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EDITORIAL

The word "crisis" has lodged itself firmly in our day-to-day vocabulary. Not only because of the financial crisis we are currently experiencing, but because the age we are living in is, decidedly, an age of "crises", be they natural or social. There is even talk of a global crisis in contemporary societies, which would appear first and foremost to be a crisis in values or in standards.

Crises are undoubtedly moments of greater or lesser disruption to the progression of society. But they are also periods of intense critical reflection and new opportunities. After all, a crisis is when critical factors converge, impelling us to ask questions and to rise to new challenges. It is no coincidence that "crisis" and "critical" share the same etymological root.

The current crisis cannot be any different: causing serious disruption to many, it offers us, the legal professional, a precious opportunity to rethink concepts, the paradigms whereby our companies are organized and governed, regulatory and supervisory systems, instruments which serve the day-to-day business needs of corporations. This is a time to take stock of what has gone wrong, and to draw up plans for our future lives together. Time to look forward to a brave new world.

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THE REVIEW OF THE LABOUR CODE AND THE LEGAL RULES ON REDUNDANCIES

On a first reading, the proposed changes to the Labour Code and the respective regulations (Draft Law 216/X) might give the misleading impression that a profound overhaul of labour legislation were in the pipeline. This is because alterations are proposed to the wording of nearly all, if not all, the articles in the Code, together with reorganization of the provisions on certain matters. However, although it would be wrong to say that the revised wording and reordering of the legal texts will make no difference at all, only in a few cases do they result in solutions materially different from those in place today. So this is not a radical reform of the legal framework or even a review which alters the essential features of Portuguese labour law as it has existed for the last three decades. But there are still a number of significant material changes, with important practical implications.

The review of the rules on redundancy and dismissal is a good example of this:

- There are amendments to the wording of all the provisions making up the legal framework on termination, in most cases without substantial modifications.
- However, certain changes which might appear to be merely formal could have important material implications. For instance, the concept of collective dismissal (Article 358) is significantly different from that currently prevailing, as it requires that partial closure be justified in the same way as for personnel cuts, which amounts to a substantial alteration (which, moreover, was never included in the preparatory proceedings).
- The main features of the procedural rules for redundancies and dismissal are retained, with a few important changes. For example, an inquiry is no longer obligatory in most cases, the required prior notice for redundancy for reasons relating to the employer will now vary depending on the employees' length of service, and some of the time limits for these redundancy procedures are shortened.

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- Redundancy payments are kept at the existing level, but it will no longer be presumed that the employee accepts his redundancy on receipt of the payment.
- The rules on unlawful dismissal continue to be based on the invalidity of the act of termination and on reintegration of the employee, but the time limit for judicial contestation is cut from one year to 60 days and different rules are established (excluding reintegration and reducing the compensation payable by the employer) for cases where the illegality consisted of irregularities of a merely formal nature.

Finally, we should stress that some of the measures proposed for the redundancy and dismissal rules will require subsequent regulation, dealing with aspects of judicial procedure, as the reduction in the time limit in which the employee can appeal to the courts has been consistently associated with a thorough overhaul of the respective rules, not provided for in the bill. In addition, some of the new provisions raise fresh questions, which it is hoped will be clarified in due time. This is the case of the new rules on unlawful dismissal where the illegality is due to formal irregularities: clarification is needed of when the contract terminates and of some of the respective effects.

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THE FINANCIAL CRISIS AND SHORT-SELLING OF SECURITIES

Although brought about by a complex host of factors, the crisis has required temporary adjustments to the rules on short selling, which demand our attention. Short selling, of course, is the practice whereby the seller is not, at the time of the deal, the owner of the securities sold, resorting to loans or other hedges to be able settle the securities to be transferred.

This practice is possible in some cases, given the time lag between the date of the market transaction and the date of physical and financial settlement. This type of arrangement has become much more common in more volatile markets, such as the markets in warrants and certificates. Some sophisticated market agents, such as funds with leverage (130/30) or hedge funds, have also recently contributed to an increase in this practice.

