains available afterwards.

Accordingly, after the insolvency of a debtor having been decreed (opening judgment), a creditor is entitled to set-off his claim provided he is not a subordinated insolvency creditor and the following pre-requisites are met:

The credit is judicially enforceable and the debtor cannot raise any kind of limitation or exception to its existence, validity and enforceability;

The credit and the counterclaim of the insolvent debtor both consist of money or similar fungible assets;

The cross-claim of the insolvency estate has arisen before the opening judgment;

The insolvency estate is responsible for the credit.

As a general rule, the conditions set above under a) and b) must be fulfilled prior to the opening judgment; and a credit cannot be set-off if it has been transferred to the creditor from a third party after the opening judgment, even if set-off was previously available to that third party.

In cross border transactions, if the Law applicable to the insolvent debtor's cross-claim is not the Portuguese law, the creditor is entitled to set-off his credit against the debtor's cross-claim if set-off is permitted by the law applicable to him.

Offsetting related to financial instruments (e.g. derivatives, securities, FX transactions) is also allowed and netting agreements/set-off clauses are specifically recognized by the Portuguese Law.

References:

- Article 99, 101 and 286 of the Portuguese Insolvency Code (Código da Insolvência e da Recuperação de Empresas);
- Decree-Law no. 70/97, of 3 April (generally known as the “Netting Law”);
- Articles 31 and 33 of the Law on Liquidation of Credit Institutions and Financial Companies, approved by Decree-Law 199/2006, of 14 August;
- Council Regulation (EC) No 1346/2000 of 29 May 2000 (article 6);
- Articles 12, 14 c), 15 and 20 of Decree-Law No 105/2004, of 8 May 2004;
- “Netting and Collateral Under the Law of Portugal”, Sofia Santos Machado, *Cadernos do Mercado de Valores Mobiliários*, available at:
<http://www.cmvm.pt/CMVM/Publicacoes/Cadernos/Documents/93642fb177b64324837c81a8fa505ca1Artigo2.pdf>;

Security interests

Generally Security interests give priority to the creditor with security - typically banks - who are the main providers of credit in most countries.

In traditional common law jurisdictions, a company can create universal security over all its present and future assets to secure all present and future debt owed to a bank. Once registered, the security is valid against all creditors, except that the floating collateral ranks after preferred creditors - typically wages and taxes. The security can be granted to a trustee for creditors. On a default there are no mandatory grace periods and the creditor can enforce out-of-court by appointing a receiver (a type of possessory manager) or by private sale. But in some common law jurisdictions there are freezes on enforcement in the event of a judicial rescue of the debtor. Also, in some of these jurisdictions there are stamp duties.

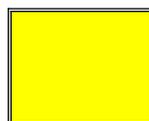
On the other hand, in many traditional Napoleonic jurisdictions, universal security is not possible, neither is security for all future debt. There is no trustee to hold the security. On enforcement, there are grace periods and no receiver. Sale is through the court and a public auction. Preferential creditors rank ahead. Some countries have a freeze on enforcement under a judicial rescue statute.

The main policy issue is therefore whether security should be encouraged or whether the law should intervene to impose greater equality.

The main tests are (1) scope of eligible assets, (2) debt secured, (3) trustee, (4) priority over preferred creditors, (5) private enforcement and receiver, (6) no rescue freezes and (7) low costs.

Q2 In Portugal, the law offers a security interest which is highly protective of the secured creditor.

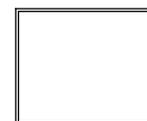
True



False



Can't say



Comment:

Under Portuguese law, parties to an agreement may establish different types of security rights (e.g. surety, guarantee, assignment of rights, pledge, mortgage, financial collateral, etc.) on different types of assets (either movable or immovable assets), including commercial undertakings (“*estabelecimento comercial*”) with the underlying assets, fixtures and chattels. However, universal security is generally not allowed.

Security for future or conditional obligations assumed by a debtor is allowed, provided that the security created is certain and duly specified. Omnibus guarantees are subject to several strict restrictions. The guarantor must be capable to determine the possible extent of the obligations and corresponding guarantee.

Enforcement of security is generally made by the sale of assets to third parties through a judicial procedure, and there is no trustee to hold the security. As a general rule creditors are not allowed to appropriate, sell or otherwise forfeit the secured assets without a Court decision or other judicial interference. Furthermore, the parties to an agreement cannot agree on the appropriation of security by the creditor in case the debtor fails to comply with his obligations (“*pacto comissório*”). However, doctrine and jurisprudence in Portugal have recently admitted the fiduciary transfer of assets by way of security to a creditor (“*alienação fiduciária com escopo de garantia*”), subject to specific limitations.

The limitations above do not apply to financial collateral arrangements (such as a financial pledge - “*penhor financeiro*” - or an outright transfer of assets by way of security - “*alienação fiduciária em garantia*”), when the financial collateral to be provided consists of cash, financial instruments or a credit claim. In the aforementioned cases, the parties may agree that the value of the collateral can be automatically offset and that the creditor may appropriate or sell to third parties the pledged assets in case the debtor is in default (including in cases of insolvency).

As regards ranking of credits, the general rule is that secured creditors (with security interests consisting of a mortgage or a pledge of assets) are deemed preferential creditors and rank before other preferential creditors, such as the state (for tax credits) and Social Security (for social security contributions).

Furthermore, the legal framework applicable to securitization provides for important exceptions benefiting investors in securities issued by special purpose vehicle companies that acquire securitized assets; such investors ranking before all other secured or preferential creditors for any claims against any such companies.

In all remaining cases, creditors are subject to the priority ranking provided for under general law, which means that tax credits and credits of public authorities rank before other secured and unsecured credits.

The Portuguese insolvency code provides for a freeze on enforcement of security in case the debtor is subject to reorganization or a rescue plan.

References:

- Portuguese Civil Code;
- article 21(1) of Decree-Law 248/86 of 25 August;
- Decree-Law no. 105/2004, of 8 May (the “Financial Collateral Law”);
- Directive 2002/47/CE (the “Financial Collateral Directive”);

- “Netting and Collateral Under the Law of Portugal”, Sofia Santos Machado, *Cadernos do Mercado de Valores Mobiliários*, available at: http://www.cmvm.pt/CMVM/Publicacoes/Cadernos/Documents/93642fb177b64324837c81a8fa505ca1_Artigo2.pdf;
- See commentary to articles 666.º and 675.º of the Portuguese Civil Code, “Código Civil Anotado”, Abílio Neto, 15th edition, Ediforum, April 2006;
- For specific legislation on the ranking priority: see, *inter alia*, article 333.º of the Portuguese Labour Code, article 166.º-A of the legal regime applicable to financial institutions (RGICSF), as well as related specific legislation; article 111.º of the Personal Income Tax Code, article 116.º of the Corporate Income Tax Code, article 3 of the legal regime applicable to asset-backed securities (approved by Decree-Law 59/2006 of 20 March);
- See Supreme Court decision in process no. 279/2002, available at <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/418d25ba10652ad68025785c004e5eee?OpenDocument>;
- articles 17.º-E, no. 1, 88.º, 89.º and 115.º of the Portuguese insolvency code;
- see Uría & Menéndez article, available at: <http://www.uria.com/documentos/publicaciones/2765/documento/artPor01.pdf?id=2552>;
- article 63.º of the Securitization Regime, approved by Decree-Law no. 453/99, of 5 November.

