

The International Comparative Legal Guide to:

Environment Law 2005

A practical insight to cross-border Environment Law



Published by Global Legal Group with contributions from:

Advokatfirmaet Haavind Vislie AS
Arthur Cox
Ashurst
Basham, Ringe y Correa, S.C.
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Stroeter & Royster Advogados
University College London
Vinge
Ziv Lev Law Offices
Žurić i Partneri

Portugal

Alberto Galhardo Simões



Miranda, Correia, Amendoeira & Associados

Ricardo Alves Silva



1 Enforcement agencies/bodies

1.1 What agencies/bodies are involved in the enforcement and administration of environmental law?

In Portugal there are several bodies involved in the enforcement and administration of environmental law. The most important are: the Environment and Land Zoning and Planning Ministry (Ministério do Ambiente e do Ordenamento do Território), the City Councils (“Câmaras Municipais”), the Environmental Institute (Instituto do Ambiente), the Waste Institute (Instituto dos Resíduos), the Water Institute (Instituto da Água), Nature Conservation Institute (Instituto da Conservação da Natureza), General-Directorate of Land Zoning and Planning and Urban Development (Direcção-Geral do Ordenamento do Território e Desenvolvimento Urbano), General-Inspection of the Environment (Inspeção-Geral do Ambiente) and the Public Prosecutors Office (Ministério Público).

1.2 What policies underlie the enforcement of environmental law by such agencies/bodies, and to what extent is environmental regulation impacted by other regulatory controls (such as price controls and/or energy regulation)?

The main principle is laid down in broad terms in the Portuguese Constitution of 1976. Article 66 guarantees a right to a clean and healthy environment and the respective duty of all citizens to defend it.

At the next legislative level, there are three key laws, which can be said to form the main skeleton of Portuguese environmental law, as follows:

- Basic Law on Environment (BLE-Law No. 11/87) - sets forth the main principles of the Portuguese environmental legal regime;
- Environmental Impact Assessment Law (EIA - Decree Law No. 69/00) - the main legislative tool provided by the legislator to prevent environmental damage; and
- Law of Non-Governmental Environmental Organisations (NGEO - Law No. 35/98).

The BLE lists several principles that must be accomplished as far as the environment is concerned:

- Principle of prevention - actions with immediate or

potential effects on the environment must be anticipated, rather than corrected;

- Principle of balance - the appropriate means of integration of the economic and social growth policies and the preservation of nature must be adopted;
- Principle of participation - different social groups are expected to intervene in the setting out and execution of the environmental policy, through legal entities, whether public or private;
- Principle of the most appropriate level of intervention - environmental policy measures should be implemented at the most suitable level of action (whether international, national, regional or local);
- Principle of international co-operation - determines the search for solutions commonly accepted by other countries or international organisations for environmental problems and for the management of natural resources;
- Principle of recovery - obligation to take urgent measures to stop environmental degradation and to promote the recovery of affected areas; and
- Principle of liability - entity shall be responsible for the damages caused to third parties by any direct or indirect action on natural resources.

It follows from the main environmental statutes that the most important policies that underlie the enforcement of environmental law are:

- Sustainable development;
- Pollution control and prevention;
- Adequate territorial planning;
- Nature conservation;
- Rational use of natural resources;
- Environmental education;
- Pollution prohibition;
- Noise reduction; and
- Polluter-payer.

Due to the sustainable development policy and to the polluter-payer principle, numerous other regulatory controls influence environmental regulation. A good example of such influence are the tax advantages offered to companies and individual citizens that invest in renewable energy sources.

2 Environmental permits

2.1 When is an environmental permit required, and may environmental permits be transferred from one person to another?

Environmental permits are generally required for polluting or potentially environmentally damaging activities in sensitive areas, notably water, air, noise and waste.

Examples of some of the most important permits are: (i) noise pollution; (ii) water usage (private, industrial, energy production, etc.), waste water management, use of land adjacent to water bodies, in-water construction and beach constructions; (iii) emission of pollution into the atmosphere; (iv) green-house gas emissions; (v) waste management; (vi) storage, treatment and destruction of waste; (vii) installation of industrial facilities; and (viii) construction of certain industrial facilities and licensing of activities harmful to the environment, such as certain animal farms, waste management facilities.

Permits are granted based on specific characteristics that can range from the qualities of the company, the facility, site for construction or any other relevant details that influence the granting of the permit. Therefore, the general rule is that most permits required for facilities, construction and activities carried out by companies may only be transferred along with the company, construction or facility they respect to.