The rules governing short selling have varied over time. Legislation has existed banning or limiting the practice since the eighteenth century. In Portugal, under the 1991 Securities Code, short selling was prohibited, resulting in the freezing of securities covered by a sell order. In practice, this meant that it was impossible to sell securities not held at the moment the order was transmitted. Later, the idea gradually took hold that short selling, which increased liquidity, would contribute to the efficiency of markets and to smoother price formation.

In taking these ideas on board, the 1999 Code represent a shift in thinking in relation to the previous code, on two essential points. In the first place, the freezing of the securities to be sold became optional. At the same time, the new rules allowed orders to be accepted even if the party issuing the order had not proven that it had the securities to be sold available.

We should here point out that the existing rules rely to a large extent on the judgment of the financial broker as the system's escape valve. In other words, if the client fails to prove that he has the securities to be sold available, the broker may refuse to execute the order. In addition, the financial intermediary may require that the securities be frozen, and a refusal to do so may also form grounds for refusing to execute the order.

In parallel to the normal rules on transfer prior to ownership, the law provides special rules on permission and prohibition. One special solution is the provision for disposal of securities not yet issued and traded on the grey market. Special prohibitions on trading are contained in the legislation on securities and property funds.

A different issue is that of the use of short selling combined with expedients used to artificially lower the prices of the financial instruments in question. One example is the spreading of false rumours concerning the company in question, at the same time as short selling its shares, in order to maximize gains from a foreseeable drop in prices. This may amount to the crime of market manipulation.

This is why, in the context of the current financial crisis, a number of steps have been taken to ban abusive short selling, as it is these practices which have served to accelerate market losses. The Portuguese Securities Commission was no exception and, in addition to requiring daily reports on short selling operations and on short positions in the shares of listed financial institutions, it issues an instruction requiring market brokers to refuse sell orders when the availability of the securities is not assured at the time the order it is issued, in respect of securities issued by financial institutions. As is usual with emergency solutions, we may expect this requirement to be lifted when the exceptional circumstances which made it necessary have changed.

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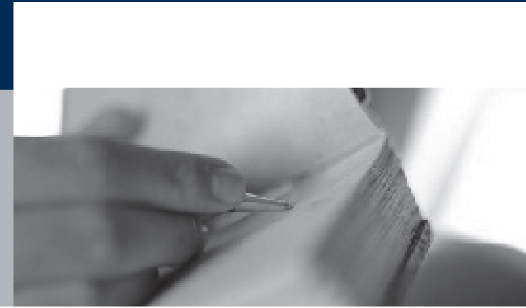
DIRECTORS' LIABILITY BONDS



In harsh financial climates, like that currently prevailing, directors are increasing exposed to the consequences of their management decisions and shareholders are less predisposed to do without instruments which minimize their risks as investors.

One of the instruments designed to guard against possible compensation claims brought against directors by companies, creditors, shareholders and third parties is a bond (or insurance policy), in favour of those, to cover such eventualities.

Under Article 396 of the Companies Code, the directors of limited liability companies by shares (*sociedades anónimas – S.A.'s*) are required to, within 30 days counting from election or appointment, lodge a bond (or file an insurance policy appointing as beneficiaries any persons entitled to compensation) of an amount to be set by the shareholders in the articles of association. The bond shall not be less than (a)€ 50,000.00 as a general rule for limited liability companies by shares and (b) €250,000.00 for limited liability companies by shares issuing securities listed on a regulated market and for which, over two consecutive years, the following thresholds have been exceeded: (i) balance sheet total -€100,000,000.00 (ii) total net sales and other income -€150,000,00000 and (iii) average workforce over the period – 150 (in other words, in terms of governance model, those corresponding to what is known as the reinforced Latin structure).

In line with the tradition of our corporate law the shareholders or the general supervision body may waive the right to the bond / security (except for the companies mentioned in the final part of the previous paragraph). And in practice, despite the low value of the bond required, most companies opt to exempt directors from lodging a bond.

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In the rare cases where the requirement is not waived, the bond must be lodged, on the terms described above, within 30 days of appointment or election, and must remain valid until the end of the calendar year subsequent to that in which the director leaves office for whatever reason.