Universal trusts

Under a trust, one person, called the trustee, holds title to the assets of another person, called the beneficiary, on terms that, if the trustee becomes insolvent, the assets go to the beneficiary and are not used to pay the trustee's private creditors. The assets are immune and therefore taken away from the debtor-trustee's bankrupt estate.

The main examples of trusts are custodianship of securities, pension funds, securities settlement systems and trustees of security for bondholders and syndicate banks. The amounts involved are enormous.

All jurisdictions have an effective trust of goods (called bailment or deposit). The common law group has a universal trust for all other assets (land and intangible property). Most members of the civil code group do not have a universal trust, subject to wide exceptions, especially for custodianship of securities. A few countries in this group have a universal trust by statute, e.g. France and China.

Q3 Portugal has a universal trust for all assets.

True



False



Can't say



Comment:

Being part of a civil law system, Portuguese law does not recognize the concept of universal trust. It should also be noted that, in line with other civil law countries, Portugal is not a party to the Convention on the Law Applicable to Trusts and on their Recognition, signed at The Hague on July 1st 1985.

Although not recognizing Trusts, the Portuguese legal system allows the protection of creditors through a statutory segregation of assets that will ring-fence certain assets for the benefit of certain creditors. There are a few cases where ring-fencing of assets is mandatory, though. That is for instance the case of financial brokers or electronic-money institutions, which are obliged to segregate their clients' assets (including cash deposits, securities or any other assets held in the name of the clients) which will not be affected by that financial intermediary insolvency or other foreclosure proceedings.

Legal Framework:

- Article 49 et seq. (especially article 49, §2 and article 55) of the Treaty on European Union;
- see article 62.º of the securitization regime, approved by Decree-Law no. 453/99, of 5 November;
- see Portuguese Securities Code;
- see CMVM Regulations 2/2007 and 3/2008, as well as CMVM Regulations 5/2013 and 4/2007;
- Decree-Law no. 59/2006, of 20 March.

Other indicators

Other bankruptcy indicators not measured here include freezes on the termination of contracts, fraudulent preferences, the priority of rescue new money, the presence and intensity of corporate rescue proceedings and recognition of foreign insolvencies. Director liability for deepening the insolvency is dealt with below.

Other financial law topics not covered in this survey include the regulatory regime, especially capital, liquidity, authorisation of financial business, conduct of business, control of prospectuses, control of market abuse and frauds, such as insider dealing, and the insolvency regime for banks. Financial regulation is a very large field.

Corporations

Introduction

Financial law involves competition between debtors and creditors so that jurisdictions can be positioned on a straight line. Corporate law however involves three main competitors: (1) shareholders, (2) creditors and (3) managers - a triangle. If the key indicators show that a jurisdiction strongly favours one or other of the parties at the points of the triangle, whether creditors, shareholders or management, then one can begin to build up a picture of the choices which the jurisdiction habitually makes in resolving the conflicting interests of the parties.

For example, a very tough prohibition on financial assistance (which is protective of creditors against shareholders) tends also to support an attitude to other principles of the maintenance of capital or to support the proposition that mergers by fusion are difficult (because they can prejudice creditors). This would be true of the English regime in 1948. Similarly, a view which easily imposes personal liability on directors for deepening an insolvency might also show a legal approach which is not supportive of the veil of incorporation in other areas, eg shareholder liability and substantive consolidation on insolvency.

The two extreme corporate law models are the Delaware model and the traditional English model, exemplified by the English Companies Act 1948 (now superseded). Napoleonic and Roman-Germanic models are in-between to varying degrees.

The Delaware regime is highly protective of management in the key areas. The traditional English regime favours creditors on most of the key contests and, where creditor interests are not involved, it tends to favour shareholders as opposed to managers.

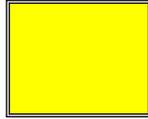
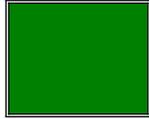
Director liability for deepening an insolvency

Generally If the law imposes personal liability on directors for deepening an insolvency, eg carrying on business and incurring debts where there is no reasonable prospect of paying them, then the regime is hostile to the interests of management. The legal risks of management are increased.

There are basically four regimes internationally: (1) directors are hardly ever liable for deepening the insolvency, eg Delaware and most US jurisdictions, plus some traditional English jurisdictions which only punish fraudulent trading; (2) directors are liable for serious negligence (England, Singapore, Australia, Ireland); (3) directors are liable for mere business misjudgements deepening the insolvency (France); and (4) directors are liable if they fail to file for an insolvency proceeding after the company becomes insolvent (France, Germany and others).

Q4 In Portugal the law rarely imposes personal liability on directors for deepening the insolvency and there is no rule that the directors must file for insolvency when the company is insolvent.

True



False



Can't say



Comment:

There is a special duty to file for insolvency in article 18 of the Portuguese Insolvency and Corporate Recovery Code, which is assigned to the company's directors in specific in article 19. Any breach of the directors' duty to apply for insolvency results in a presumption of gross negligence, under article 186/3/a: a rebuttable presumption though, according to the Portuguese case-law.

Moreover, article 186/1 of the Portuguese Insolvency and Corporate Recovery Code defines as negligent any insolvency situation created or deepened by wilful misconduct or gross negligence of the company's directors, in law or in fact, in any of the three years preceding the beginning of the insolvency process. Pursuant to articles 189/2/a/c/d, a sentence which rules the insolvency as negligent must identify the directors who have been found guilty of such insolvency, and it might bring about a disqualification period for the exercise of commerce and certain positions, the loss of credits against the insolvency, and a conviction to return the goods and rights already received as the payment of these credits. Finally, in accordance with article 189/2/e, directors who have been found guilty are personally liable (joint and several liabilities) for all unpaid creditors' claims to the extent they exceed the value of the insolvency mass.