2.2 Is there any right of appeal against the decision of an environmental regulator not to grant an environmental permit or in respect of unduly onerous conditions contained in an environmental permit?

Under Portuguese Law the decisions of environmental regulators in cases of both refusal to grant a permit and issuance of a permit which imposes unfair or unduly onerous conditions can be subject to administrative and judicial appeals.

The act that grants or refuses an environmental permit is considered an administrative act, which can be appealed to the hierarchical superior body (under the Administrative Procedural Code - Decree-Law no. 442/91), or to the administrative courts. This appeal to the administrative courts (under the Administrative Tribunal Procedures Code - Law no. 13/2002, and Law no. 4-A/2003) can be filed along with precautionary measures aimed at assuring temporary protection of the claimants rights prior to a final decision by the court on the merits of the case.

2.3 Are there any special permitting requirements (e.g. requirements to conduct environmental audits or environmental impact assessments) for particularly polluting industries or large-scale installations/projects?

There are special permitting requirements regarding particularly polluting industries and large-scale installations/projects. The most relevant are as follows:

- (i) Environmental Impact Assessment: Under Decree-Law no. 69/2000 an environmental impact assessment

must be conducted in specific cases, such as construction of oil refineries, nuclear plants and installations, certain mineral transforming installations, certain industrial chemical plants, large scale transportation infrastructures, dams, oil wells, large scale agricultural infrastructures, etc.

- (ii) Integrated Pollution Prevention (IPPC): IPPC is governed through Decree-Law no.194/2000. Pursuant to the IPPC regime, certain industrial facilities considered as highly polluting (for example, oil refineries, metal production facilities, ore furnaces, glass production facilities, chemical facilities, waste management facilities, etc.) must obtain a prior environmental license in order to commence activity. The license establishes specific environmental duties, such as adoption of preventive measures for the control of pollution; prohibition of production of "important pollution"; and avoidance of waste production, or its respective valorisation or elimination.
- (iii) Control of Major-Accident Hazards Involving Dangerous Substances: Decree-Law n.º 164/2001 applies to facilities which use or store dangerous substances. The operator of such facilities must adopt all the necessary measures to avoid serious accidents and to limit their consequences to mankind and to the environment. Prior to commencement of activity, the environmental authorities must be informed of the dangerous substances used or stored, and of the activities performed on the premises. Policies on the prevention of serious accidents, security reports, and internal and external emergency plans must also be approved by the environmental authorities prior to licensing of the activity.

2.4 What civil and/or criminal enforcement powers does the government have in connection with the violation of permits?

In order to ensure compliance and enforce environmental principles, rights and obligations there are several mechanisms spread throughout statutes such as the Portuguese Criminal Code, the Basic Law on Environment and the Environmental Impact Assessment Law.

The basic principle is in Article 52.3 of the Constitution whereby any person has the right to initiate court proceedings aimed at promoting the prevention, the end or the repair of an environmental damage, and at obtaining the respective compensation. The same possibility is set forth in article 40.4 and 40.5 of the BLE.

The specific mechanisms include: (i) imprisonment or fines for the violation of environmental permits and rules; (ii) accessory penalties, such as confiscation of material and prohibition of future activity; and (iii) precautionary measures destined at avoiding environmental disasters. The amount of the fines, as well as the scope of the accessory penalties and precautionary measures, vary depending on the specific rules and on the seriousness of the violation.

The most serious situations are treated by the Portuguese legislator as crimes, giving rise to fines or imprisonment. The Portuguese Penal Code lists a number of actions that

amount to a crime, as they are, directly or indirectly, damaging to the environment, such as:

- pollution (imprisonment up to 3 years, or fine and in certain cases which endanger the life of third parties imprisonment can go up to 8 years);
- starting fires or causing explosions, and other behaviour, such as the emission of toxic gases, radioactive substances (3 to 10 years imprisonment) or nuclear energy (5 to 15);
- disregarding construction regulations and causing damage to facilities (1 to 8 years imprisonment); and
- Damages Against Nature, such as eliminating fauna or flora species, or destruction of natural habitats (imprisonment up to 3 years, or fine).

Environmental wrongdoing also gives rise to a type of administrative liability (“responsabilidade contra-ordenacional”), which allows public authorities other remedies in order to prevent and/or cease environmental offences. It is set forth in article 47 of the BLE, whereby any breach of rules contained in environmental legislation, which does not amount to a crime, shall be deemed an administrative violation and, as such, sanctioned with a fine. Said article also allows for accessory sanctions applicable to offenders of environmental legislation, such as prohibition of performing an activity, revocation of state subsidies, permits and licenses, confiscation of equipment, to name a few.

