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Portugal: Law & Practice

Rita Samoreno Gomes and Petra Carreira
PLMJ

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PORTUGAL

Law and Practice

Contributed by:
Rita Samoreno Gomes and Petra Carreira
PLMJ see p.24

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PORTUGAL

1. General

1.1 General Characteristics of the Legal System

Portugal has a code-based civil law justice system. Legal process is conducted through both written submissions and oral argument.

Primary sources of law are laws and customary rules. Legal doctrine is not a source of law, but merely an interpretative tool. There is no precedent rule in the Portuguese legal system. As with legal doctrine, case law is another interpretative tool for the proper application of the law.

In some circumstances, the Supreme Court of Justice may be called upon to make a final decision on conflicting case law, but the decision rendered is not binding outside the case in which it is rendered.

The courts may adjudicate ex aequo et bono when the law allows it or when the parties agree on it.

Civil proceedings rely on the dispositive principle – ie, the principle that the parties to the dispute are to determine the scope of the case by alleging the facts and adducing the evidence they deem appropriate.

The court's role is to conduct and monitor the proceedings and ensure that evidence is produced according to the applicable legal rules. The court weighs the evidence produced according to predetermined rules, including on the burden of proof.

Nevertheless, the courts have a range of powers they can use of their own motion if considered necessary to reach a decision. These include asking for evidence not requested or produced by the parties, calling the parties or witnesses to testify, ordering expert evidence or asking the parties or third parties to disclose documents or other relevant evidence.

1.2 Court System

The Portuguese court system has several categories of courts, as set out below.

- The Constitutional Court.
- The Court of Auditors, which oversees the legality and regularity of public revenue and expenditure.
- The judicial courts, which include the Supreme Court of Justice, the courts of appeal (appellate courts) and courts of first instance. The courts of first instance fall into several categories according to the subject-matter, economic value of the dispute and territorial jurisdiction (eg, criminal, family, labour, commercial and enforcement courts). Among judicial courts, there are specialised courts, such as the Court of Intellectual Property, the Maritime Court and the Court of Competition, Regulation and Supervision, which have jurisdiction over the whole country.
- The administrative and tax courts, the role of which is to settle disputes arising out of the exercise of public power and tax relations. These include the Supreme Administrative Court, the central administrative courts (north and south), and the administrative and tax courts in the first instance.
- The justices of the peace (*julgados de paz*), which are small claims courts with special features and jurisdiction.
- Arbitral tribunals.
- Courts-martial, which may be created in wartime.

- The Conflicts Court, the role of which is to resolve conflicts of jurisdiction between courts.

1.3 Court Filings and Proceedings

Save for pending injunctions, court filings in civil proceedings are open to the public unless they are kept confidential by the court of its own motion or upon request of the parties, such as to protect sensitive or confidential information, business secrets, private data, the intimacy or dignity of the parties, or family and private life.

Subject to the above, public disclosure entails the right to access the case file and obtain copies or certificates. As a rule, lawyers are free to consult case files, even those in which they do not act for any of the parties, unless they are confidential. Non-lawyers can only access non-confidential court files if they are considered to have a legitimate interest.

The court may also decide to protect court filings and proceedings from public disclosure by concealing confidential information or documents, and by limiting the number of persons allowed access to the proceedings and evidence (eg, by restricting access to experts and/or the parties and their counsel).

1.4 Legal Representation in Court

As a rule, only lawyers with a valid registration with the Portuguese Bar Association can act as legal representatives before Portuguese courts.

Foreign lawyers who are authorised to practice in their home EU and EEA member states, or lawyers from other countries who enjoy the freedom to provide their services under European Union law, may practice in Portugal under their home-country professional title. However, they may only act as legal representatives before the Portuguese courts under the supervision of a lawyer registered with the Portuguese Bar Association. European Union lawyers may also practice in Portugal under their home-country professional title, subject to prior registration with the Portuguese Bar Association.

Foreign lawyers from non-EU member states may become members of the Portuguese Bar Association under the same terms as Portuguese lawyers provided they have been granted a law degree by a Portuguese university, whether directly or by equivalence, and their country grants reciprocity to Portuguese lawyers.

Brazilian lawyers whose university degrees have been obtained in Brazil or Portugal may register with the Portuguese Bar Association on a reciprocal basis.

Trainee lawyers have limited powers until they have completed their professional traineeship and may only appear in court if accompanied by their mentor.

2. Litigation Funding

2.1 Third-Party Litigation Funding

Third-party funding is not yet specifically regulated in Portugal.

Given the current lack of regulation and in light of the principle of contractual freedom, it is understood that parties can resort to third-party funding and will, in principle, have full discretion on how to govern their relationship with third-party funders. However, third-party funding will always be subject to the general mandatory rules and principles of public policy, good faith, abuse of rights, conflicts of interest and public morality.