Financial assistance to buy own shares

Generally Many jurisdictions prohibit a company from giving financial assistance to buy its own shares. The typical example would be where a bidder finances the acquisition of a target company by a loan and after the takeover arranges for the target to guarantee the loan and charge its assets to secure the guarantee. The commercial effect is similar to the repayment of the share capital of the target before its creditors are paid. Shareholders should be subordinated to creditors.

The prohibition therefore favours creditors against shareholders of the target.

The Delaware regime does not prohibit financial assistance. The traditional English regime has a wide prohibition (not England any more). Most Roman-Germanic regimes are against it, with Napoleonic regimes hesitant. The EU has a prohibition against financial assistance by public companies. Some countries allow financial assistance by private companies if solvency is established.

A contravening transaction is usually a criminal offence and void.

Q5 Portugal permits a company to grant financial assistance for the purchase of its own shares.

True



False



Can't say



Comment:

The financial assistance for the purchase of a company's own shares is expressly forbidden under article 322 of the Portuguese Companies Code, regarding public limited companies. The provision sets as null and void any financial assistance on these terms. Portugal did not transpose article 23 of the Directive 2006/68/CE of 6 September, which introduced some flexibility regarding the financial assistance regime.

Exceptions are made in relation to banks and other financial institutions' operations, and to the acquisitions of shares by or for the company's employees or the employees of an associated company.

There is no equivalent prohibitive rule with regard to private limited companies.

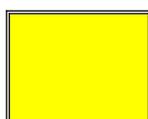
Public takeover regime

Generally A public takeover regime which is free and open tends to favour managers who can guard against takeovers by poison pills and the like and who have relative freedom to acquire other companies. An example is the Delaware regime. A restrictive regime on the lines of the British system tends to favour shareholders.

The chief features of a restrictive regime are: (1) the bidder must make a mandatory bid in cash when a threshold of shares in the target is reached, eg 30%; (2) the bidder must pay the same price to all shareholders (sharing the control premium); (3) no partial bids (getting control on the cheap); (4) proof of certain funds to implement the offer; (5) compulsory acquisition of dissenting minorities (squeeze-out); (6) fixed timetable; (7) no ability of the managers to frustrate a bid by poison pills without shareholder approval; and (8) control of the content of circulars, especially forecasts.

Q6 Apart from exchange controls and restrictions on foreign direct investments, the public takeover regime in Portugal is open and has few restrictions.

True



False



Can't say



Comment:

The public takeover regime in Portugal is generally open. There are however some rules of the Portuguese Securities Code, which regulates public takeovers, that must be considered, especially articles 173 and onwards.

All the company's workers must be given all the relevant information about the takeover's implications on their labour relationship. In addition to that, and given the optional nature of EU takeover law, the Portuguese takeover regime is permissive on what concerns preventive (ex-ante) defensive measures. Voting ceilings are commonly found in listed companies. In respect of reactive (ex-post) defensive measures, during the takeover process, the management body of the target company may not perform acts that materially affect the net equity of the target company and which may significantly affect the objectives announced by the offeror, apart from the

normal day-to-day management of the company. This passivity rule however is subject to a reciprocity rule, i.e. it does not apply to takeover bids conducted by offeror companies which are not subject to the same rules, or are controlled by a company not subject to the same rules.

The Portuguese legal regime imposes a mandatory bid under article 187 of the Securities Code, when the shares within a public limited company exceed one third or a half of the voting rights of the target company's social capital, unless proof of lack of dominance over the target company. In general, a mandatory bid must cover all the company's shares. A mandatory bid may be made either in cash or through market securities.

According to articles 194 and 196 of the same Code, after the launch of a general takeover bid, subject to the conditions of no. 1 of article 194 the offeror may acquire the remaining shares for a fair consideration (squeeze out), in cash, and the holders of the remaining shares have a right to sell-out.

Other indicators

Other important indicators are corporate governance (difficult to measure), free ability to merge companies by fusion, the one-share-one-vote rule, and, to a lesser extent, minority protections. Other indicators relate to quick and cheap incorporation, the *ultra vires* rule, maintenance of capital, no par value shares, shareholder liability, substantive consolidation on insolvency and disclosure. These are not measured here.

Commercial contracts

Introduction

Contract is at the heart of commercial life, and is everywhere. In fact, the main tenets of contract law across the main families of jurisdictions are consistent - it is in the fields of insolvency and property law where the main differences emerge. It is true that there are contract differences, for example, between writing requirements, open offers, the time of acceptance and specific performance, but often these differences are of lesser significance in practice in the business field.

The key indicators the survey chooses all tend to symbolise whether the approach of the jurisdiction to contract is hard or soft. If the approach is hard, then the jurisdiction tends to support predictability in business contracts so that certainty and freedom of contract are valued more than mitigating the risk of occasionally abusive behaviour and unfair results, especially for weaker parties. A soft jurisdiction tends to give greater primacy to notions of good faith and the like.

Exclusion of contract formation

Generally Commercial parties often wish to be able to negotiate heads of terms commercially without being bound by a contract. In some jurisdictions, the courts are ready to infer that the parties are bound if the terms are sufficiently clear, even if they have said expressly that they do not intend to be bound.

Q7 In Portugal, parties are not bound to heads of terms if they expressly state that the terms are "subject to contract" or some such clear phrase.

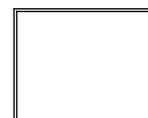
True



False



Can't say



Comment:

Within the pre-contractual phase of commercial contracts, both contractual and non-contractual agreements might be found. Portuguese scholars have been identifying 'heads of terms' as a non-contractual agreement – especially if the parties expressly agree to be 'subject to contract' –, as they usually only set the way negotiations

must be carried on between the parties and constitute mere agreements to negotiate. However, the *nomen iuris* that the parties attribute to these pre-contractual agreements is not the only criterion to qualify them as either contractual or non-contractual.

Non-contractual agreements as such do not fall within any specific Portuguese legal regime, and therefore do not generate any contractual obligation. However, parties are always subject to pre-contractual diligence duties, based on the good faith concept, such as culpa in *contrahendo*. Portuguese courts have only been applying culpa in *contrahendo* to these mere preparatory agreements, without any further legal consequence, as opposed to pre-contractual agreements that are already binding between the parties.

Termination clauses

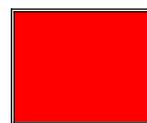
Generally Many contracts, especially loan contracts, leases of goods and long-term sales contracts, contain events of default on the occurrence of which one party can terminate the contract. Jurisdictions which uphold freedom of contract and the literal interpretation of contract give effect to these clauses and do not rewrite the contract according to the court's notions of what is fair. Other jurisdictions prefer good faith. We ignore consumer contracts - where there may be consumer protections.