Other specific enforcement powers also apply depending on the sector. For example, Article 19 of the Waste Management Law provides that in case of emergency or serious danger to public health or the environment, the Minister of Health or the Environment Minister can undertake the necessary actions to avoid any damage, including the suspension of any waste management activity. The statutes on the Quality of Water (Decree-Law nr. 236/98), the Environmental Impact Assessment, the Integrated Pollution Prevention regime, and the rules on Control of Major-Accident Hazards Involving Dangerous Substances also contain specific enforcement powers.

Main actions can also be filed to obtain the closure of illegal installations and compensation for damages. Precautionary measures can be filed to assure temporary protection of the claimant’s rights, prior to a final decision by the court on the merits of the case.

3 Waste

3.1 What is waste and are there special categories of waste that involve additional duties or controls?

Portuguese classification of waste has been strongly influenced by the European Union legislation on this matter. Currently, the Portuguese definition of waste and the different types thereof is provided in Decree-Law no. 239/97 (“Waste Management Law”). Pursuant to this statute, waste is “any substance or object that a holder disposes of, or wishes to dispose of”. Waste is material, often unusable, left over from any manufacturing, industrial, agricultural, or other human process, as well as material damaged or altered during a manufacturing process and subsequently rendered useless.

In Portugal, as in all other European Union Member-States, the European Waste List is in force (Decision of the Commission no. 2000/532/CE, as subsequently amended). Said list classifies all substances or objects considered waste.

The Waste Management Law, and other specific laws, also list various categories of waste, including hazardous waste, industrial waste, urban waste, hospital waste, radioactive waste, demolition waste, inert waste, and organic waste.

Specific types of waste, due to their increased danger (notably their toxicity), are subject to special management and disposal rules, including: used tyres (Decree-Law no. 111/2001), used oils (Decree-Law no. 87/91), Mud from Waste Water Treatment Plants (Decree-Law no. 446/91), to name a few.

3.2 Can I store and/or dispose of waste on my property?

Pursuant to the provisions of the Waste Management Law (Decree-Law no. 239/97), unauthorised storage and disposal of waste is forbidden.

As such, only duly authorised persons and companies may store and dispose of waste on their property, except in the case of storage of industrial waste on the producers property, which is always permitted on a temporary basis. Long term storage of waste or disposal in a property must first be licensed by the Environment Ministry (when an Environmental Impact Assessment is required) or by the Waste Institute (in certain cases set forth in article 9.2 of the Waste Management Law.)

3.3 If I transfer waste to a lawful recipient, do I retain any residual liability in respect of it (e.g. if the transferee/ultimate disposer goes bankrupt/disappears)?

Under article 6.1 of the Waste Management Law (Decree-Law no. 239/97), the final responsibility for the waste lies with the producer. However, this liability is without prejudice to the different potential liabilities of other operators in the strict measure of their involvement in the management/disposal process.

This means that, in principle, when a producer transfers its waste to a lawful recipient, it will no longer be responsible for its final destination. The same will happen, for example, with a company responsible for the temporary storage of waste once it transfers such waste to a disposal facility, etc.

These rules will obviously not be applicable to situations in which the producer acts unlawfully, giving, for example, wrongful information as to the nature of the waste.

4 Liabilities

4.1 What sort of liabilities can arise where there is a breach of environmental laws and/or permits, and what defences are available?

The general framework for liability due to breach of environmental laws and/or permits emerges from the Basic Law on Environment (BLE - Law no. 11/87), which influenced all subsequent environmental legislation.

Three types of liability can arise depending on the action: criminal liability, administrative liability (“contra-ordenacional”) and civil liability. Criminal liability is treated in the Criminal Code, as well as in other specific legislation (article 46 of the BLE) (see question 2.4 above). Administrative liability generates fines and accessory sanctions (see question 2.4 above). Civil liability results from the general rules contained in the Civil Code, as well as from other rules contained in specific legislation.

As a rule, all general defences under criminal, administrative and civil laws are possible. Civil defences may include: (i) no fault of the defendant (except in cases of strict liability); (ii) no damage suffered by plaintiff; and (iii) no relevant connection between fault and damage. Examples of criminal defences are: (i) action is carried out as a necessary means to avoid an effective danger to the offender’s legally protected interests; (ii) action is carried out to avoid an effective danger to offender’s life or health, which could not be avoided by any other form; and (iii) action was merely negligent, as offender neither had nor should have had knowledge that the actions performed were illegal.