It should be noted, however, that recourse to these financing schemes may raise further and specific issues within some settings, most notably when the litigation concerned is not a dispute strictly between private parties (eg, litigation funding arrangements within opt-out based class actions whereby the servicing of the debt is to be made via any unclaimed compensation amounts).

There is no specific rule imposing a duty on parties to disclose whether they are being funded by a third party. However, knowledge of third-party litigation funding and the terms of the funding agreements may still be a relevant factor or even a requirement, at least in certain cases (eg, in the cases referred above).

To date, there is no identifiable established case law addressing the issue of litigation funding, and, until 2020, recourse to these financing schemes in Portugal was very rare. However, since December 2020, several class actions backed by litigation funding arrangements were commenced before the Portuguese courts. Third-party funding is currently a hot topic for discussion among legal practitioners in Portugal.

2.2 Third-Party Funding: Lawsuits

There is no specific restriction on the types of lawsuits available for third-party funding. In any event, third-party funding remains subject to the general mandatory rules and principles of Portuguese law (public policy, good faith, abuse of rights, conflicts of interest and public morality).

2.3 Third-Party Funding for Plaintiff and Defendant

There is no specific restriction on who may receive third-party litigation funding. If it complies with the general mandatory rules and principles of Portuguese law, third-party funding is available for both plaintiffs and defendants in Portugal.

2.4 Minimum and Maximum Amounts of Third-Party Funding

There is no express provision on minimum or maximum amounts a third-party funder will fund.

2.5 Types of Costs Considered Under Third-Party Funding

To date, there is little indication of what costs a third-party funder will consider funding. Funders are nevertheless expected to rely on standard contracts used in other countries where third-party funding has been permitted and used for a long time or specifically regulated.

Under Portuguese law, the principle and limits of freedom of contract, in principle, allow any legal costs to be financed by a third party. The right of the third-party funder to recover those costs will be governed by the financing agreement (subject to any applicable mandatory rules).

2.6 Contingency Fees

Portuguese law expressly forbids arrangements whereby counsel's fees are exclusively dependent on the outcome of the case. This prohibition is expressly stated in the Rules of the Portuguese Bar Association.

These Rules also prohibit lawyers from sharing fees, except with lawyers, trainee lawyers and paralegals with whom they work.

Counsel's fees may however be composed of a fixed part regardless of the outcome of the case (eg, according to the time spent or the urgency or complexity of the matter) and a success fee depending on the results obtained.

2.7 Time Limit for Obtaining Third-Party Funding

There is no express provision on when a party to the litigation should obtain third-party funding. Thus, in light of the principle of freedom of contract, there are no time limits on when a party should obtain third-party funding.

3. Initiating a Lawsuit

3.1 Rules on Pre-action Conduct

Portuguese courts do not impose any rules on the parties in relation to pre-action conduct. There are also no requirements for potential defendants to respond to pre-action letters.

3.2 Statutes of Limitations

The general limitation period is 20 years, including claims relating to contractual civil liability. There are however several exceptions providing for shorter limitation periods, as follows.

The limitation period for non-contractual civil liability is three years. This limitation period begins to run when the claimant becomes aware of its right, even if the person responsible for the harm and the full extent of the damage is unknown. This is without prejudice to the general 20-year limitation period if the period has passed from the harmful event. If the wrongful act constitutes a crime for which the law establishes a longer statute of limitations, the longer period applies.

The statute of limitations is five years from the date the right can be exercised when the claim is based on rents due by tenants, interest, dividends from companies, alimonies and other periodic benefits.

There are also limitation periods of two years and six months (eg, claims from merchants and establishments providing accommodation services against consumers, respectively).

Limitation periods will be interrupted by the judicial service of any act expressing an intention to exercise the right (eg, serving a claim or a judicial notice on the defendant). In this case, a new limitation period begins to run from the date of the act that caused the interruption.

3.3 Jurisdictional Requirements for a Defendant

There are no specific jurisdictional requirements for a defendant to be subject to suit in Portugal. Any person with legal personality may be a party to an action and, even without legal personality, certain entities may be parties, such as associations, civil companies, condominiums and branches.

There is freedom to sue, which is different from the merits of the case.

Regarding the international jurisdiction of Portuguese courts, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (Brussels Regulation (recast)) is fully applicable in Portugal.

Moreover, Portuguese courts have international jurisdiction under Portuguese civil procedural law in some cases (eg, when the right claimed cannot become effective except by means of an action brought in Portugal).

The above does not differ from court to court.

The forum non conveniens legal doctrine does not apply in Portugal.

3.4 Initial Complaint

In the initial complaint, the plaintiff must:

- indicate the court with which the lawsuit is filed and identify the parties;
- indicate the professional address of its counsel;
- indicate the type of proceedings;
- allege the essential facts constituting the cause of action and the legal grounds on which the action is based;
- make a request to the court;
- state the value of the claim; and
- list the witnesses and produce other means of evidence.