Q8 In Portugal, a termination clause in a loan or sale of goods contract between sophisticated companies (not individuals) providing for the termination of the contract immediately on certain events is usually upheld, even if the event concerned is relatively trivial.

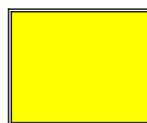
True



False



Can't say



Comment:

Termination clauses are generally admissible in commercial contracts, as a consequence of the principle of parties' contractual autonomy, a cornerstone in the Portuguese legal system, in which the parties are free to agree on the content and conditions of a contract.

Limits must however be established in particular situations, even between companies. The Portuguese legislator prohibits any exploitation of a situation of abuse of a dominant position or of an economic dependence by one company over another, in articles 11 and 12 of the Law 19/2012. To impose a termination clause on a commercial contract under one of these circumstances would certainly fall within this prohibition.

The Portuguese courts have also been considering good faith to ascertain the exercise of contractual rights as valid. To terminate a contract based on a termination clause that has proven to be imposed on the other party or that might lead to an unbalanced situation between the parties will be considered as contrary to good faith. The Portuguese regime on the General Contractual Terms and Conditions expressly prohibits any clause contrary to good faith, in its article 15.

Exclusion clauses

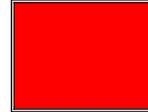
Generally Contracting parties often seek to exclude their liability for defective performance of the contract. So the issue is whether these exclusion clauses are generally upheld if they are clear and whether freedom of contract is allowed in this area.

Q9 In Portugal, exclusions of liability in most commercial contracts between sophisticated companies, such as a sale of goods contract, are generally upheld if they are clear.

True



False



Can't say



Comment:

Article 809 of the Portuguese Civil Code, which applies also to commercial contracts, prohibits any contractual clause that excludes civil liability in advance: however, most of the Portuguese scholars and case-law have been admitting exclusion of liability clauses in case of slight negligence.

There is also one exception to the general rule under article 809, in 800/2, for legal representatives or assistants' acts. Moreover, article 602 of the Portuguese Civil Code allows the parties to agree to limit the debtor's liability to some of his assets.

Regarding the regime of the General Contractual Terms and Conditions in particular, applicable to the contractual clauses that lack previous negotiation, and where one of the parties either merely subscribes or accepts them, exclusion clauses between companies are also generally forbidden under article 18.

Indeed, parties may not establish, in any case, any clause that excludes or restricts liability, directly or indirectly, neither in the case of damages to life, moral or physical integrity or health, nor in the case of non-contractual property damages on third parties. With regard to liability for non-compliance, arrears or defective performance, and liability for representative or assistants' acts, parties cannot exclude or restrict, directly or indirectly, their liability in the case of misconduct or gross negligence. Exclusion clauses in the case of slight negligence are however admissible. This must however not result in an unbalanced situation between the parties, contrary to good faith.

Other indicators

Other contract indicators not assessed here include writing formalities, open offers, mistake, frustration, damages, penalties, specific performance and whether notice of assignment of the contract to the debtor is mandatory if the assignment is to be valid on the insolvency of the assignor.

Litigation

Introduction

The first three key indicators of governing law, jurisdiction and arbitration tend to show whether the jurisdiction does or does not place a high value on international comity and freedom of contract as opposed to national primacy.

The indicator on class actions tends to show whether or not the jurisdiction's litigation system is orientated towards plaintiffs, especially mass plaintiffs in product liability cases. This indicator may also show the attitude of the jurisdiction to the protection of individual parties as against business parties, both in terms of the incidence of costs and enforcement.

Governing law clauses

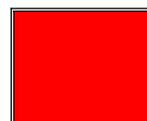
Generally Most countries apply a foreign governing law of a contract even if there is no connection between the contract and the jurisdiction. If the courts do not uphold the governing law, the effect is that the contract obligations may be different.

Q10 The Portuguese courts will apply an express choice of a foreign law in a loan or sale of goods contract between sophisticated companies, even though the contract has no connection with the foreign jurisdiction, but subject to Portugal's public policy and mandatory statutes.

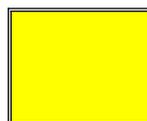
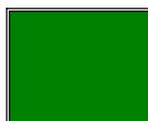
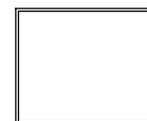
True



False



Can't say



Comment:

Portuguese Courts will apply an express or implied choice of a foreign law in a loan or sale of goods contract between sophisticated companies, even though the contract has no connection with the foreign jurisdiction, subject to: (a) Portugal's public policy; (b) Portuguese overriding mandatory provisions; (c) the possibility that effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be, or have been, performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful; (d) the mandatory provisions of the country with which, safe for the law chosen, the contract maintains exclusive contacts at the time of the choice; (e) the mandatory provisions of EU Law when all other elements relevant to the situation at the time of the choice are located in one or more Member States.

Legal Framework:

- In its capacity as an EU Member State, Portugal is bound by the provisions enshrined in Regulation (EC) No 593/2008 of the European Parliament and of the Council ('Rome I').

Relevant Information:

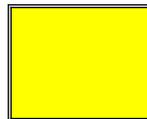
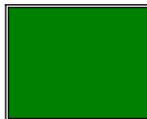
- Up to this date, Portugal is not a party to the Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods, nor to the United Nations Convention on Contracts for the International Sale of Goods (CISG);
- Regulation 593/2008 has replaced the Rome Convention on the Law Applicable to Contractual Obligations, of which Portugal was a party to since 1993;
- Portugal's domestic legal framework embraces the principle of private autonomy, which encompasses contractual autonomy. This principle is established, at a substantive law level, in article 405(1) of the Portuguese Civil Code; it is reiterated, at a choice-of-law or private international law level, in article 41(1) of the same Code. Unlike Article 3 of the Rome I Regulation, article 41 of the Portuguese Civil Code subjects the effectiveness of the parties' choice of law agreement to one of two *alternative* requirements: (i) that the choice of law agreement is grounded on a meaningful interest of the parties; (ii) that the contract bears a 'reasonable relation' to the jurisdiction whose law was chosen. It is to be noted that article 41 of the Portuguese Civil Code has but a residual scope of application; most notably, it is not applicable to matters covered by the Rome I Regulation.
- Pursuant to a widespread interpretation among Portuguese Private International Law scholars, Article 348 of the Portuguese Civil Code imputes the knowledge of substantive foreign law to the court. According to one such divulged point of view, foreign law is a question of law, not fact. It is hence able to be known by a judge even if it has not been pleaded and proved by a party. A special duty of collaboration with the court impends, notwithstanding, over the parties.