4.2 Can an operator be liable for environmental damage notwithstanding that the polluting activity is operated within permit limits?

As regards civil liability an operator may still be held liable for a polluting activity even if acting within permit limits. Pursuant to Article 41 of the Portuguese Basic Law on Environment (BLE - Law nr. 11/87), any agent that causes significant damage to the environment due to a considerably dangerous activity will be liable for such damage. This form of strict liability means that it applies irrespective of fault, and even in those cases in which the agent carries out his activity holding a valid permit, or in compliance with applicable statutory rules. However, the Portuguese courts have held that Article 41 is not in force, as it still requires further regulation on the assessment of the compensation.

Irrespective of this controversy, other provisions also refer to strict liability. Articles 1.2 and 23 of Law nr. 83/95 (Lei de Participação Procedimental e de Acção Popular) provide for a right to compensation for damages caused by any act or omission resulting from an objectively dangerous activity that breaches the collective rights to a healthy environment and quality of life. This right to compensation also arises irrespective of fault.

On another note, the discussion of Environmental liability at European Union level has led to a new Parliament and Council Directive on this issue (Directive no. 2004/35/CE, of 21 April 2004, on environmental liability with regard to the prevention and remedying of environmental damage). The Directive must be transposed by Portugal until 30 April 2007.

4.3 Can directors and officers of corporations attract personal liabilities for environmental wrongdoing, and to what extent may they get insurance or rely on other indemnity protection in respect of such liabilities?

Directors and officers of a company may attract personal civil and criminal liabilities. Under the rules of the Portuguese Companies Code, directors and other officers of

a corporation may be held liable for damages caused by their actions or omissions in violation of their duty of care, or any other legal or contractual duties, unless they prove to have acted without fault.

The potential civil liabilities may be towards the company, the shareholders or third parties. In the first case, the company may file an action against its directors and officers in order to obtain the amounts paid to third parties as a result of negligent or faulty action by said directors and officers. Liability to shareholders and third parties may also occur if the acts of the directors or officers cause direct damage to same and provided that all requirements for general civil liability are met.

Criminal liabilities result from Article 12 of the Portuguese Criminal Code. Under this provision, companies cannot be held criminally liable. The liability lies with the officers of the company that carried out the criminal actions.

In Portugal it is not usual for directors or officers of a company to subscribe a specific insurance policy to deal with liability from environmental wrongdoing. The possibility of directors subscribing an insurance policy in favour of the company covering their personal liability is expressly contemplated in the Companies Code for joint stock companies and as an alternative to providing a bond. However, this insurance will only cover the directors’ liability to the company, and not any liability to public entities or to other third parties.

4.4 What are the different implications from an environmental liability perspective of a share sale on the one hand and an asset purchase on the other?

It is substantially different if the company has incurred environmental or other type of liabilities. The general rule is that such liabilities are individual liabilities of the company. In the case of an asset purchase only the assets (not the company) are transferred. Therefore, the conclusion should be that the company’s liabilities are not transferred to the purchaser. On the contrary, in a share sale the purchaser will become a shareholder of the company, and therefore be affected by the liabilities of a company in which it holds an equity interest.

However, situations may arise where the seller of the shares is held environmentally liable irrespective of the sale, notably in those cases where the environmental liability was known and not disclosed at the time of sale (see principle of good faith in question 7.3 below). Criminal liability will also be attributed to the seller if he was responsible for an environmental crime carried out prior to the sale of the company or of the assets.

4.5 To what extent may lenders be liable for environmental wrongdoing and/or remediation costs?

There is no special legislation on lenders’ liability for environmental wrongdoing and/or remediation costs.

The general principle under Portuguese law is that there must be a relevant connection between fault and damage. In the great majority of the cases, this connection will not exist. However, as an example, one could envisage potential lenders’ liabilities in situations where it can be proved that the lender knew it was financing a project that would cause

environmental damages. As a matter of practice, lenders limit in the contracts any potential liabilities for the borrower's environmental wrongdoings.

Remediation costs will only apply if a lender can be held liable. In such case, the general regime for natural restitution established by the Basic Law on Environment shall apply. It is worth mentioning that, as referred above, the Portuguese legal system recognises the "polluter-pays" principle. That is to say, the one who causes damage to the environment shall re-establish the situation before the damage took place. This compensation shall preferably be paid through natural restitution (*restitutio in integrum*), as it is considered the only form of remedy that assures full compensation.