Documentary evidence, together with the power(s) of attorney, should be submitted with the initial complaint, without prejudice of the possibility of submitting those at a later stage in certain cases.

The court may invite the plaintiff to perfect the initial complaint if it does not meet any legal requirements or if there are any shortcomings in the allegations of fact.

If there are supervening facts (occurring after the initial complaint is filed or which the parties only become aware of after their pleadings are filed), they may be brought to the attention of the court up to the conclusion of the trial at first instance.

3.5 Rules of Service

There is no specific procedure for informing an adversary that it has been sued or will be sued. However, if the defendant is a lawyer, counsel for the plaintiff is required by the Rules of the Bar Association to inform the defendant that a court case will be brought against it.

Process is served under the supervision of the court, which issues a formal notice to the defendant according to standard procedures by registered post, by the court clerk or an enforcement officer.

When the whereabouts of the defendant are unknown, or where attempts to locate de defendant's address are unsuccessful, the court may decide to serve the claim by public notice.

Service of defendants abroad is carried out under:

- Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast);
- the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (HCCH 1965 Service Convention); or
- under bilateral agreements, as applicable.

3.6 Failure to Respond

If the defendant does not respond to a lawsuit, the court will first check whether the service was proper. If it was not, the court will order the service to be repeated.

If process has been served properly and the defendant still fails to respond, the facts alleged in the initial complaint are deemed to be admitted by the defendant.

However, there are situations in which the defendant's failure to respond is not taken as an admission of the facts alleged in the initial complaint (eg, where there is a multi-defendant case and one of the defendants has contested the

facts alleged in the initial complaint or when the service has been carried out by public notice).

If a properly summoned defendant fails to respond to a lawsuit, the case is referred to counsel for the plaintiff (and the counsel for the defendant, if appointed) for closing statements within ten days. The court will then issue a default judgment.

3.7 Representative or Collective Actions

Parties are generally allowed to file collective actions (eg, when multiple plaintiffs join their claims because they hold the same or similar interests). When two or more similar proceedings are pending before the court and the legal requirements for this are met, the cases may be joined at the request of the parties or by a decision of the court of its own motion.

There is a specific form of class action whereby an individual or a group of individuals, associations, foundations, local authorities or, in respect of certain matters, the public prosecutor and the Directorate-General for Consumers may bring an action in representation of a larger group of people. This class action procedure is known as the *ação popular* (popular action) and may be brought in areas such as the environment, public health, consumer rights, cultural heritage, state-owned property and private enforcement of competition law.

The popular action provides for an opt-out procedure. There is no specific definition of a class and there is no determination of a class by preliminary certification. Moreover, in these proceedings, the court can issue an initial dismissal judgment if it considers that the claim is blatantly unfounded and that it cannot proceed as a class action or will not succeed. This is an exception to the general rule in civil proceedings where the merits of the case are normally heard only at the end of the case, after evidence has been taken.

Class actions as set out above are not very common in Portugal, although there seems to be a recent growing trend, particularly in the field of competition law (private enforcement) and consumer protection.

The Portuguese legal system is very plaintiff-friendly when it comes to the payment of court costs in popular actions.

3.8 Requirements for Cost Estimate

There are no requirements to provide clients with a cost estimate of the potential litigation at the outset.

The only point to note is that Portuguese law expressly forbids arrangements whereby counsel's fees are exclusively dependent on the outcome of the case (contingency fees). They may however be composed of a fixed part regardless of the outcome of the case (eg, according to the time spent, the urgency or complexity of the matter) and a success fee depending on the results obtained.

4. Pre-trial Proceedings

4.1 Interim Applications/Motions

Under Portuguese law, there are no interim applications/motions before trials or substantive hearings of a claim.

4.2 Early Judgment Applications

There is no specific procedure for the parties to apply for early judgment on some or all the issues in dispute, or for the other party's case to be struck out before trial or substantive hear-

ing of the claim. The parties usually do so in their pleadings or submissions made during the proceedings as a result of the arguments put forward.

As a rule, the judgment is rendered at the end of the case, after the taking of evidence in the trial, and covers procedural and substantive matters. The court may nonetheless anticipate a ruling on one or more procedural matters, or even decide the merits of the case (either partially of fully), if it considers it unnecessary to produce any or additional evidence on the matter being decided.

4.3 Dispositive Motions

The parties cannot make formal and autonomous dispositive motions with the court before the trial. However, defendants rarely present arguments in their pleadings and submissions for the case to be dismissed or disposed by the court without the need for a trial hearing.

4.4 Requirements for Interested Parties to Join a Lawsuit

Interested parties not named as plaintiff or defendant may join a lawsuit in different situations and through different procedures.