Foreign jurisdiction clauses

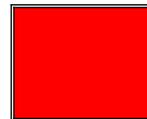
Generally Many contracts confer jurisdiction, sometimes exclusive, on the courts of a foreign jurisdiction, usually accompanied by a choice of foreign governing law.

Q11 The Portuguese courts will generally uphold a clear submission in a loan or sale of goods contract between sophisticated companies to the exclusive jurisdiction of the courts of a foreign country, even if there is no connection between that country and the contract.

True



False



Can't say



Comment:

Within the context and purview of agreements conferring exclusive jurisdiction that fall under Brussels I Regulation, Portuguese courts will generally uphold agreements conferring exclusive jurisdiction in a loan or sale of goods contract, even if there is no connection between that country and the contract. The same solution applies to choice of court agreements excluded from the scope of application of the referred European instrument.

Legal Framework:

- Portugal is bound by Council Regulation (EC) No 44/2001 – Brussels I - which generally allows for exclusive jurisdiction agreements.

Outside the scope of Brussels I, domestic provisions will apply, chiefly Article 94 of the Portuguese Civil Procedure Code (C.P.C.).

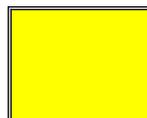
Said article establishes that parties may celebrate exclusive jurisdiction agreements, which are subject only to a few cumulative requisites set forth in article 94.3 of the C.P.C.

Arbitration recognition

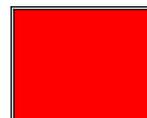
Generally Contracting parties, especially in trading and construction contracts, but less so in loan contracts, wish to submit disputes to arbitration, sometimes in a foreign country. The resulting award is often enforceable locally under the New York Arbitration Convention of 1958, to which most countries have adhered.

Q12 In Portugal, the courts allow sophisticated contracting parties to submit contract disputes to a foreign arbitral tribunal to the exclusion of the Portuguese courts.

True



False



Can't say



Comment:

In Portugal, arbitration is governed by the Lei 63/2011. According to article 1 of this Statute, in principle, arbitral conventions can be celebrated in relation to any dispute that is not submitted, by a special law, (1) to the exclusive jurisdiction of the Portuguese judicial courts or (2) to mandatory arbitration. If none of these two situations exist, contracting parties can submit disputes to a foreign arbitral tribunal.

Mandatory arbitrations exist when the law requires parties to go to arbitration, independently of their will. They are regulated in articles 1082 and following of the Portuguese Civil Procedure Code (CPC). The rules on the procedure and composition of the arbitral tribunal might be excluded from the parties' freedom and established by law. This is the case for expropriation disputes, for example, regulated in articles 38 and following of the Portuguese Expropriations Code. In other cases of mandatory arbitration, it is still in the parties' freedom to choose a foreign arbitral tribunal.

Two considerations are worth mentioning. Firstly, the Regime of General Contractual Terms and Conditions establishes an absolute prohibition and invalidity of general clauses that preview arbitration procedures which do not ensure the procedural safeguards established by law (articles 12 and 21(h) of the Decreto-lei 446/85).

Duties of communications and information also have to be fulfilled in these cases (articles 5 and 6 of the Decree). Secondly, the arbitral awards are subject to recognition by the Portuguese judicial courts according to article 978 of the CPC and articles 55 and 56 of the Lei 63/2011.

Class actions

Generally In some countries, such as the United States, a plaintiff can be authorised by the court to sue on behalf of all claimants who are similarly situated. Claimants have to opt out or they are bound.

Q13 In Portugal, class actions where the class is bound if they do not opt out are generally not allowed.

True**False****Can't say****Comment:**

Portugal's unique class action system – “ação popular” *i.e.* popular action – establishes an opt-out principle, although with important safeguards, pertaining to the *erga omnes* effect of *res judicata* and also to ensure adequate representation in certain cases.

Legal Framework:

- According to article 52^o3 of the Portuguese Constitution, “everyone shall be granted the right of popular action”. This right was crystalized under the Popular Action Law, Law 83/95, which was, in some points, influenced by the American class action system.
- Law 83/95 establishes an opt-out principle in articles 14 and 15. Article 19 enacts safeguards to the opt-out principle, by sustaining that inadequate representation may influence *res judicata*.

Other indicators

Other indicators not covered by this survey include contingent costs, loser pays the costs of the winner, prejudgment freezes or arrests, appeals, scope of disclosure (discovery of documents), efficacy of waivers of sovereign immunity and the enforceability of foreign judgments.

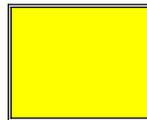
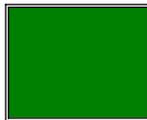
Real property

Ownership of land

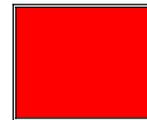
Generally In most countries, nationals can own land absolutely and are not restricted simply to leases for a limited term or simple rights of occupancy. However, in some jurisdictions, absolute ownership of land is not available to nationals or local corporations. If this is so, then the jurisdiction would be coloured green if citizens can lease land for a very long term without material restrictions, such as 999 years, and can also mortgage or sell the land or give it away or bequeath it under their wills without official consent because the ownership is a close proximate of absolute ownership. If on the other hand citizens are entitled only to a lease of, say, 70 years or less, or to similar rights of occupancy, and if there are limitations on dealing with the land without official consent, such as mortgaging, selling or bequeathing it, then the jurisdiction would be red.

Q14 In Portugal nationals and local corporations are entitled to own land absolutely.

True



False



Can't say



Comment:

Both nationals and local corporations are entitled to fully own land, either through direct acquisition (asset deals) or indirect acquisition (share deals). In Portugal, the property rights that can be acquired are the following:

- Full ownership;
- Surface right;
- Usufruct;
- Right of use.

Portugal's Legal Framework however does not contemplate Trusts (fiduciary ownership), except in the Autonomous Region of Madeira - a Free Trade Zone.

Legal Framework:

- Article 62 of the Portuguese Constitution recognizes the fundamental right to private property. The fundamental right to full ownership knows only one derogation, when for urgent reasons of public utility expropriation may occur. The State's right to expropriate land is limited by a public interest requirement and a duty of just compensation.
- On the other hand, there are several mandatory pre-emption rights, such as:
- In cases of co-ownership of property, when one of the owners intends to sell his share, the remaining owners have a pre-emption right over the same, article 1409 of the Civil Code.
- Owners of rural land can have in certain cases pre-emption rights regarding the sale of contiguous property, article 1380 of the Civil Code
- Public entities may have pre-emption rights regarding the acquisition of properties legally classified as realty with historical and/or architectural value, Law 107/2001, of September 8th,
- Public entities may have pre-emption right over certain transactions, according soil protection policies, Law 31/2014, of May 30th;

- Some municipalities also have pre-emption rights over certain transactions regarding real estate within their territory;
- Tenants may have pre-emption rights over leased property, article 1091 of the Civil Code.

