



NEWSLETTER

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Enforcing Stock Options

Option contracts are regulated by the applicable provisions governing promissory contracts. As such, they are promptly enforceable when the obligation falls due (the agreed exercise date) and the writer, despite having been notified to comply with the exercise within a reasonable period of time, fails to fulfil such obligation.

In the event of the writer's bankruptcy, once proceedings are filed and regardless of whether the company is to be liquidated or recovered, creditors may not enforce rights other than those petitioned in the insolvency proceedings within 30 days from the date of notification by the Court of the preliminary decision to put the company into administration.

During such period, the debtor (writer) is deprived of any powers to administer or dispose of assets making up the estate until a final decision is made on whether to recover the company or proceed with liquidation. Such powers will be vested in the court appointed administrator, who will act as the company's representative for all matters of a financial nature and is entitled to terminate all transactions that may harm creditors. Acts undertaken in breach of these arrangements are ineffectual.

As such, it will be left to the administrator's discretion whether or not to allow for the enforcement of debts and obligations, which includes options, depending on whether such deal has a negative or positive impact upon the bankruptcy estate.

A call option holder will certainly not enforce it, given the insolvency status of the company. Put holders, on the contrary, may have a legitimate interest in enforcing their options so that their own stock is acquired by bankrupt company at a set price, therefore being considered creditors. Enforcing the option is, however, dependant on fulfilment of the following requirements. According to Portuguese Insolvency Law provisions, derivative transactions are automatically terminated and liquidated upon declaration of insolvency. If the option was already exercisable at the time, the

creditor will be entitled to claim the value of the difference between the exercise price and the current fair market value (based on the market or stock exchange prices at the time of adjudication of bankruptcy). On the contrary, if the option is not yet exercisable, the creditor shall not be entitled to a claim at the time of insolvency.

Portuguese insolvency proceedings claims are hierarchal and divided into four categories: secured, preferential, unsecured and subordinated claims. Where the option holder is entitled to claim the abovementioned value and given the fact that he may already be a shareholder, such claim will be considered unsecured or even a subordinated claim, and rarely settled in full.

Put and call options are not often granted through shareholders' agreements but, instead, through private option contracts entered into by the shareholders alone. Granting of options through such mechanisms is, however, a viable alternative. Granting of stock options in the company's by-laws is very rare as these are filed with the Companies Registry and follow an inflexible and often cumbersome process of issue and registration. Furthermore, by being readily available to the public, it would to a large extent hamper confidentiality and secrecy of commercially sensitive matters, especially where privately held companies are concerned.

Both shareholders' agreements and by-laws are equally enforceable, although companies are not bound by the former; such type of agreement is fully enforceable between the shareholders.

Options granted in a shareholders' agreement or in the company's by-laws are equally valid and enforceable. Only parties entering the stock option contract, i.e. the holder and writer, will be bound by its clauses.

Contractual positions of such option contracts may, however, in certain circumstances be assigned. Such assignment is permissible and will be subject to the fulfilment of



determined conditions, depending on the nature of the contract, the parties involved and whether there has been a division of the original writer's assets following a judicial ruling on divorce or in the event of death.

In a nutshell, option contracts are exercisable against the spouse of the original writer of the said contract that gives her or his consent. The contractual position of a writer of a put option contract can be assigned to the deceased's successors provided certain requirements are fulfilled, as follows.

Death and heirs

According to the applicable Contract Law and Inheritance Law provisions, obligations and liabilities enshrined in promissory contracts entered into by the parties are enforceable against the same and their heirs provided that the rights and obligations of each contract are not entered into as result of the *intuitus personae* nature of the parties. Put options contracts, whereby the deceased shareholder promised to sell a specific amount of shares at a given price, may be exercised and enforced against the heirs.

Divorce and spouses

Provisions governing the supplementary matrimonial property regime in Portugal stipulate that whatever assets are earned or acquired by one of the spouses or partners during marriage are deemed to be common and, as such, shall be treated as being co-owned by both spouses regardless of the fact that the option is held individually by the writer. Upon divorce, common assets are distributed equally between the spouses. It is possible, although rare, for shares to be distributed in such manner, where the shares would be awarded to the divorcing spouse that was never a party or consented to the option agreement. If shares are awarded, as a result of the division of common assets in a divorce, to the original writer's spouse, who was not party or

consented to the stock option contract, the option contracts is not exercisable against him or her. Consequently, if the underlying shares are disposed of following a divorce, the stock option holder may only enforce the option against the original writer.