Joinder as Plaintiff or Defendant (Intervenção Principal)

When the interested party has the same interest in the lawsuit as the plaintiff or defendant, it may apply to join the lawsuit as a plaintiff or defendant, as appropriate. In this case, the joining party may submit its own pleading, which is only allowed up to the end of the pleadings stage, or adopt the existing claim/defence filed by the original parties at any time before the judgment is rendered by the court.

Assistance (Assistência)

If the interested party holds an interest in the decision of the claim being favourable to one of the parties, it can apply to join the case by assuming the position an assistant. The assistant may join the case at any time before a judgment is rendered by means of an ad hoc application or by lodging a claim/defence (if the assisted party is also in due time to lodge a claim or a defence).

Opposition (Oposição)

If the interested party claims to have a right that is fully or partially incompatible with the right invoked by the plaintiff in a lawsuit between two or more parties, it can apply to join the case to assume the position of opponent. The opponent may join the case before the trial is scheduled or before a judgment is rendered by the court, if the trial has already been scheduled. To that end, it must file a claim that meets the legal requirements for the plaintiff's initial complaint.

4.5 Applications for Security for Defendant's Costs

It is not possible to apply for an order that the plaintiff/claimant must pay a sum of money as security for the defendant's costs under Portuguese law.

4.6 Costs of Interim Applications/ Motions

Under Portuguese law there are no interim applications/motions before trials or substantive hearings of a claim.

4.7 Application/Motion Timeframe

Portuguese law does not provide a specific period for courts to decide on applications/motions.

It is very difficult to estimate the timeframe for a Portuguese court to decide an application or a

motion, as this depends largely on the judge presiding over the case, the workload of the court, the complexity of the case or of the application/motion. From experience, an application/motion usually takes up to a month to be dealt with. In cases of an urgent nature, such as injunctions or insolvency proceedings, the courts tend to deal with an application/motion more rapidly and sometimes within a few days.

A party can request that the application/motion be dealt with on an urgent basis, even in cases that are not urgent in nature. The timeframe for the court's decision will depend on factors such as the court's workload and the need to grant the opposing party an opportunity to comment on the application/motion filed.

5. Discovery

5.1 Discovery and Civil Cases

There is no discovery process in Portuguese law. However, a party may ask the court to order the other party to disclose a specific document or set of documents. Requests for reference to an excessively broad class of documents or information on a certain matter or that will lead to non-specific searches will not be granted by the court.

The requesting party must also indicate the facts it intends to prove with the documents requested.

The request for disclosure of documents will only be granted by the court if the requesting party is unable to obtain the documents by any other means or has substantial difficulty in doing so.

The court may also order the parties to disclose documents or other evidence of its own motion.

5.2 Discovery and Third Parties

The court may order third parties to the proceedings to disclose documents or other evidence to support the facts in dispute. This can be either of the court's own motion or at the request of either party.

Refusal to produce the documents ordered by the court or failure to provide justification for the impossibility of doing so may give rise to a procedural fine for the third party.

5.3 Discovery in This Jurisdiction

There is no discovery process in Portuguese law.

5.4 Alternatives to Discovery Mechanisms

The general rule in civil proceedings is that each party bears the burden of alleging and proving the facts on which the claim or the defence is based. Any facts not objected to by the opposing party will be deemed to be admitted and therefore proved. Thus, only disputed facts will be subject to evidence.

As a rule, all evidence should be presented by the parties with their pleadings. After this point, the appropriate time to submit documents and other evidence or to change the evidence submitted is the pre-trial hearing.

Up to 20 days before the trial, the parties can amend their list of witnesses. If so, the opposing party will have five days to exercise the same option. Witnesses who are named by the parties at this point will have to be brought by the parties to the trial, as they will not be summoned by the court. In practice, if these witnesses fail to appear at the trial, no new date will be scheduled for their examination.

Furthermore, up to 20 days before the trial, the parties can file additional documents upon payment of a procedural fine, unless they demonstrate they were unable to do so by that time.

After that point and during the trial, the parties will only be allowed to file documents that they could not have submitted earlier and which have become necessary as a result of a subsequent event.

Witness evidence and expert testimony is given at the trial.

Portuguese law provides for the possibility of written testimonies by witnesses under certain circumstances but this is seldom the case.

Reports by legal counsel, academics or other experts may be put forward at any time during the proceedings at first instance.

5.5 Legal Privilege

Lawyers are subject to attorney-client privilege under the Rules of the Portuguese Bar Association.

Attorney-client privilege covers all facts, documents or information concerning professional matters which are made available by the client to the lawyer in the exercise of their professional duties.

Any facts, documents or information obtained in breach of attorney-client privilege will not be admitted as evidence in court proceedings.

Correspondence and documents exchanged between lawyers and their clients cannot be seized by the court, unless they relate to a criminal offence in proceedings where the counsel is a defendant.

In-house counsel are also subject to attorney-client privilege, provided they are registered with the Portuguese Bar Association and practise as lawyers.