5 Contaminated land

5.1 What is the approach to liability for historic contamination of soil or groundwater?

It can hardly be said that there is a systematic approach to this issue. Although decontamination of soil and groundwater has been discussed at government level, there are no special rules for liability for historic contamination of soil or ground water or for decontamination of soils or groundwater.

The general rules that apply to this issue are set forth in the Portuguese Basic Law on Environment (BLE) and in the European Sixth Environmental Action Programme. The general regime of the BLE for pollution liability is based on the fault of the polluter. In the case of certain dangerous activities, though, the law establishes a strict liability, which states that the polluter is liable for the damages caused to the environment irrespective of fault. However, it should be noted that the courts have been holding that this strict liability rule is not yet in force (see question 4.2 above).

One of the objectives established in the European Sixth Environmental Action Programme is to protect soils against erosion and pollution. The Commission Communication, of 16 April 2002 - Towards a Thematic Strategy for Soil Protection is also relevant in this regard.

5.2 How is liability allocated where more than one person is responsible for the contamination?

The general rule for liability allocation is that the owner and/or the holder of waste or other residues are responsible for the damages caused to the soil.

As there are no special rules for soil contamination, the general liability regime should apply. If there is more than one person responsible for the soil contamination, they will all be jointly and severally liable for the environmental damages caused. The degree of fault of each contaminator is presumed equal. If it is proved that there were different degrees of fault among the contaminators, those that had to pay a higher portion of the damages will be entitled to claim the excess back from the others.

5.3 If a programme of environmental remediation is 'agreed' with an environmental regulator can the regulator come back and require additional works or can a third party challenge the agreement?

Articles 35. 2 and 35.3 of the Basic Law on Environment (BLE - Law no 11/87) provide that the Government may enter into model contracts in order to progressively reduce pollution, provided that the pursuit of a certain activity does not cause any significant danger to men or the environment.

As regards specific sectors, the Law of Water Quality (Decree-Law no. 236/98) establishes in Articles 68 and 78 that environmental promotion contracts and environmental adaptation contracts can be executed between the Government and the Representative Associations of the sector. Any company can adhere to these contracts within three months from signature.

Any contract entered by an administrative body for the implementation of their objectives is deemed an administrative contract according to Article 179.1 of the Administrative Procedural Code. As a result, the administration is entitled to unilaterally modify the contract's terms and conditions in order to achieve its environmental purpose. However, save for any statutory rule to the contrary or implied terms and conditions arising from the nature of the contract, such unilateral modification should not undermine the maintenance of the contract's goal and the financial balance between both contracting parties.

Lastly, pursuant to the Administrative Tribunal Procedures Code (Law no. 13/2002, of 19 February 2002, and Law no. 4-A/2003, of 19 February 2003) any third party or environmental association may challenge the agreements and their performance insofar as they consider that such agreements or their respective performance are, or may be, prejudicial to the environment.

5.4 Does a person have a private right of action to seek contribution from a previous owner or occupier of contaminated land when that owner caused, in whole or in part, contamination?

Under Article 40.5 of the Basic Law on Environment (BLE - Law no. 11/87) any municipality authority or citizen that suffered a damage caused by an action carried out by a person engaged in activities susceptible of impairing the use of environmental resources, is entitled to an indemnity for damages caused.

In addition, regardless of whether the damaging activity is susceptible of impairing the use of environmental resources, if a previous owner or occupier of contaminated land gave rise to the contamination, in whole or in part, he will be liable: (i) for the damages caused to the land purchaser, which would not have been suffered had the land not been purchased (Articles 915 and 908 of the Civil Code), or (ii) for all damages arising from the land's loss or deterioration in case of land lease (Article 1044 of the Civil Code).

5.5 Does the government have authority to obtain from a polluter monetary damages for aesthetic harms to public assets, e.g., rivers?

Eventual aesthetic harms must be prevented in the relevant

licensing procedure by anticipating any damage that may arise from a certain activity. When there are risks of aesthetic harms the license must only be granted if all necessary actions at avoiding same are taken by the licensee. Regardless of the above, and though there is very little experience in this area in Portugal, it would be possible for the Government to claim compensation for aesthetic harms to public assets caused by a polluter.