Well designed option contracts will include specific clauses to enhance enforcement, so that the shares are effectively acquired or sold, and specific clauses to provide for swift remedies and/or compensation in the event of non-fulfilment or breach of contract, thus creating interwoven layers of protection.

In order to guarantee compliance it is advisable, where there is a strong and justified uneasiness toward the writer, to agree upon a pledge of the underlying shares or to deposit the shares with a broker until such time as the option is exercised. The pledge, who may be the call option holder, will be entitled to retain the assets as security against the underlying obligations of the option contract (but cannot sell the shares) and may refuse to return them until the contractual conditions have been fulfilled.

Although they are not mechanisms to increase compliance, sureties and other guarantees will increase the option's enforceability and improve the chances of recovering losses and damages in cases of non-fulfilment or breach of contract.

Personal and bank guarantees, whereby one party (a person, company or bank) assumes responsibility for payment of damages and losses resulting from breach of option contract provisions, may be agreed upon. Rarely, where put options are concerned, if the guarantor is also a shareholder it also possible for the guarantor to uphold the contractual obligations and perform on the writer's behalf with the holder's consent. Depending on the desired level of protection and on the guarantor's willingness to provide written consent, sureties may be

joint and primary or ancillary and derivative.

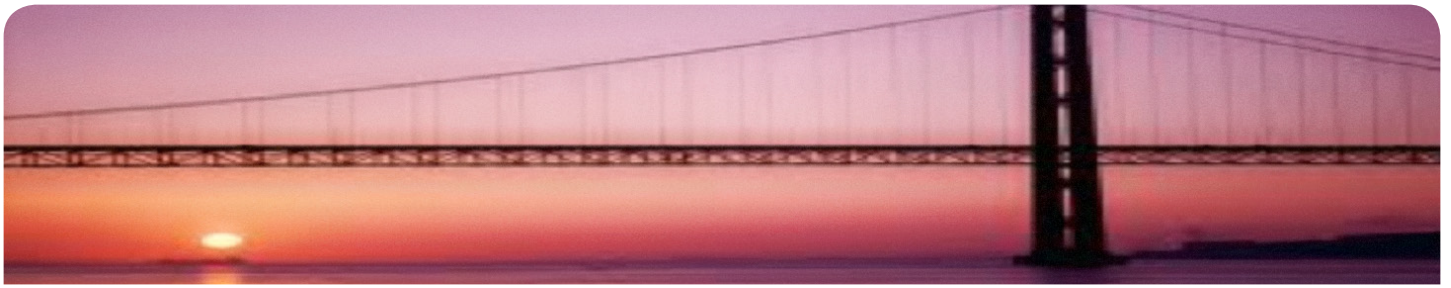
Penal clauses and liquidated damages clauses are also available to increase the recovery of losses and damages, but will not provide for additional compliance.

For the most part, option contracts are regulated by the applicable provisions of Portuguese Contract Law governing promissory contracts. As such, remedies are only provided for breach of contract when the writer cannot or will not fulfil his duties under the contract upon exercise of the option.

Provided the parties are not obliged to fulfil any other ancillary conditions and clauses potentially enshrined in the contract prior to the exercise date, the writer is not considered to be in breach if he disposes of the shares subject to a certain option before such time. The writer shall be deemed to be in breach of contract only where exercise on the specified exercise date cannot be complied with. In fact, solely non-fulfilment due to an unavailability of own shares to sell – at the time of the option's exercise – is capable of triggering the following remedies to protect and, primarily, compensate the holder.

Specific performance proceedings, filed by the holder of the option, will either compel the writer to acquire, resell or issue own stock and sell it to the former or, where impossible or excessively costly for the writer, to award a sum to restore the holder to the same economic position he was in at the time the option was granted, or would be expected to be in, if fulfilment of the contract had been performed.