The concept of property in Portugal encompasses not only full ownership but also other rights *in rem* relating to acquisitions and of guarantees (security interests). The Portuguese concept of full ownership coincides the UK's notion of freehold, and comprehends the full and exclusive right of use, fruition and disposal of the property.

Security of land title and land registers

Generally Many jurisdictions improve the security of title to land by a registration system which, although not necessarily state-guaranteed, has high reliability. An example is the Torrens system developed in Australia and used in many other countries, eg Canada and England.

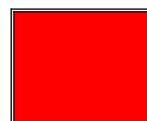
Most countries in the civil code groups do not have a title register but instead require documents concerning land to be notarised and filed at the registry so that they can be searched. The United States does not generally have title registers for land although there may be mortgage registers. They rely on title registration companies which provide title insurance.

Q15 Most land in Portugal is registered in a land register which records most major interests in land, eg ownership, mortgages and longer-term leases.

True



False



Can't say



Comment:

Portugal's Land Registry Code establishes that Land, as well as most Real Estate rights and interests, must be registered, except for urban leases which are only subject to registry if they are for longer than six years. An up-to-date record of all properties and registrations is currently available at www.predialonline.pt, upon payment, where prospective purchasers can, prior to acquisition, access relevant information relating to the property in question - such as the name of the owner and a list of encumbrances attached to the property.

Judicial procedures whose purpose, principal or accessory, is the recognition, constitution, amendment or termination of any real estate rights are also subject to registration.

The land register is mainly intended to publicize the legal status of properties, in order to ensure safety in real estate legal transactions.

Legal Framework:

- According to Articles 2nd and 8th-A of the Land Registry Code, the constitution, recognition, acquisition or change of *in rem* rights over property have to be filed with the Land Registry Office. This requirement is mandatory and the absence of said registration may entail a lack of protection vis-à-vis third parties and curtail the possibility of transferring the land in the future.
- Land Registry Certificates will provide the relevant information regarding the property (description and location) as well as establish the title and disclose all rights and obligations over the land such as charges, easements and encumbrances *inter alia*.

- There are no restrictions on public access to the information available in the Land Registry, which, upon payment, is accessible online or in any of the over 300 Offices of the Land Registry spread across the country.
- According to the article 7 of the Land Registry Code, registration creates the presumption that the right exists and belongs to the registered holder pursuant to the terms on which the entry defines it.

Relevant information:

- In Portugal, transfer of real estate can be executed through the execution of a public deed with a public or private notary or through an authenticated private document. Subsequently, the transaction should be duly registered with the Land Registry Office. Title insurance does not exist in Portugal.

Land development restrictions

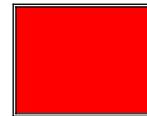
Generally Many countries restrict development and the change of use of land and require permits to be obtained for any development or change of use.

Q16 In Portugal, apart from environmental controls (dealt with later), the control of commercial development and the change of use of land is very light and, where required, permits are quick and cheap to obtain.

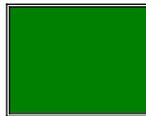
True



False



Can't say



Comment:

Apart from environmental controls, the control of commercial development and the change of use of land in Portugal is substantial as it is governed by several public law provisions (such as those that protect the National Agricultural Reserve and The Natural Ecological Reserve) and a planning policy, framed by Legal Framework of the Territorial Planning Instruments (*Regime Jurídico dos Instrumentos de Gestão Territorial*), which is implemented through national, sectorial, special, regional and local development and urban plans. There are a few private law provisions set in Portuguese Civil Code concerning neighbourly relations that must also be born in mind.

The municipal plans for land planning define the permitted use according to the area of activity (housing, commerce and services, industry, agriculture, etc.) and the permitted changes in use.

Special plans (referring to protected areas, coastline, public water dams, estuaries and archaeological parks) define unauthorized, conditioned and preferential uses.

The Municipalities are usually the competent authorities to conduct existing and successive control procedures for any commercial development and change of use of land. The control procedures are governed by the Legal Framework of Urbanization and Building (*Regime Jurídico da Urbanização e Edificação*). However, depending on the nature of the project and the activity to be developed, other permits of other public entities may be required (for example, to implement industrial, tourist and commerce projects).

The process of obtaining permits may be lengthy at times, however progress has been made in this area, such as Decree-Law 48/2011 which instituted a “zero licensing” initiative to simplify the setting up and modification of food and beverages, retail, service providers or storage establishments.

Legal Framework:

- Land Registry Code;
- Decree-Law 380/99 which establishes the Legal Framework of the Instruments for Territorial Management, and sets forth zoning regulations regarding the use of the land (*Regime Jurídico Dos Instrumentos De Gestão Territorial*);
- Decree-Law 555/99, which governs the Legal Regime of Urban Development and Construction (*Regime Jurídico de Urbanização e Edificação*);
- Decree-Law 9/2007 which institutes Public Interest Restrictions to Noise;
- Decree-Law 166/2008 which institutes Public Interest Restrictions to safeguard National Ecological Reserves;
- Decree-Law 73/2009 which institutes Public Interest Restrictions to safeguard Agricultural Reserves – imposing constraints on non-agricultural uses of land which are deemed to be more suitable for agriculture;
- Law 17/2014 establishing the Policy on the National Maritime Areas Planning and Management (*Bases da Política de Ordenamento e de Gestão do Espaço Marítimo Nacional*);
- Law 31/2014 which establishes the general public policy provisions regarding land and urban development (*Lei dos Solos*).

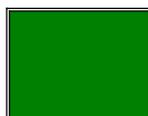
Other indicators

Other indicators not surveyed include transfer costs, stamp duties and lessee protections.

Employment law

Generally The indicator here is whether it is easy or hard to hire and fire employees. The measures include high minimum wages, maximum hours, minimum holidays, maternity rights, equal pay for equal work (non-discrimination) and severance costs.

Q17 In Portugal, there are few controls on hiring and firing employees or on the terms of employment.

True**False****Can't say****Comment:**

The Portuguese Labour Law Code is the relevant legal framework for analysing this question.