6 Powers of regulators

6.1 What powers do environmental regulators have to require production of documents, take samples, conduct site inspections, interview employees, etc?

Environmental regulators have ample control powers, as follows:

- Production of documents - Article 60.2 of the Administrative Procedural Code (Decree-Law no. 442/91) establishes the general principle that every individual with an interest in an administrative procedure must fully cooperate on the appraisal of the relevant facts. As a result of the above principle, any environmental administrative regulator within the context of an administrative procedure can require production of documents from individuals.
- Control and Inspect - Article 13 of the Institutional Framework of the Ministry of Cities, Environment and Land Zoning and Planning (Decree-Law no. 97/2003), the General-Inspection of the Environment has the power to control and to conduct inspections in order to guarantee compliance with the law, without prejudice to the prerogatives of the General-Inspection of the Land Administration at municipally level (Article 12).
- Duty to cooperate - The IPPC rules and the rules on Control of Major-Accident Hazards Involving Dangerous Substances set forth an obligation to cooperate with the environmental inspection services. Pursuant to this obligation, environmental regulators may require production of documents and analysis, as well as conduct any necessary inspection of the premises.

7 Reporting/disclosure obligations

7.1 If pollution is found on a site, or discovered to be migrating off-site, must it be disclosed to an environmental regulator or potentially affected third parties?

Article 40.1 of the BLE establishes a duty of cooperation by all citizens towards the accomplishment of a healthy environment. Despite this general rule, Portuguese law does not provide for a special duty of mandatory disclosure of any environmental breach to the relevant environmental regulator or to the potentially affected third party.

However, such duties exist for the facilities subject to the special regime on the control of major-accident hazards involving dangerous substances (Decree-Law no. 164/2001). As per Article 29 of said statute, in case of a

serious environmental accident, the operator must: (i) inform immediately the competent emergency services of the occurrence; (ii) inform the General-Directorate of the Environment within 24 hours; and (iii) within one week of the occurrence, inform the General-Directorate of the Environment of the circumstances in which the accident took place, of the dangerous substances involved, of the available data which may allow for the evaluation of the effects of the accident on humans and on the environment, as well as of the emergency measures taken.

Finally, public servants or agents are bound to a duty of mandatory disclosure to the relevant administrative superior when they become aware of crimes or administrative offences during and in result of the performance of service (Article 242 of the Portuguese Criminal Procedure Code).

7.2 When and under what circumstances does a person have an affirmative obligation to investigate land for contamination?

Again general rules apply to the obligation to investigate land contamination. Public administration agents are under a compulsory duty to publicly expose and investigate situations that may amount to a criminal offence (Article 242 of the Criminal Code).

Any employee of the General-Inspection of the Environment or of the General-Inspection of the Land Administration has an affirmative obligation to investigate possible land contamination. Failure to do so will result in potential liabilities before third parties, as per Article 3.1 of the Legal Regime applicable to the Liability of the Administration for Acts of Public Management (Decree-Law n.º 48051).

7.3 Is it necessary for a seller to disclose environmental problems to a prospective purchaser in the context of a merger and takeover transactions?

Under the Portuguese Companies Code there is no specific obligation on the seller to disclose environmental problems in which the company is/was involved in the context of a merger or takeover. However, there is a general contract law principle that the parties should conduct themselves in good faith. Not disclosing relevant environmental (or other) problems or liabilities may amount to a breach of such duty of good faith and entitle to purchaser to sue for damages caused and/or terminate the contract. A well structured transaction, though, should include a due diligence of the target company and contractual safeguards on environmental and other potential liabilities.

As regards mergers, members of the management or inspection bodies are jointly and severally liable for the damages caused to the purchaser if they breached their statutory duty of diligence in disclosing the environmental problems and liabilities pending on the merged company.

8 General

8.1 Is it possible to use an environmental indemnity to limit exposure for actual or potential environment-related liabilities, and does making a payment to another person under an indemnity in respect of a matter (e.g. remediation) discharge the indemnifier's potential liability in respect of that matter?

Environmental indemnities can be used as a limited mechanism to reduce environmental risk exposure. Firstly, such indemnities can only apply to civil liabilities, and not to criminal liabilities. Secondly, they would only apply between the parties to the contract, meaning that the indemnity would not affect a legitimate claim for environmental wrongdoing of any third party to the contract (public or otherwise). However, the beneficiary of the indemnity could then claim restitution from the entity that provided the indemnity.

8.2 Is it possible to shelter environmental liabilities off balance sheet, and can a company be dissolved in order to escape environmental liabilities?