However, the disposal of shares in violation of a certain share option contract is not challengeable. Provisions governing the fulfilment of contracts provide that the void ability of agreements and reversion of assets can only be triggered where a



debtor, acting in bad faith, has imperilled, diminished or eliminated the estate thus endangering creditors' guarantees and satisfaction of their credits.

The parties may, however, agree to award liquidated damages (or similar, under a penal clause) following breach of contract.

Legislation

The New Extraordinary Portuguese Surtax

The extraordinary tax is intended to reduce the budget deficit and its creation is justified by the worsening of the sovereign debt crisis. Its extraordinary character also results from the fact that this tax is subject to a time limitation as its use will presumably be limited to this year and it will not be repeated in subsequent years.

This extraordinary surtax will apply to chargeable income from the various categories of IRS (personal income tax), to the extent they exceed the annual value of the minimum salary, and including those subject to special rates such as capital gains. The income of non-habitual residents is also subject to this tax although the income of non-residents is excluded. As for income from capital, non-chargeable items such as interest and dividends are excluded. This reveals concerns about savings and bank financing. What is certain is that the decrease in income available to families, alongside an increase in spreads and interest rates, will have negative consequences for mortgage lending and, ultimately, for the banking system, and this will have certainly been the subject of appropriate consideration.

From the financial point of view, the extraordinary surtax will penalize salaried employees and pensioners to a greater extent. However, as has been mentioned, more than 60% of the revenue will come from the 10% of taxpayers who are taxed in the highest bands. In other words, we

are witnessing (yet another) increase in the progressive nature of IRS, in view of the exemption thresholds for this surtax (2x annual minimum salary). These taxpayers will pay the surtax by withholding tax this coming December and this will have the character of a payment on account as an adjustment will be made to the tax due after presenting the income tax return in 2012.

In relation to independent workers and those with other income such as rental income and capital gains, no provision is made for any payment on account during this year. The tax will only be paid in 2012 on the basis of the return to be presented for the income earned in the year 2011.

It also remains to be seen whether the revenue from the extraordinary surtax will be applied in its entirety to the state budget. In this scenario, such an application would be duly justified in light of the Autonomous Regions Finances Law of the and also in light of the Local Finances Law, which make provision for certain exceptions as to the destination of revenue, specifically in the case of extraordinary taxes.

Regulation 1/2011 on disclosure duties of consulting and investment firms and systems and services market managing entities.

Regulation 1/2011 provides for disclosure duties to holders of qualifying shareholdings of consulting and investment firms of market managing entities for systems and services as well as disclosure duties on the appointment of board members and supervisory board members.

Provisions of regulation 1/2011 amend those of regulations 4/2007 on the same topics disposing on the details and information that must be provided in the communications effected to the Portuguese stock market supervisory authority (CMVM) Comissão do Mercado de Valores Mobiliários referring to merger and acquisition projects

of consulting and investment firms, systems and services, markets managing entities as well as increase and decrease of qualifying shareholdings. The aforesaid legal provisions also stipulate the information that must be provided to CMVM, on board of directors and supervisory board members appointment. The aim of such provisions is to allow not only for prudential assessment of acquisitions and increase of shareholdings but also, on the capabilities, qualifications and reputability of those appointed to carry out such skilful duties.

CMVM Regulation 2/2011 provides for disclosure duties on transactions effected on derivatives where the underlying assets are admitted to trading on a regulated market.

Provisions of Regulation 2/2011 amend those of Regulation 2/2007 on the duties to report transactions on financial instruments in order to include in those duties all financial instruments whether or not such transactions were carried out on a regulated market. Such obligations become binding also for all financial brokers, either with head office or any other presence in Portugal namely through a branch. The duty to report such transactions must be affected no later than the close of the following working day to which the transactions took place. Such duties of reporting will not be applicable to transactions on derivatives not admitted to trading on a regulated market. The scope of the provisions aims at preventing and monitoring market abuse and insider dealing.

Case Law

Topic matter: Tax Voluntary Arbitration

Case: Judgement issued by the recently created Fiscal Arbitration Court. Source: www.dgsi.pt

The recently enacted "January 2011" Fiscal Arbitration Court ruled on the refund of



Stamp Duty levied by the Portuguese Tax Authorities for the registration of a share capital increase on the amount of Euros 12,500,000, on the basis that it was in breach of the applicable European provisions.