Portuguese law has a reasonable level of protection for employees, with relation to the terms of employment and the controls on hiring: the minimum wage is established by law (article 273); there is a maximum limit of 8 hours of work per day and 40 hours per week (article 203); a minimum of 22 working days' vacation must be granted annually (article 238); employees are granted personal rights of expression, privacy, moral and physical integrity (articles 14 and following), and especially, rights of equality and non-discrimination (articles 23 and following) with 'equal pay for equal work' (article 270). Maternity and paternity rights are also safeguarded (article 33 and following). There is a duty to negotiate in good faith, in the formation of an employment contract (article 102). Contracts of adhesion are permitted (article 104 and following). No legal form is required, in principle, for the employment contract (article 110) except for the employment contracts of temporary duration (article 141). Trial periods are allowed and legally regulated (article 111 and following).

As for the firing controls, the degree of protection for workers varies depending on the type of dismissal. Unilateral dismissal is allowed, provided there is a fair cause ('justa causa')- meaning an intentional wrongful conduct of the worker – and a formal disciplinary procedure is adopted (articles 351 and following).

Dismissals based on redundancy reasons (market, technological or structural reasons) – collective dismissals (article 359) and individual dismissals due to extinction of the job (article 367) - are admissible and the employee's protection is relatively low; the employer has to pay a minimum legal severance and has to comply with a previous legal procedure, but no favorable binding opinion from an external entity is required.

Dismissal based on lack of skills/aptitude (articles 373 and 374) is lawful, but the legal requisites are very strict and exigent; the employer has to pay a minimum legal severance and has to comply with a previous legal procedure. In case of unlawful dismissal, the employee is offered reintegration in the workplace plus compensation for all damages, which may be high (article 389).

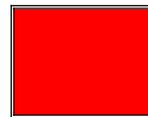
Environmental restrictions

Q18 In Portugal the rules governing the environment and liability for clean-up are very light and relaxed.

True



False



Can't say



Comment:

Portuguese rules governing the environment and liability for clean-up are demanding. Article 3 of the Lei 11/87 ('*Lei de Bases do Ambiente*') provides the principles of prevention and accountability, fundamental in environmental law. There is strict liability for the environmental damages caused in the course of especially dangerous activities (article 41). Liability insurance is mandatory for highly risky activities (article 43) and, in some cases, criminal sanctions are imposed (article 46). Those who damage the environment have an obligation to repair the damage and recreate the original situation or, that being impossible, to pay compensation and incur in the necessary works to minimize the damage (article 48).

The Decree-Law 147/2008 transposes the Directive 2004/35/CE, consecrating the 'polluter pays principle'. Article 4 establishes jointly responsibility of wrongdoers and article 5 reduces the standard of causation to mere likelihood or probability. Article 22 established a duty to constitute financial guarantees to assure the event of environmental liability. Lei 89/2009 establishes the legal framework for environmental offenses. Both intentional and negligent conducts are punished (article 9) and fines can reach significant proportions (articles 22 and 23).

Lastly, the high degree of environmental protection is from its constitutional consecration. It is a fundamental task of the State to assure environmental protection (article 9(e) of the Portuguese Constitution). Article 66 grants a social Right to Environment and sustainability. Class actions for environmental protection are also allowed (article 52(3)(a)).

Openness to foreign business

Generally These indicators measure the degree to which the country is open to foreign businesses. The indicators are quite generic and therefore subjective.

Foreign direct investment

Q19 In Portugal foreigners may freely own and control local companies outside protected industries, such as media, banks and defence.

True



False



Can't say



Comment:

In Portugal, there are generally no restrictions or control of foreign investment in local companies, apart from general reporting duties to the Bank of Portugal, for statistical purposes and anti-money regulation. Being a member of the European Union, Portugal has adopted the general principle of non-discrimination of foreign investment based on the nationality of the investor. However, the same principle of non-discrimination does not fully apply to investors coming from outside the EU region and EEA in what relates to national defence and other strategic sectors (including inter alia energy, water, telecommunications and/or transportation). Indeed, a recently enacted decree-law contains some measures for the safeguarding of national strategic interests in the sectors outlined above, which includes the right to oppose to an acquisition of control over «strategic assets» on those sectors, on justified grounds and under exceptional circumstances (as a result of which all agreements in connection with such intended acquisition shall be deemed null and void).

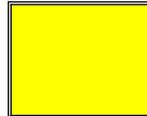
Legal Framework:

- Article 49 et seq. (especially article 49, §2 and article 55) of the of the Treaty on European Union;
- Article 63 et seq. of the of the Treaty on European Union;
- Article 86 and 87 of the Constitution of the Portuguese Republic;
- Decree-Law 295/2003, of 21 November, which approved the legal regime applicable to economic and financial transactions with foreign countries and of foreign exchange transactions (“Regime Jurídico das Operações Económicas e Financeiras com o Exterior e das Operações Cambiais”);
- *Lei do Sistema Estatístico Nacional* – Lei n.º 22/2008, de 13 Maio;
- *Instrução sobre Estatísticas de Operações com o Exterior* – Instrução do Banco de Portugal n.º 27/2012, de 17 de Setembro;
- Law 11/90, of 5 April, which approved the legal framework applicable to the privatization of assets that were nationalized after the 25 April 1974 revolution (“Lei Quadro das Privatizações”), especially the modification introduced by Law 50/2011 of 13 September (new article27-A);
- Law no. 9/2014, of 24 February;
- Decree-Law no. 138/2014, of 15 September.

Exchange controls

Q20 In Portugal, there are no exchange controls. Businesses may therefore have foreign bank deposit accounts in foreign currency, borrow in foreign currency and repatriate profits to foreign shareholders in foreign currency.

True



False



Can't say



Comment:

Being a member of the European Union and of the Economic and Monetary Union - thereby having adopted the euro currency, Portugal has implemented the principle of freedom of payments and capital movements, in line with the guidelines of the International Monetary Fund (IMF) and of the Organisation for Economic Co-operation and Development (OECD).

Under Decree-Law 295/2003, businesses are free to open foreign bank deposit accounts in foreign currency, borrow in foreign currency and repatriate profits to foreign shareholders in foreign currency. Nonetheless, under article 21.º, some restrictions may temporarily apply to transactions between a resident entity and a foreign entity being a member or residing outside of the European Union, for severe political reasons and in case of emergency, in line with international rules adopted by Portugal. It should also be noted that businesses domiciled in Portugal may have to report such transactions to the Bank of Portugal, for statistical purposes (namely, if the amounts being transacted in a given calendar year are equal or higher than 100.000 euros).

