

Portuguese Supreme Court of Justice decision of 1 March 2016 regarding warranty clauses in controlling interest sale and purchase agreements

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In its judgment of 1 of March 2016, the **Portuguese Supreme Court of Justice (“STJ”)** ruled on a matter of vital importance for M&A by taking a position on the applicable legal classification and regime of **warranty clauses** which are agreed upon amongst parties to a sale of controlling interests.

In this decision, the STJ accepts, under the **principle of contractual freedom** set out in article 405 of the Portuguese Civil Code, the validity of warranty clauses - in the form of express warranties (*garantias convencionais*) or warranty obligations (*obrigações de garantia*) – by virtue of which the parties contractually agree to allocate the risk resulting from non-verification of the statement of fact covered by the warranty to the seller, transferring such risk to the seller, which under normal business risk-sharing would fall to the buyer.

The assumption of this risk means that the warrantor shall be strictly and automatically liable to the warrantee for any nonconformity between the warranted qualities and the actual features of the subject matter of the transaction, without the need of satisfying civil liability criteria such as unlawfulness (*ilicitude*) and fault (*culpa*).

The STJ held that in a **warranty obligation** the warrantor is not bound to a result and, therefore, in the event of nonconformity between the warranted and verified situation there will not be a breach per

se (which would entail an obligation to indemnify) but rather the generation of a specific performance obligation which, as a rule in share sales, shall be of a pecuniary nature.

In the opinion of the STJ, the damage suffered by the warrantee, which shall serve as a parameter for the determination of the value of the pecuniary obligation, thus corresponds to the “difference between the company’s business and financial value warranted by the seller through the disclosed accounts and its real value which would have determined the price of the transaction”.

Finally, the STJ concludes that “the agreed warranty clauses cannot but be regarded as legally admissible as they result from the freedom of contract that confirms the parties’ private autonomy and therefore we do not sustain or submit that its scope exceeds in any way the limits of the law (article 405(1) of the Portuguese Civil Code) – cf. for this purpose **Prof. Mota Pinto**, in “*Teoria Geral do Direito Civil*”, 1976, pp. 65 et seq., and **Prof. Pedro Pais de Vasconcelos**, in “*Teoria Geral do Direito Civil*”, 7th Ed., p. 358 and pp. 498 - 500.”

The full text of the decision can be found at: <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b-980256b5f003fa814/b8d6ce752f2c198e-80257f6a00533631?OpenDocument&Highlight=0,4915%2F04.9TVLSB.L1.S1>

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