According to Article 65 of the Portuguese Companies Code (Código das Sociedades Comerciais) every company is bound to present an annual balance sheet. The annual balance sheet must reflect all liabilities. Future liabilities will be included in the accruals account, provided that a value can be determined.

There is no special provision preventing the dissolution of a company on the grounds that it maintains environmental liabilities. If the shareholders decide to dissolve a company, general rules on dissolution and liquidation of the assets will apply.

Any existing environmental liabilities should be paid during the liquidation stage up to the limit of the company's assets. As regards liabilities that are still being litigated, the company's liquidators should provide a bond to assure payment to potential creditors. Should any liabilities arise after liquidation and extinction of the company, the previous shareholders shall be liable up to the portion of the assets that were allocated to them upon division of the company's assets. In addition, the dissolution of a company with the single purpose of escaping any type of liabilities may also amount to criminal behaviour.

8.3 Can a parent company be held liable for pollution caused by an affiliate and/or sued in its national court for pollution caused by a foreign affiliate?

The general rule is that a parent company cannot be held liable for the acts of its affiliate as they are separate legal entities. There are two exceptions: (i) parent and affiliate entered into a management subordination contract; and (ii) parent maintains total control over the affiliate. The concept of total control is subject to some controversy. The majority takes the view that it means holding a direct or indirect 100% equity interest in the affiliate, but others also argue that a minimum 90% direct or indirect equity interest in the affiliate would suffice to achieve total control.

Under the above circumstances, the law lifts the "corporate veil", and a parent company can be held liable for pollution caused by an affiliate. By the same token, it can be sued in its national court for pollution caused by a foreign affiliate. An action can only be brought against the parent company thirty (30) days after the affiliate is in arrears.

8.4 Is there any legislation to protect "whistle-blowers" in environmental matters?

There is no special legislation concerning "whistle-blowers" in environmental matters. There are, however, regulations that could have a remote connection with whistle-blower protection, such as the law on witness protection (Law no. 93/99 and Decree-Law no. 190/2003).

8.5 Are group or "class" actions available for pursuing environmental claims, and are penal or exemplary damages available?

Yes. In the Portuguese legal system there is a group action especially available for pursuing environmental claims (Law no. 83/95, of 31 August). This law also establishes civil and criminal liabilities resulting from any illegal environmental conduct.

9 Emissions trading and climate change

9.1 Does the law facilitate emissions trading and, if so, what emissions trading schemes are in operation?

Emission trading is regulated by Decree-Law 243-A/2004, which transposed directive 2003/87/EC. From 1 January 2005 the Ministry of Labour and Economic Activities, in connexion with the Ministry of Environment, Land Zoning and Planning, shall develop a National Allocation Plan (NAP) for a period of three years and a subsequent period of five years. The NAP shall state the total quantity of allowances that the responsible authority intends to allocate for that period and how it proposes to allocate them.

As a result, over 240 Portuguese installations are covered by the scheme, which began 1 January 2005. The 2005-2007 allocation is estimated to be in line with the national climate change target for the covered sectors, and the 2008-2012 NAP will likely be negotiated from 2006 onward. That allocation is expected to be more demanding than the current one (approx. 115 million tons of greenhouse gases emission per year).

9.2 What is the general policy with respect to climate change?

Portugal approved in 2004 a National Climate Change Programme, which puts forward policies and measures to meet the national climate change target under the Kyoto Protocol - +27% relative to 1990 levels. However, Portuguese emissions are already some 36-40% above that target. The annual shortfall is estimated to be around 5-8 million tonnes per year and the policy decision is to acquire half of that shortfall on the international market, either directly or through a public-private carbon fund. In this

regard, a recent government decision has set a 150 day period for such a strategy to be proposed to government.

The remaining 2.5-4 million tonnes per year will likely be subject to additional domestic policies and measures such as a carbon tax, green public procurement and domestic reduction projects.

10 Asbestos

10.1 Is Portugal likely to follow the lead of the US in terms of asbestos litigation?

Portugal has specific legislation on commercialisation and utilisation of asbestos and products with asbestos (Decree-Law n.º 28/87, of 14 January 1987), as well as on the protection of the workers' health for the exposure to asbestos (Decree-Law n.º 284/89, of 24 August 1989).

It will be very unlikely that Portugal will follow the lead of the US in asbestos litigation. Indeed, the regulations on asbestos date back to the late eighties, and to the best of our knowledge litigation is virtually non-existent. Even if this pattern changes, the numbers and amounts of damages would certainly not reach the magnitude and proportions of the US.