5.6 Rules Disallowing Disclosure of a Document

Under Portuguese law, all persons are under a duty to co-operate with the court in discovering the truth. This includes the duty to provide whatever documents or information are requested by the court. However, the persons concerned may refuse to comply with the order of the court if it entails:

- a violation of physical or moral integrity;
- an intrusion into private or family life, domicile, correspondence or telecommunications; or
- a breach of professional or public officers' privilege, or of state privilege.

In case of refusal, the court may ask the appellate court to assess whether the duty of secrecy should prevail or instead be waived.

6. Injunctive Relief

6.1 Circumstances of Injunctive Relief

In Portugal, there are specific injunctions and general injunctions. The former are governed by specific provisions, whereas the latter are available when there are no specific injunctions appropriate to the circumstances of the case. The injunctions specifically provided for in Portuguese law include:

- provisional restoration of possession;
- suspension of corporate resolutions;
- attachment of assets;
- suspension of new construction;

- listing of assets;
- presentation of movable or immovable property;
- judicial delivery of property subject to a financial lease;
- seizure and delivery of a vehicle;
- protection of industrial property; and
- injunctive relief for copyright.

As a general rule, a party seeking to obtain injunctive relief has to present evidence:

- of a strong prima facie case (fumus boni juris);
- that the respondent has breached its right or is in the verge of doing so;
- that such breach is likely to cause harm which is not repairable (or not easily repairable);
- there is urgency (periculum in mora); and
- the relief sought is proportionate to the detriment of the respondent.

6.2 Arrangements for Obtaining Urgent Injunctive Relief

Injunctions are urgent measures and should be decided within 15 days of the application if it is an ex parte measure, or within two months if the respondent files a response. These time limits are indicative since there are no consequences if they are not met. Moreover, timings may vary according to the circumstances of each case and the court where the injunction was sought.

However, requests for an injunction are usually decided quickly – especially in the case of an ex parte injunction. When the urgency is clear, it may be the case that the court will grant the injunction within one or two business days.

There are currently no arrangements under Portuguese law for out-of-hours judges or similar.

6.3 Availability of Injunctive Relief on an Ex Parte Basis

In principle, interim relief is obtained after the respondent has been granted the right to be heard, save if the applicant convinces the court that the prior hearing of the respondent will jeopardise the injunction. In this case, the injunction will be issued as an ex parte measure.

Provisional repossession will be granted ex parte if the dispossession was the result of violence.

Attachments of assets are always issued on an ex parte basis.

6.4 Liability for Damages for the Applicant

In principle, the applicant will not be held liable for any potential losses suffered by the respondent, even if the respondent successfully later discharges the injunction. The reason is that the injunction is granted by the court and any resulting harm to the respondent will have been duly weighed (proportionality test). However, in some cases where the injunction is deemed unjustified or it expires due to the applicant's actions or omissions, the latter can be held liable for damages provided it did not act in a prudent manner. In the case of ex parte injunctions, it may be more frequent for the applicant to be held liable for losses suffered by the respondent. If this is the case, the applicant will, in principle, not be required to provide any security for such potential losses.

6.5 Respondent's Worldwide Assets and Injunctive Relief

Portuguese law does not expressly limit injunctive relief to assets located in Portugal. Therefore, it seems that injunctions can be ordered with respect to the domestic and worldwide assets of the respondent. It will then be a question of

determining whether the injunction ordered by a Portuguese court will be enforceable in the jurisdiction where the relevant assets are located. The enforcement of injunctions in Portugal is limited to the assets that are within Portugal.

Portuguese courts can grant injunctive relief on worldwide assets in support of foreign proceedings, provided all applicable legal requirements are met.

6.6 Third Parties and Injunctive Relief

As a rule, only the addressees of injunctions (ie, respondents) are bound by their terms. If the applicant intends to obtain injunctive relief against a person, they must be included in the application for injunctive relief so that they are bound by the injunction.

6.7 Consequences of a Respondent's Non-compliance

Anyone that fails to comply with the terms of an injunction commits the crime of disobedience. This is in addition to any appropriate measures to enforce the injunction and possible civil liability for damages caused by that disobedience.

7. Trials and Hearings

7.1 Trial Proceedings

Civil trials are conducted in the presence of the judge, the court clerk and counsel for the parties. The parties or their representatives may also be present. The procedure involves mostly oral argument and witness/expert examination.

The court will first encourage the parties to reach a settlement. If this is not possible, the trial proceeds to the taking of witness evidence.

Witness Evidence

Each party may usually call up to ten witnesses to testify. Each witness takes an oath to tell the truth at the beginning of their testimony under penalty of committing a criminal offence. The witnesses called by the plaintiff are heard before the witnesses for the defendant. Counsel for the opposing party is entitled to cross-examine the witness but may not broaden the scope of the questions put by counsel for the party that called the witness. The court may intervene at any time and put questions to the witness. The testimony of witnesses is only relevant to facts of which they have first-hand knowledge. Some judges allow expert witnesses, especially when the case is highly complex and/or involves very technical issues.