Specifically the judgement refers to a ruling of the European Union Court of Justice on this matter which provided that it was unlawful to levy any taxes on share capital increase of companies.

The Portuguese Tax Authorities appealed on the grounds that the Fiscal Arbitration Court did not have competence to issue such judgement that the responsibility for the refund lied with the Registrar of Companies rather than with the Tax Authorities and that the levying of Stamp Duty on share capital increase of companies was not in breach of European Union provisions.

An appeal is predictable, notwithstanding the judgment to be historically the first to be known, although it remains unpublished. It also reflects the expectable type of defence the tax authorities will put forward in the years to come: the scope of the Fiscal Arbitration Court legal powers.

Case Law

Topic matter: Banking secrecy
Case: Decision of The Court of Appeal of Lisbon. Source: www.dgsi.pt

The duty of confidentiality, including banking secrecy is not absolute and may be lifted to protect other rights, especially those related to the right of access to justice and effective judicial protection as provided in the provisions of Article 20, paragraph 1 and 5 of the Portuguese Constitution.

In the present case, it seemed necessary that the claimant (Ex wife) in injunction proceedings against her ex husband gains knowledge of the transactions of the defendant's bank account in order to ensure an equitable sharing of the couple's joint assets following their divorce.

News in Brief

1. Maria Antónia Cameira speaks at 55th UIA Miami annual Congress.

We successfully announce the release of our latest publication "Corporate Governance in Practice" which served as a basis for the debate of the joint session of the M&A, Banking and Corporate Law Commissions at the congress of the UIA, in Miami, which was held on the 31st October 2011- 4th November 2011. The paper focuses on bringing in depth and breadth to the rules and recommendations aimed at enhancing corporate governance practices, of Portuguese management and boards.

2. Cameira Law on the move

On 30th August 2011 Cameira Law relocated its London Office to Berkeley Square, in the heart of Mayfair, in a move set to harness the evolving synergies in London's thriving international legal and business markets. The firm welcomes the change whilst pursuing its commitment to provide exceptional legal services and strengthening its cross border activities between Portugal, UK and Brazil.

3. The Legal 500 recognition

Cameira law celebrates top tier ranking in the latest edition of Legal 500
Cameira Law is delighted to announce through the recent success of the firm that it has officially been awarded top tier ranking in the Legal 500, 2011. Such recommendation highlights the dedication, drive and deliverance provided by the firm worldwide.

The Legal 500 Series, now in its 25th year, is widely acknowledged as the world's largest legal referral guide. This year, more than 180,000 in-house counsel and lawyers have been surveyed and interviewed globally. The Legal 500 is an independent guide, and firms and individuals are recommended purely on merit.

Cameira law has retained excellence through recent publications, such as Put &

Call Options Over Shares Advantages And Pitfalls, Acquiring Regulated Businesses Mergers and Acquisitions and Competition Law Perspectives, M&A Revival: taking off The corporate insolvency processes connection, Effects and Recovery from the Financial Crisis and events held in and around London.

4. Employment Law Guide

We proudly announce the release of the Portuguese Employment Law Guide. Concise and easy to understand, the guide is a must-have for both employers and employees.

The Employment Law Guide outlines the laws that govern employment relations, employment agreements, working hours, holidays, pay, disputes and grievances, health and safety, discrimination and privacy. This edition covers the major amendments to Portuguese employment law introduced by the law 7/2009 and is up-to-dated up to June 2011.

The Guide is a must-have reference for anybody involved in employment law, employment relations, human resources and management - employers, employees, managers, HR and employment relations specialists, union members and representatives, lecturers and students.

5. Mr. Carlos Costa, Governor of The Bank of Portugal, - CPE (Centre of Portuguese Studies) - 16th June.

Cameira Law, a member of the CPE, organized and sponsored another CPE dinner on the 16th June 2011 at the Institute of Directors.

Governor of Bank of Portugal, Carlos Costa was the keynote speaker. His presentation focused on the theme: "The financial Crisis and the seeking of financial help from IMF". The dinner was again joined by four major top level sponsors supporting the CPE: Banif Investment Bank and Millenium BCP from Portugal and Caixa Geral de Depositos and Bank Espirito Santo in the United Kingdom.