10.2 What are the duties of owners/occupiers of premises in relation to asbestos on site?

Decree Law n.º 28/87 forbids (Article 5) the use of asbestos in construction (e.g. insulating sheaths). The statute also prescribes (Article 13) several handling rules, like working in an open or open air space, wetting the product before cutting, use of protective material (articles 14 and 15), employee information duties (Article 17), and compulsory medical inspections (Article 12). All the materials made from asbestos must be labelled in Portuguese with the sign of danger and with the indication of the handling rules (Articles 10 and 15).

11 Environmental insurance liabilities

11.1 How big a role does environmental risks insurance play in Portugal?

The ever growing environmental control and enforcement of environmental laws and regulations in Portugal has led to an increase in the necessity of environmental insurance or other liability control mechanisms. However, most companies do not possess specific environmental risk insurance, resorting to normal civil liability policies in order to cover operational risks.

11.2 What types of environmental insurance are available in the market?

The existence of specific environmental insurance is rare. The major Portuguese insurance companies only offer coverage of environmental risks in their general civil liability policies.

This fact, along with the absence of any mutual association of insurance companies, and of major reinsurance in respect to environmental risks, has led those Portuguese companies that wish to obtain environmental risk coverage to enter into insurance policies in foreign countries.

11.3 What is the environmental insurance claims experience?

As mentioned above, Portugal has not had much experience in the area of environmental risk insurance. In addition, serious environmental disasters have not been a usual problem in Portugal.

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**Alberto Galhardo Simões**

Miranda, Correia, Amendoeira & Associados
Rua Soeiro P. Gomes, L1 - 2nd Fl
1600-196 Lisbon
Portugal

Tel: +351 21 781 48 00
Fax: +351 21 781 48 02
Email: alberto.simoes@mirandalawfirm.com
URL: www.mirandalawfirm.com

Alberto Galhardo Simões (born 1966), Partner. Graduate of the Lisbon Catholic University Law School (1990). Admitted in 1992. Joined the Firm in 2003. Previously, Alberto worked at Luiz Gomes & Associados as an associate, focusing his practice mainly in corporate and contract law. He left the firm to undertake an L.L.M at King's College London (University of London), in the area of International Business Law. In 1998, Alberto joined the legal department of the InterAmerican Development Bank (IDB) in Washington D.C., where he was charged with primary responsibility for the legal aspects of the Bank's projects in Brazil, and other Spanish-speaking countries of the Mercosul. While at the IDB, he was engaged in the structuring of environmental and social public sector and infrastructure private sector projects under corporate and project finance structures. Alberto's project practice has given him a comprehensive experience in dealing with a wide range of environmental matters. Alberto has written articles for Portuguese and international publications on environmental law, company law and project finance, and has also been a lecturer in conferences. In the Firm, Alberto heads the Project Finance Practice group. He has experience in a wide range of financing transactions including trade finance, asset finance, restructuring and project finance. Project financing experience includes the financing of oil and gas, mining and infrastructure projects in Europe, South America and Africa. He has acted for sponsors, banks and international treaty organisations. Alberto is fluent in English and Spanish.

**Ricardo Alves Silva**

Miranda, Correia, Amendoeira & Associados
Rua Soeiro P. Gomes, L1 - 2nd Fl
1600-196 Lisbon
Portugal

Tel: +351 21 781 48 00
Fax: +351 21 781 48 02
Email: ricardo.silva@mirandalawfirm.com
URL: www.mirandalawfirm.com

Ricardo Alves Silva, Associate. Graduate of the Lisbon University Law School. Since finishing his degree in 2000, Ricardo has been working in Administrative Law, Environmental Law, Land Planning, Expropriations and Urbanism Law. Before joining Miranda, Correia e Amendoeira, Ricardo was an attorney with CERBA & Associados-Capitão, Espanha, Rodrigues Bastos, Areia & Associados, specialising in the above referred areas, and working on projects ranging from the drafting of environmental statutes, defence of public and private entities in environmental and urbanism cases, and drafting of rules and statutes on land and environmental planning at Municipal, Regional and National level. Ricardo has been a lecturer at Expropriation Law seminars organised by the Bar Association, and is presently preparing his Masters Thesis in Administrative Law at Lisbon University Law School.

**Miranda**

Miranda, Correia, Amendoeira & Associados

Attorneys at Law

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