Expert Evidence and Testimony by Experts

If the court requests an expert opinion, the parties may ask that the expert appear at the trial to provide clarifications on the expert report.

Statements by the Parties

The parties may request the court to make oral statements on facts of which they have first-hand knowledge. These facts must be indicated to the court in advance. These statements can be requested until closing arguments in the first instance.

Once the taking of evidence has been completed, the counsel for the parties shall deliver their closing statements.

The final decision should be rendered within 30 days of the trial, but this time limit is only indicative and is often not complied with.

The trial is recorded by the court's recording system.

7.2 Case Management Hearings

The legal process generally involves a pre-trial hearing. This hearing is typically a case management hearing held between the court and counsel for the parties to establish the matters in dispute and those which will be the subject of evidence at trial. They also organise the next steps in the proceedings, including scheduling of the trial. Procedural issues may be adjudicated at the pre-trial hearing and the court may also decide on the merits of the case (either partially or fully), if it considers that the case is ready for such a decision.

The pre-trial hearing is conducted orally, but counsel for the parties may submit written applications.

As a rule, the pre-trial hearing is recorded by the court's own recoding system, but the court can dispense with this upon prior agreement between the parties.

7.3 Jury Trials in Civil Cases

Jury trials are not available in civil cases in Portugal. Jury trials are available in criminal cases for the most serious crimes but they are very seldom used.

7.4 Rules That Govern Admission of Evidence

During the trial, the parties will only be allowed to file documents that could not have been submitted earlier and have become necessary as a result of a subsequent event.

Reports by legal counsel, academics or other expert opinions may be put forward at any time during the proceedings at first instance.

7.5 Expert Testimony

Expert testimony is permitted at trial.

If the court, of its own motion or on application by the parties, decides to request expert evidence, it will first list certain questions to be answered by the expert(s) and decide what data or documentation should be made available for this purpose. The parties are given an opportunity to put forward a position on these issues in advance.

The expert evidence may be conducted by one court-appointed expert or by a panel of three experts: one expert appointed by each party and the third expert appointed by the court.

The appointed expert or panel of experts must submit the expert report to the court within the time limit set by the latter.

As soon as the expert report is submitted, the parties may raise complaints or request clarifications from the expert(s), which must be provided in writing. The parties may also ask the court to order the production of a second expert report by a different expert or panel of experts.

The parties may also request the presence of the experts at trial to provide clarifications on their report. No opinion may be given on the facts of the dispute.

Expert witnesses introduced by the parties are not expressly allowed by Portuguese law. However, some judges allow experts to give evidence, even if they have no first-hand knowledge of the facts of the dispute, especially when the case is highly complex or involves very technical issues. Written expert reports by party-appointed experts are not treated as expert evidence but are instead considered as part of the evidence and pleadings submitted by the relevant party. Written expert reports by party-appointed

experts may be filed up to the end of the trial at first instance.

7.6 Extent to Which Hearings Are Open to the Public

In principle, court sessions are public and the general public may attend. Nevertheless, hearings may be conducted on camera to safeguard:

- the parties' dignity or the intimacy of their private or family life;
- public morals; or
- the court's normal functioning and the effectiveness of its decisions (eg, in case of injunctions).

7.7 Level of Intervention by a Judge

The level of intervention by a judge during a hearing or trial varies greatly and depends on each judge. Some judges limit themselves to complying with legal formalities and intervene only if necessary, whereas other judges intervene to a greater extent and preside over hearings and trials in an active way.

Although it is possible for judgments to be delivered at the end of the trial, this is not often the case. The overwhelming majority of judgments are reserved to a later date. The reason is that the judge has to weigh all the evidence taken at the trial and draft a written and fully reasoned judgment.

7.8 General Timeframes for Proceedings

It is very difficult to estimate a general timeframe for court cases in Portugal. The duration of proceedings depends on many different factors, such as the court hearing the case, the workload of that court, the court's schedule, the complexity of the case, the number of parties and their conduct, the nationality of the parties, and the need for expert opinions, among others. However, the duration of a commercial dispute from filing the claim through trial is generally up to 18 months. The typical duration of trials for commercial disputes is from one to three days, although several days, weeks or even months may pass between each trial session.

8. Settlement

8.1 Court Approval

The need for court approval to settle a lawsuit depends on whether the settlement is made within the proceedings or out of court.

If the parties agree to settle before the proceedings end, the court will have to validate whether the right in dispute can be subject to an agreement and whether the settlement complies with all procedural rules.

If the parties reach an out-of-court settlement involving the withdrawal of the claim by the plaintiff, the court will limit itself to validating the withdrawal.