The penalty for failure to post the bond is "immediate cessation of functions". But this also serves to raise a number of questions, as it is not clear whether "immediate cessation of functions" constitutes a case of lapse (in which case, if thirty days elapsed without the bond being lodged the director would cease to hold office) or else grounds for dismissal from office, dependent on resolution by the shareholders. In practical terms, the solution may also result in legal uncertainty, because third parties wishing to confirm the appointment and powers of directors have to rely on the minutes demonstrating the resolution and/or the companies registry documents, and the fact is that the minute confirming the appointment does not preclude that the director may subsequently have failed to post the bond within the legal time limit of 30 days, and equally when such failure to lodge a bond, determining "immediate cessation of functions", is not subject to filing with the companies registry.

The possibility of replacing the bond by an insurance policy – which would appear, *prima facie*, as better for the director, as it releases him from the need to immobilize a capital sum – has led the authors of the legislation to clarify that the cost of the insurance should not be borne by the company, save insofar as it exceeds the minimum amounts indicated above. This option for the insurance, however, raises the issue of knowing whether or not the exclusion of wilful misconduct shall be allowed. In our opinion such exclusion, as it disfavours the company and the creditors, shall not be allowed. In line with this opinion, the same has been followed by National Commission of the Financial Supervisors, in a recent note on article 369.º of Portuguese Companies Code; reasons being the need to assure a higher level of protection of the third party, without prejudice of the insurance company's right to claim from the director the respective payment.

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THE PHARMACEUTICAL INDUSTRY AND THE PARALLEL TRADE IN DRUGS (PART II)

Refusal to supply drugs by a company in a dominant position with the aim of limiting parallel exports may be abusive, but will not be so if the company refuses to supply "*abnormal quantities*" of pharmaceutical products, in other words, "*quantities out of proportion to those sold previously by the same wholesalers to meet the market needs of the member State*" (decision *Sot. Lélos kai Sia EE. e O.*, of 16.9.2008, cases C-468/06 *et al.*). This is the latest final word from the Court of Justice on the dispute before the Greek courts between the Greek subsidiary of GlaxoSmithKline and drugs wholesalers.

We should recall that the issue of parallel imports is a delicate one, which has been extensively but not always coherently examined by legal and economic thinkers. In the past, parallel importers were regarded as heroes, because they contributed to interpenetration between the economies of member States, helping to realize the internal market. As a consequence, the Court of Justice classified as restrictive on competition both absolute territorial protection (*Consten e Grundig*, 1966) and export restrictions (*Miller*, 1977), even arguing that from then on "*parallel trade must be given a certain protection, (…) in so far as it favours the development of trade, on the one hand, and the strengthening of competition (…), that is to say, in this second respect in so far as it gives final consumers the advantages of effective competition in terms of supply or price (…). Consequently, while it is accepted that an agreement intended to limit parallel trade must in principle be considered to have as its object the restriction of competition, that applies in so far as the agreement may be presumed to deprive final consumers of those advantages.*" (decision GlaxoSmithKline vs. *Comissão*, of 27.9.2006, ase T-168/01, no. 121).

However, in the field of drugs, State interference in free price setting and social security arrangements for subsidising prices for consumers (*vide* Directive 89/105/EEC), coupled with national rules on marketing and distribution (*vide* Directive 2001/83/EEC), have led the courts to consider that, whilst the setting of prices is not entirely free, due to State constraints on this, these prices should be considered when assessing the legality of restrictions on parallel trade, insofar as this is "*one of the factors which may create opportunities for parallel trade*".

It is in this sense that we should stress that this decision recognizes as non-abusive the action taken by companies in a dominant position to defend their legitimate commercial interests in rejecting "*orders for quantities which are abnormal*" or "significant", of "*products intended essentially for parallel exports*" (*Sot. Lélos kai Sia EE. e O.*, no. 71), as the legitimate alternative to the atomic threat that it would be to consider that "*the only choice left for a pharmaceuticals company in a dominant position is not to place its medicines on the market at all in a Member State where the prices of those products are set at a relatively low level*" (no. 68).

Finally, another relevant feature of the decision is that it underlines the "*public service*" obligation on wholesalers, to "*assure that the relevant geographical market is adequately and continuously supplied, in order to assure that patients' needs are met*", avoiding "*drugs shortages*", and that it recalls that national authorities (*vide* INFARMED, I.P.) are responsible for regulating Article 81 of Directive 2001/83/EC (in its current wording – *vide*, in Portugal, Article 100.2 of Decree-Law 176/2006, of 30 August), requiring this Institute to define "*by regulation, the minimum quantities or criteria for determining the minimum quantities of drugs which must be kept at all times by wholesalers operating within national territory, in order to assure continuity of supply and access to the drugs by patients*".

