



21 APR. 20

DISPUTE RESOLUTION AND ARBITRATION

Coronavirus: Amendment to the exceptional and temporary measures with an impact on civil procedure

The international public health emergency due to the new Coronavirus (COVID-19) pandemic has led to the urgent and succession introduction of a range of legislative measures. These measures are an exceptional and temporary response to the pandemic in Portugal and they include the declaration of a state of emergency across the whole country that has already been extended twice.

Rita Samoreno
Gomes

Petra
Carreira

"Procedural deadlines are suspended and, as a rule, no procedural acts will be done, except for procedural acts that are done automatically (for example, the distribution of cases to the appropriate courts), and summonses and notifications."

The urgency in approving various legislative packages and the reaction by different sectors has understandably led to the legislation issued by the Government or by the Assembly of the Republic being reviewed and, where advisable, amended or clarified.

In the justice sector and, in particular, with an impact on civil proceedings, some of the exceptional and temporary measures implemented by Decree-Law 10-A/2020 of 13 March and by Law 1-A/2020 of 19 March gave rise to questions of interpretation or required an enhanced solution. Law 4-A/2020 of 6 April, which came into force on 7 April, sought to clarify and refine some of these measures by amending the legislation in question.

What are the solutions now planned for the time periods and steps in civil court proceedings?

1. Transitional arrangements for calculating time limits

In non-urgent cases:

- o Procedural deadlines are suspended – now expressly and no longer by application of the rules on court holidays – and, as a rule, no procedural acts will be done, except for procedural acts that are done automatically (for example, the distribution of cases to the appropriate courts), and summonses and notifications.
- o However, when all parties believe they are in a position to take steps online using the official platform of the courts (Citius) or by means of distance communication resources, including teleconferencing, video calls, or similar (such as Webex or Skype), cases can continue and in-person acts such as a preliminary hearings or trials can be held, as can acts that are not urgent and do not need to be done in person.

In steps that have to be recorded (such as preliminary or trial hearings), it is necessary to use either (i) the videoconferencing systems that exist in the courts, or (ii) Webex (virtual rooms), licensed by the Institute of Financial Management and Justice Equipment (IGFEJ). These allow the parties and others involved in the case to take part using videoconferencing.

In the meantime, the Superior Council of the Judiciary has announced that 157 virtual rooms will come into operation in the courts of first instance, the appeal courts, and the Supreme Court of Justice. This means that even some trials and other steps usually carried out in person can take place.

- A final decision (sentence or judgment) can be given in cases in which the court considers it is not necessary to take any further steps. This could happen, for example, in cases where there is no witness evidence to be given, or where it has already been given, or even in cases where the parties waive their right to produce evidence that could have been given. Although it only refers to a “final decision”, there appears to be no obstacle to the judge issuing interlocutory decisions, provided they respect the other measures in force for non-urgent cases.
- All steps in enforcement actions are suspended including sales, collective insolvency proceedings, transfers of real property, and attachments and their preparatory acts. The only exception is for acts which if not done, could cause serious harm to the livelihood of the creditor, or would cause irreparable harm. The decision on the harm and the consequent conclusion of the act depends on a prior judicial decision.

Non-urgent cases include, in general, declarative actions, except for interim injunctions, and enforcement actions.

"Contrary to what the previous provision seemed to be, urgent procedures continue to be handled, with no suspension or interruption of time limits, acts or steps."

In urgent cases:

- Contrary to what the previous provision seemed to be (it raised questions of interpretation), urgent procedures continue to be handled, with no suspension or interruption of time limits, acts or steps.
- Some steps require the physical presence of the parties, their lawyers or other people involved in the case. However, in other cases, procedural acts are done by means of distance communication resources, including teleconferencing, video calls or similar means such as Webex or Skype. Examples of steps that require the physical presence of the parties are prior hearings and trial hearings, and, in the course of the latter, the giving of evidence by witnesses, or declarations by a party or by their legal representative.
- When it is not possible to carry out procedural steps that require the physical presence of the parties, their lawyers or other people involved in the case and the life, physical integrity, mental health, freedom or the immediate survival of those involved is at issue, the step can be held in person. However, this must not result in the presence of a number of people greater than provided for in the recommendations of the public health authorities.

In the wake of these recommendations, the Superior Council of the Judiciary has issued guidelines to help implement the social distancing measures. These guidelines address, among others, (i) the maximum number of persons present and distance between them, (ii) the minimum size of courtrooms, (iii) a limitation of the presence of the public and others who are not strictly necessary to the procedure in question, (iv) a limit on the number of witnesses per procedure/day, (v) the use of masks and/or visors, (vi) daily cleaning and disinfection of courtrooms, and (vii) adoption of respiratory etiquette procedures.

- If it is neither possible nor appropriate to ensure that procedural steps go ahead in the terms of the preceding paragraphs, the suspension of time limits established for non-urgent procedures also applies to urgent cases.
- Even though insolvency proceedings are urgent cases, the time limit for the debtor to petition for insolvency under the Insolvency and Corporate Recovery Code is suspended. Under normal circumstances, the debtor has to petition for insolvency within 30 days of becoming aware of the insolvency situation, or within 30 days of the date on which they should have become aware of it.

Urgent cases include interim injunctions, insolvency proceedings and Special Revitalisation Processes (PERs). The following are considered urgent for the purposes of applying the rules now established for urgent cases: (i) processes and procedures to defend rights, freedoms and guarantees harmed or threatened with harm by any unconstitutional or illegal action, and (ii) processes, procedures, actions and steps that are necessary to avoid irreparable damage. The latter include cases involving minors at risk, urgent educational guardianship cases, and procedural steps and trials involving detained suspects.