8.2 Settlement of Lawsuits and Confidentiality

The settlement of a lawsuit can remain confidential if made out of court. This is usually the purpose of out-of-court settlements followed by the plaintiff's withdrawal of its claim. To achieve this, the parties usually submit a joint written application informing the court that they have reached an agreement without disclosing the terms of the settlement. The plaintiff then withdraws the action and the judge ratifies this without knowing the terms of the settlement.

8.3 Enforcement of Settlement Agreements

If the settlement agreement was entered into by the parties within court proceedings and ratified by the court, the court's decision to approve the agreement and end the case has the force of a judgment. This makes it possible to bring enforcement proceedings if one of the parties does not comply with the agreement.

If parties reach an out-of-court settlement, they will be responsible for ensuring the agreement is enforceable if it is breached. Generally, this is achieved if the agreement is subject to a specific notarisation or authenticated by a lawyer.

8.4 Setting Aside Settlement Agreements

Settlement agreements can be set aside based on unilateral breach by one of the parties or on revocation by both parties.

9. Damages and Judgment

9.1 Awards Available to the Successful Litigant

A successful litigant will have a judgment in its favour that can be fully enforced against the losing party if the latter does not voluntarily comply with the court decision.

Under Portuguese law, there are no remedies available at the full trial stage.

9.2 Rules Regarding Damages

The general rule under civil law is that the duty to compensate only exists in respect of damage which the injured party would probably not have suffered had it not been for the event that led to the damage.

The duty to compensate includes not only the damage caused by the event, but also the benefits or profits that a party failed to obtain as a result of the event.

The court can order compensation of future damage, as long as it is foreseeable. If not, the compensation for future damage will be referred for a further decision.

Compensation for moral damage is available as long as its seriousness merits compensation.

Punitive damages are not available under Portuguese law. However, the parties to a contract may agree that, in the event of default or breach of contract, the defaulting party will be bound to pay liquidated damages or a penalty clause. Both the amounts of liquidated damages and penalty clauses may be reduced by the court on an ex aequo et bono basis at the request of the debtor if considered excessive. Penalty clauses may also be reduced if the underlying obligations have been partially met.

9.3 Pre- and Post-judgment Interest

The general rule under civil law is that the duty to compensate only exists in respect of damage that the injured party would probably not have suffered had it not been for the event that led to the damage.

The duty to compensate includes not only the damage caused by the event, but also the benefits or profits that a party failed to obtain as a result of the event.

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9.4 Enforcement Mechanisms of a Domestic Judgment

A domestic judgment may be enforced by a subsequent court action brought by the party seeking enforcement against the person against whom enforcement is sought.

The enforcement procedure involves a trilateral procedural relationship between the creditor, the enforcement officer and the court, in order to attach and carry out a judicial sale of the debtor's assets to satisfy the creditor's claim.

Where enforcement proceedings are based on judgments, the debtor is not notified of their commencement and is only aware of their existence after the attachment of assets has taken place.

Enforcement proceedings in Portugal can only target assets of the debtor located within Portugal.

9.5 Enforcement of a Judgment From a Foreign Country

Recognition and enforcement of judgments given in member states of the European Union are done in Portugal under the terms of the Brussels I "Recast" Regulation. As a rule, these judgments require no special procedure and are automatically enforceable in Portugal.

Recognition and enforcement of judgments rendered in other foreign countries are done under Portuguese civil procedural law, without prejudice to the provisions of international treaties, conventions or specific legislation.

To have effect and be enforced in Portugal, non-EU judgments are subject to a specific procedure by a Portuguese court to review and confirm them. The court with jurisdiction for this is the appellate court of the place where the defendant is domiciled or has its registered office.

As a rule, the recognition of the foreign judgment is formal in nature and the court will not review the merits of the case. However, this may happen, for instance, if the recognition of the foreign judgment would lead to a result which is incompatible with Portuguese public policy.

The recognition proceedings begin with the filing of the initial application. The plaintiff may request the production of evidence. The judge will order the notice of the case to be served on the defendant, who has 15 days to respond. If the defendant files a response, the plaintiff will be granted ten days to respond. If no response is filed by the defendant, it is deemed to have admitted the facts alleged by the plaintiff in the initial application. The court will then make its decision, which may be appealed by either party. As soon as the decision on recognition becomes final and unappealable, it can be enforced in Portugal as if it were a domestic judgment.

10. Appeal

10.1 Levels of Appeal or Review to a Litigation

As a rule, there are two levels of appeal: to the appellate court and to the Supreme Court of Justice.

A party can appeal to the appellate court when the value of the claim is higher than EUR5,000 and the decision is unfavourable to the appealing party in an amount more than EUR2,500. The appellate court decides on matters of fact and law.

Provided that certain requirements are met, a party can appeal a decision rendered by the appellate court to the Supreme Court of Justice when the value of the claim is greater than EUR30,000 and the decision is unfavourable to the appealing party in an amount which is greater than EUR15,000. The Supreme Court of Justice decides on matters of law only.