When competition and regulation converge, it will be easier to create circumstances in which "*manufacturers, importers and wholesalers*" can perform their legal obligation "*to supply, dispense or sell the drugs requested of them*" in accordance with "*the principle of continuity of service to the community*" (*idem*, Article 6, paras. 1 and 2).

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"It is not abusive for a dominant company to refuse to supply abnormal quantities of drugs, even when the objective of such refusal is to limit parallel exports."

AUTONOMOUS TAXATION IN INCOME TAXES THE EXPIRY OF THE RIGHT TO ASSESS TAX

The right to assess tax – to render the tax obligation enforceable, with a fixed and certain value – expires, as a rule, four years after the date on which the chargeable event occurs or after the end of the year in which the chargeable event occurred, depending on whether the events in question are formed *instantaneously or successively* (cf. Article 45, parag. 1 and 4, of the General Taxation Law).

So in order to ascertain the moment from which the expiry period of the right to assess tax is counted, we need first to classify the underlying chargeable event.

In what concerns the time element in the chargeable event, events are deemed to be formed *instantaneously* when, because they comprise a single "event" or "circumstance", they take form and are extinguished in the same instant. For example, an *act* or a *document* and an *acquisition* of a property – which are subject, respectively, to Stamp Duty and to Municipal Tax (IMT) -, are taken to be events which are formed *instantaneously.* In contrast, chargeable events which, because they consist of a series of "events" which succeed each other over a pre-set period of time, and are therefore only completed at a moment necessarily subsequent to that at which they started to take form, are regarded as being formed *successively.* Paradigmatically, the *taxable* profit subject to Corporation Income Tax (IRC), consisting – in simple terms – of the algebraic result of increases (gains, income and positive variations in assets) and decreases (losses, costs and negative variations in assets) in the company's assets occurred from the beginning to the end of the taxation period (which is of one year), falls within the concept of a chargeable event which is formed *successively.*

The separation of chargeable events into these two categories (formed *instantaneously* or *successively*), needed to identity the dies a quo for the expiry period of the right to assess tax, has permitted the Portuguese courts and Portuguese Tax Authorities (cf. Circular no. 12/2004, of 11 June 2004) to classify – correctly – chargeable events subject to Personal Income Tax (IRS) and Corporate Income Tax (IRC) through a withholding final rate (e.g. distribution of dividends to a non-resident tax payer) as events which are formed *instantaneously.* Nevertheless, this recognition was followed by the inevitable amendment to the wording of Article 45.4 of the General Taxation Law (cf. Article 40.1 of Law 55/2004, of 30 December – the 2005 State Budget Law), which altered the date from which the expiry period for assessment of IRC on such instantaneously formed events is counted, moving it to the first day of the calendar year following the occurrence of the event.

However, in addition to events subject to withholding at a final tax rate, there are other events, also subject to IRS and IRC, which do not constitute *instantaneously* formed chargeable events and which are not covered by the said exception introduced in Article 45.4 of the General Taxation Law in terms of the counting of the expiry period for the right to assess the tax.

We refer, in general terms, to the *expenses* and *charges* subject to autonomous taxation. As follows from the above, these *expenses* and *charges* are *instantaneously* formed chargeable events, facts formed by a single "event" (the *expense* or *charge*). In effect, irrespective of the moment when considered for declaration or taxation purposes, it is the undocumented expense, in the form of a cash outflow at a given moment – for argument's sake, on 12 April 2003 – which is automatically and *autonomously* subject to IRC, at a rate of 50%.

This means, in the hypothesis in question, that the expiry of the right to assess the IRC payable by way of autonomous taxation on this expense occurred on 12 April 2003 would end on 13 April 2007. Consequently, if the tax authorities were to effect an additional assessment of IRC with regard to the taxable profit of 2003 and to this *expense* subject to autonomous taxation, which, subsequently, took place on 12 April 2003, notifying the tax payer of this in early December 2007, this tax assessment, as regards the part corresponding to the tax assessed by way of autonomous taxation, would be unlawful due to the fact that the expiry of the right to assess has already occurred on 13 April 2007.