Other suspensions

With the entry into force of Law 4-A/2020 of 6 April, the following are maintained:

- The suspension of limitation and expiry periods for all types of processes and procedures to prevent expiry or limitation as a result of the exceptional situation we are experiencing. As previously provided, this suspension will take precedence over any rules that establish mandatory maximum periods for limitation or expiry and the periods are extended for as long as the suspension lasts.

"Suspension of limitation and expiry periods for all types of processes and procedures to prevent expiry or limitation as a result of the exceptional situation we are experiencing."

- The suspension of eviction actions, special eviction procedures and actions to recover possession of rented property are suspended, when the tenant could be placed in a vulnerable situation due to not having anywhere to live as a result of the judicial decision to be made. However, it is now provided that, even in cases in which the tenant/lessee has their own home, another "reason of social need" may result in the suspension of eviction actions, special eviction procedures, and actions to recover possession of leased movable property, if this also implies that the tenant/lessee may be placed in a fragile situation, in the terms set out above.
- The transitional arrangements to suspend deadlines apply, with any necessary adaptations, to procedures taking place in registry offices. One example of this is the Out-of-court Business Recovery Scheme (RERE) in which any procedural periods currently running are suspended. These include the period for negotiations resulting from the negotiation protocol.

Entry into force

An interpretative rule was set out to make it clear that the provisions of Law 1-A/2020 of 19 March on time limits and procedural steps, and the changes resulting from the wording introduced by Law 4-A/2020 of 6 April, will take effect from 9 March 2020. The only exception is for the rules on urgent cases, which will take effect on the date of entry into force of this law, that is, from 7 April 2020.

2. Special rules on justified impediments and the closure of courts or other premises where acts should be done

The special rules on justified impediment and the closure of the courts or other premises where procedural acts should be done are set out in articles 14 and 15 of Decree-Law 10-A/2020 of 13 March. The aim of these rules is to safeguard public health and they remain unchanged and apply to all judicial proceedings in respect of acts and steps which, in accordance with what is set out above, can or should be carried out. Accordingly:

- Any statement issued by a health authority in respect of a party to a case or their representatives or lawyers, or of any other person involved in the case, attesting to the need for them to go into a period of isolation due to a possible risk of COVID-19 infection is grounds to invoke a justified impediment to doing any procedural that must be carried out in person before the courts or other bodies.
- The above declaration is also grounds to justify the failure to appear for any procedural or administrative step, and for its postponement.

- The premises where procedural acts have to be done may be closed, or in-person service at these premises may be suspended, by decision of a public authority based on the risk of COVID-19 infection. If this happens, the deadline to do the judicial or administrative act in question is suspended from the date of closure or suspension of the service until there is a decision of the public authority to reopen the premises.

As a result of legislative measures described above and interpreted in accordance with the other applicable legislation, we advise our clients to:

- Find out what the situation is in the court where your case is being heard or in the court with jurisdiction to hear and decide your case. If it has been closed by a decision of the public authorities due to the risk of the spread of COVID-19, all deadlines are suspended and is not expected that any steps will be taken – at least in person – until a declaration is issued by a public authority to order the reopening of the premises.
- Find out whether or not your case is considered urgent.

If it is urgent, it will go ahead without suspension or interruption of time limits, acts or steps, without prejudice to the specific arrangements for the steps that require the physical presence of the parties, in accordance with the above;

If it is not urgent, all time limits to do procedural acts are suspended. However, cases can continue and non-urgent in-person and remote acts can be done when the parties believe they are in a position to do them using IT platforms to do them electronically. These platforms include Citius (the official online platform of the Portuguese courts) and distance communication resources such as Webex or Skype. In practice, the continuation of non-urgent cases depends on the agreement of all those involved.

- In non-urgent cases, in-person procedures such as prior hearings or trial hearings could be postponed or cancelled. However, they can be carried out by means of distance communication via Webex or Skype, when the court and the parties believe they are in a position to hold them.

The courts have been upholding the understanding that, subject to the agreement of the parties, even non-urgent procedures can be handled, and, in many cases, the courts have already stated that they are able to continue to deal with them. When that is the case, the courts have been giving notice to all those involved in the proceedings to comment on whether the conditions exist to go ahead.

However, it is important not to assume that procedural steps have been cancelled or that they will be dealt with remotely if the judge has not made an order to this effect in the specific case.

- It may become necessary for someone involved in proceedings to go into preventive isolation due to a potential risk of infection by COVID-19. If this happens, the court should be asked to consider confirming that there is a justified impediment to doing a particular act and, as a consequence, the person in question should be allowed to do it after the scheduled date or legally established period.
- If the case is not urgent, as explained above, it is necessary to confirm (i) whether the conditions exist to do the act or take the step, including, when applicable, with the court and the opposing party, and (ii) the advantages and disadvantages of continuing to do all or some of the applicable procedural acts.

"However, it is important not to assume that procedural steps have been cancelled or that they will be dealt with remotely if the judge has not made an order to this effect in the specific case."

The state of emergency will remain in place until at least 2 May and there is still no certainty as to the duration of the current exceptional situation. However, as soon as it comes to an end, it will be important for parties to have done all acts necessary or appropriate to defending their procedural positions, and to be as prepared as possible to deal with a future which is, for now, uncertain, but will certainly be different and challenging.

We are continuing to monitor the situation very closely and will keep our clients permanently up to date and supported during these exceptional circumstances. ■