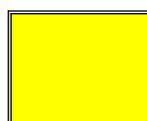
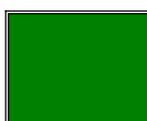
Legal Framework:

- Article 63.º of the Treaty on the functioning of the European Union ;
- Decree-Law 295/2003, of 21 November, which approved the legal regime applicable to economic and financial transactions with foreign countries and of foreign exchange transactions (“*Regime Jurídico das Operações Económicas e Financeiras com o Exterior e das Operações Cambiais*”);
- *Lei do Sistema Estatístico Nacional – Lei n.º 22/2008*, de 13 Maio;
- *Instrução sobre Estatísticas de Operações com o Exterior – Instrução do Banco de Portugal n.º 27/2012*, de 17 de Setembro;

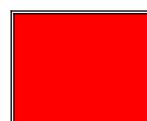
Alien ownership of land

Q21 In Portugal, foreign-controlled companies have the same rights as nationals or residents to own or lease land without a permit.

True



False



Can't say



Comment:

Foreign-controlled companies have the same rights as local persons with regard to land ownership and lease in Portugal, without any discrimination between local and foreign owners whatsoever.

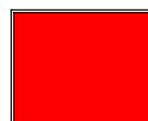
Legal Framework:

- Articles 49.º and 50.º, n.º 2, e) of the Treaty on the functioning of the European Union;
- Articles 405.º and 1302.º et seq. of the Portuguese Civil Code
- NRAU (New Urban Lease Regulations) approved by Law 6/2006 of 27 February 2006.

Application of the law

Generally These indicators deal with the application of the law, as opposed to what the law actually says. They are bound to be generic and subjective, a matter of impression.

Q22 In Portugal, the higher courts usually treat big businesses as fairly as they treat individuals and do not favour local interests over foreigners.

True**False****Can't say****Comment:**

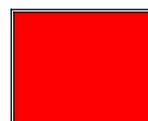
There is no direct answer to this question, because no empirical study has been done on these specific matters.

However, an empirical study conducted by the Francisco Manuel dos Santos Foundation has concluded that, between 2010 and 2012, only 15% of the big businesses involved in commercial suits lost the majority of them. These successful results might be influenced by the strong financial support that they have to afford legal advice and defence. In any case, this study seems to contradict the perception of scholars. No clear conclusion can be established.

Scholars and lawyers also have the perception that no tendency exists to favour local interest over foreigners. But, once again, no empirical study has been done on this matter.

Costs and delays of commercial litigation

Q23 The costs and delays of commercial litigation in the higher courts in Portugal are not considered materially greater than in other comparable countries.

True**False****Can't say****Comment:**

According to empirical data, the delays of litigation in Portuguese Courts are considerable. In January 2012, 1 in every 3 companies was involved in pending actions. These delays are mainly related to labour disputes, insolvencies or debt collection issues. The majority of companies believe that these delays are caused by procedural rules and the way appeals are being administrated. Also according to the World Justice Project, Portugal is below the average of high-income countries in terms of celerity of judicial decisions. Specifically in higher courts, 8% of the companies had pending actions on the Courts of Appeals ('Tribunal da Relação'), 2% in

the Supreme Court of Justice (‘Supremo Tribunal de Justiça’) and 2% in the Supreme Administrative Court (‘Supremo Tribunal Administrativo’). Delays on higher courts are, thus, much lower than on lower courts.

According to the Portuguese report on the study on transparency of costs, the costs of litigation in Portuguese Courts are considerably lower than the ones due on other European high-income countries. Specifically in higher courts, the cost of an appeal is comparatively low. Civil proceeding costs are set out in Articles 5 and 7 and Tables I and II annexed to the Regulation on Procedural Costs approved by the Decree-Law 34/2008, of 26 February. It is important to mention that most of these studies are related to civil litigation in general and not only commercial litigation.

Overall ranking

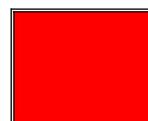
This overall ranking is achieved by a survey of all the rankings as shown this table:

	Question	Rating
1.	Insolvency set-off	
2.	Security interest	
3.	Universal trusts	
4.	Director liability for deepening insolvency	
5.	Financial assistance to buy own shares	
6.	Public takeover regime	
7.	Exclusion of contract formation	
8.	Termination clauses	
9.	Exclusion clauses	
10.	Governing law clauses	
11.	Foreign jurisdiction clauses	
12.	Arbitration recognition	
13.	Class action	
14.	Ownership of land	
15.	Security of land title and land registers	
16.	Land development restrictions	
17.	Employment law	
18.	Environmental restrictions	
19.	Foreign direct investment	
20.	Exchange controls	
21.	Alien ownership of land	
22.	Court treatment of foreign big business	
23.	Costs and delays of commercial litigation	

True



False



Can't say



Profiles

The survey was carried out by the following students:

Inês Viterbo is a Trainee Lawyer at Morais Leitão, Galvão Teles, Soares da Silva & Associados. She is a graduate of the LL.M. Law in a European and Global Context at Católica Global School of Law, Lisbon (Portugal). She concluded her bachelor degree at Universidade Católica Portuguesa, in Porto. She did an internship at the Portuguese Constitutional Court and her areas of election are labour law, fundamental rights and contracts. She can be reached at inesviterbo@gmail.com

Joana Vitorino Mendes is currently a research scholar at The University of Michigan Law School. She is a graduate of the LL.M. Law in a European and Global Context at Católica Global School of Law, Lisbon (Portugal). She enrolled in the program Center for Transnational Legal Studies, London (UK), spring 2013, embracing her interests in international public law, constitutional and administrative law and comparative studies. She can be reached at joanavmendes@gmail.com

Tomás Guedes da Cruz Almeida graduated in 2003 at Nova School of Law (Faculdade de Direito da Universidade Nova de Lisboa) and began as trainee lawyer at Vieira de Almeida & Associados (2003-2005). He is registered with the Portuguese Bar Association (Ordem dos Advogados Portugueses) since 2005. During the first semester of 2006, he was admitted as a trainee at the European Investment Bank, based in Luxembourg, in the Spain/Portugal legal division. Tomás worked for 2 years in the legal division of Banco Finantia, S.A. (Portuguese investment bank) focusing on the capital markets, M&A and corporate finance. Since 2008, he is working as senior legal counsel at Brisa – Auto Estradas de Portugal, S.A., focusing on infrastructure PPP projects and overseas deals (consultancy services and internationalization of company's business). Tomás enrolled in the LL.M – International Business Law, at Católica Global School of Law (Lisbon), for the academic year 2013/2014.

Diogo Magalhaes is a J.S.D. student at Cornell University. He was recently appointed as a visiting professor at IIT Chicago-Kent College of Law, where he will teach a Course on EU Law and a seminar on Comparative Federalism during the Spring Semester of 2015. Diogo is a graduate of Catolica Global School of Law's LL.M. Program, Law in a European and Global Context. After his LL.M. Degree he attended a semester at Duke University, pursuing research in Intellectual Property and Legal Theory. He can be reached at dmagalhaes@live.com

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