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THE NEW RULES ON COURT COSTS

On 5 January 2009, Decree-Law 34/2008, of 26 February 2008, will take effect, as amended by Law 43/2008, of 27 August 2008, and by Decree-Law 181/2008, of 28 August 2008, approving the Procedural Costs Regulations, revoking the Judicial Costs Code and amending, amongst other legislation, the Code of Civil Procedure, the Code of Criminal Procedure and the Code of Fiscal Proceedings and Procedure.

The aim of the legislators was not only to unify and simplify the dispersed legislation on this matter, establishing a common set of procedural rules for costs due in any type of judicial, administrative or fiscal proceedings, but also to help unclog and speed up the judicial system.

In keeping with the aim of reducing congestion of the system, the new legislation provides incentives for the use of alternative means of dispute resolution.

In addition, the new legislation seeks also to implement measures designed to penalize litigation regarded as excessive or unwarranted.

In effect, the legal changes betray a clear intention to penalize litigation, with application of a special court charge for corporate litigants bringing a given volume of actions and, for instance, the institution of an "exceptional penalty charge", to be applied at the judge's discretion, when he considers the parties to be using obstructive or delaying tactics.

Both these charges raise serious questions of constitutional admissibility, the former because it restricts the right of access to the courts, and consequently the right of action, and the latter because it results in application of a penalty, dependent to a large extent on exercise of the judge's discretionary powers, not proceeded by due adversarial process. The fact that this legislation has not been submitted, through the proper channels, to prior analysis of its constitutionality is therefore the cause of some perplexity.

Moreover, rules of this type may become heavy-handed when transposed to criminal procedure. For instance, under the new rules, private prosecutors and accusers may be held liable for payment of court costs in cases where, in the former case, the accusation brought is rejected in full or in part and, in the latter case, when it is shown that the complaint was made in bad faith or with serious negligence.

In this area, provision is also now made for the possibility of self-assessed court costs on constitution of the private prosecutor or on the request of the judicial pre-sentence investigation, being subsequently corrected, in view of the outcome of the proceedings and the actual usefulness of the procedural steps taken or promoted by the private prosecutor.

Other increases in procedural expenses have added to this tendency to penalize litigants.

One of the main increases are in the court costs for administrative and fiscal proceedings where, in addition to scrapping several exemptions and situations where fees were previously reduced, the new rules eliminate the cap of €250,000.00 on the value of actions and appeals for the purposes of assessing court fees, meaning that any amount above this value is now included when calculating costs.

A further example of the same trend is the newly-enshrined possibility of court fees being adjusted in "especially complex" cases.

Inversely, however, a number of measures serve to ease the extra burden on litigants. In the first place, the attorney's fees and expenses are included, up to a set limit, in the costs payable by defeated litigant and, secondly, the defendant's liability for court costs is limited to the cases of guilty decisions at first instance or total rejection of an appeal.

Finally, we should draw attention to the reduction of 25% to 50% in force since September 1st. for pleadings submitted online.

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EXTENSION OF PUBLIC SERVICE CONCESSIONS AND COMPETITION

A question which has recently attracted attention is that of the extension of public service concession agreements. Strictly speaking, the point at issue is whether these extensions are legitimate, as it appears that decisions on the allocation of economic benefits, which by rights should be subject to market competition, are in fact being shielded from just such competition. In other words, to paraphrase a Brazilian author who has written tellingly on the subject, we need to determine whether or not these extensions have actually involved "*cheating on the best bid principle*", by failing to allow outsiders to demonstrate that they might be able to provide the public service on terms more favourable to the public interest.

No single answer to this question will fit all the different scenarios.

Of course, unless provision has been made to this effect in the rules governing the procedure and the contract and if, on the other hand, no abnormal change in circumstances has occurred, the parties cannot simply extend the contracts on their expiry date (or close to that date). This would amount to an inadmissible rejection of the fundamental principles of the European and national public procurement system – competition, transparency and non-discrimination.

As the European Commission has stated, in these cases, extension of the concession should be treated as equivalent to the conclusion of a new concession agreement, and should therefore proceed in accordance with the rules which flow from the basic tenets of primary community law on public procurement.

If, on the other hand, the contractual clauses make express provisions for the possibility of extending the duration of the agreement and if, in addition, the concession agreement was concluded as the outcome of a genuine competitive procedure, it will in principle be admissible to decide on such extension. In these circumstances, no material interest relating to the protection of fair competition and transparency appears to be unjustifiably derogated. Of course, this will all depend on the specific contractual provisions – an extension for one period (or successive periods) equal to the original duration may raise more doubts than an extension for a lesser period. It will also be important to consider the degree of autonomy enjoyed by the contracting authority in extending the agreement.

There are other cases where a decision to extend is taken when the contract still has time to run, unsupported by any express provision to this effect, but justified by an abnormal alteration in circumstances. If it can be proven that overriding economic reasons and also the need to develop the public service to pre-defined quality standards require a fresh capital expenditure plan, the contracting authority should be able, with due grounds, and within the general limits deriving from the rules on the modification of administrative contracts, to order this to happen, when there is a risk of serious damage to the running of the public service and to the public interest. In return, as the price payable for derogation of the principle of the stability of contracts, the public authorities will be duty bound to assure the contractor that the economic and financial stability of the concession will be restored. Naturally, a contractual procedure may instead be adopted for altering the relationship between the parties, and indeed a bilateral approach is more consistent with a more even-handed conception of contractual relationships under administrative law, as has gained growing acceptance.

There are several options at the disposal of a contracting authority seeking to restore the economic and financial balance of the contract, from the attribution to the concessionaire of direct compensation, to increasing the charges payable by users, and extending the duration of the contract by a proportionally appropriate period to repay and provide a return on the additional investment, under normal operating conditions (cfr., to this effect, the provisions of Article 410.1 of the Public Contracts Code), or indeed any combination of these solutions.

The third option (extension of duration) will often be preferable, either because the authorities cannot, for budgetary reasons, meet the new costs directly, or else because the increased charges needed might, purely and simply, by virtue of their scale, render the public service in question inefficient and anti-competitive.

In this context, it will therefore be legitimate to argue that extension of duration does not amount to groundless perpetuation of the concession agreement, or involve any "private treaty in disguise", but is instead justified by the need to pursue the public interest.

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ANA FILIPA MORAIS ANTUNES PUBLISHES WORK ON SALE/LEASEBACK AGREEMENTS

Sale/leaseback agreements are a form of finance lease, whereby the owner of an asset sells it to a third party who immediately leases it back to him, granting the lessee the possibility of buying it back at the end of the lease.

Although not expressly provided for in Portuguese law, sale/leaseback agreements are of unquestionable importance, and the Portuguese courts have already rendered decisions concerning them

(cf. Decision of the Supreme Court of Justice, of 28 October 1999, case no. 99B635, and Decision of the Lisbon Court of Appeal, of 18 March 1999, case no. 0007752, both in *http://www.dgsi.pt*).

In "Sale/leaseback agreements – The difficult dialogue with the legal prohibition *of comissoria lex*", recently published by Universidade Católica Editora, Ana Filipa Morais Antunes seeks to clarify some of the issues concerning these agreements, in the light both of Portuguese legal scholarship and case law and of legal experience in other countries.

Might sale and leaseback be admissible under Portuguese law? Does sale and leaseback consist of a contract designed to function as a guarantee and of an atypical security for performance of obligations? Should sale and leaseback be interpreted under the rules on chattel mortgages? Do sale/leaseback agreements breach the prohibition of *comissaria lex,* established in Article 694 of the Portuguese Civil Code?

Discussion of the admissibility of sale and leaseback is extremely timely, when we consider that this contractual form provides not only for financing, but also for the provision of security, and could be taken as a faster and more efficient alternative to the typical guarantees for obligations.

In this study, originally presented as coursework for the Masters and Doctoral Programme in Private law at the Faculty of Law (Lisbon School) of the Portuguese Catholic University, the Author has sought to answer the question of admissibility of indirect guarantees within the Portuguese legal system, and also to clarify whether sale/leaseback in fact constitutes a guarantee for the discharge of obligations.

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