There is also the possibility for the parties to appeal to the Constitutional Court when all ordinary appeals have been exhausted and issues of a constitutional nature are at stake.

The general rule is that the appeals do not stay the proceedings. However, when filing the appeal, the appealing party may request that it have a suspensive effect because the immediate enforcement of the judgment would cause considerable damage. If this is the case, the appealing party must provide security. The attribution of suspensive effect to the appeal depends on the authorisation of the court.

10.2 Rules Concerning Appeals of Judgments

The appeal is filed with the court that issued the judgment and this court decides whether the appeal is accepted or not. If it is accepted, the case is sent to the higher court.

Certain court decisions such as decisions regarding the jurisdiction of Portuguese courts, early dismissal of the claim or judgments issued against standardised Supreme Court case law are always subject to at least one level of appeal, regardless of the value of the claim and of the unfavourable decision.

There are decisions against which appeals may not be brought, such as case management decisions, unless they conflict with the equality of arms, the adversarial principle, the establishment of facts or the admissibility of evidence.

In principle, a judgment rendered by a court of first instance which is upheld by an appellate court on similar grounds and without a dissenting vote cannot be appealed to the Supreme Court of Justice.

An appeal may also be brought against a decision rendered by an appellate court when it concerns a matter of legal relevance which is necessary for a better application of the law, or when it concerns interests of social relevance.

10.3 Procedure for Taking an Appeal

The time limit for lodging an appeal against a decision rendered by a court of first instance is usually 30 days from notification of the decision but is reduced to 15 days in certain cases (eg, urgent proceedings, such as injunction or insolvency).

These periods are extended by a further ten days if the appeal relates to the review of the facts as established by the court of first instance and involves a review of the recorded evidence.

The time limit for lodging an appeal against a decision issued by an appellate court is also 30 days from notification of the decision but is reduced to 15 days in certain cases.

The time limit for the opposing party to respond an appeal is the same as the one within which the appellant party may lodge an appeal.

10.4 Issues Considered by the Appeal Court at an Appeal

The appellate courts can review the decisions of the courts of first instance both in matters of fact and law.

The Supreme Court of Justice has jurisdiction to review the decisions rendered by the appellate courts in matters of law.

In both cases, the courts decide only on the matters addressed in the statement of appeal and these matters define the scope of the appeal and the review of the judgment on appeal.

10.5 Court-Imposed Conditions on Granting an Appeal

Portuguese law does not provide that the court can impose any conditions on granting an appeal.

10.6 Powers of the Appellate Court After an Appeal Hearing

After hearing an appeal, the appellate court may uphold the appealed decision or overturn it, in whole or in part.

In certain cases, the appellate court may refer the case back to the court of first instance to repeat the trial, even if only with regard to certain points of the judgment.

11. Costs

11.1 Responsibility for Paying the Costs of Litigation

At the end of the proceedings, the losing party bears the costs associated with the proceedings, including court fees and the costs incurred by the prevailing party, including the fees the latter has paid to its counsel (in this case, for a limited amount of 50% of the amount of court fees paid by all the parties).

If the losing party does not agree with the statement of costs submitted by the winning party, it can file a complaint with the court.

If there are several losing parties, they will all be liable to pay a proportion of the amount to the winning party. In turn, the winning party can only recover costs from each defendant in that same proportion.

If a party litigates in bad faith, makes a claim knowing that it is false, wilfully fails to tell the truth or acts in a reckless manner, the court can order it (and its counsel) to pay compensation to the opposing party.

11.2 Factors Considered When Awarding Costs

When the court renders its judgment, it also determines the amount of costs – by reference to the value of the case and considering, among other things, the conduct of the parties and the complexity of the matter – and the proportion of costs to be borne by each party.

11.3 Interest Awarded on Costs

Interest is not usually awarded on costs under Portuguese law.

12. Alternative Dispute Resolution (ADR)

12.1 Views of ADR Within the Country

In Portugal, court litigation is still the most commonly used type of dispute resolution. The vast majority of disputes are resolved through the judicial system. However, the importance of ADR mechanisms has become increasingly significant in recent years, especially with regard to arbitration. This is largely due to the inefficiency and slowness of the traditional judicial system.

There are several ADR mechanisms available in Portugal as an alternative to the state courts. The most popular ADR methods in Portugal are arbitration, mediation, conciliation and the justices of the peace.

Arbitration is the most popular ADR method and there is a widespread view that Portugal arbitration friendly. This is due in part to the fact that Portugal is at the hub of Portuguese-speaking investment, has a model-law based arbitration law and is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

Despite recent efforts, there is still some reluctance to resort to mediation for dispute resolution, especially private mediation, probably because both parties and legal professionals are still unfamiliar with its scope and process.

Conciliation is available in court proceedings although it is seldom successful.

The justices of the peace is a hybrid dispute resolution tribunal, comprising a mediation stage followed by, if unsuccessful, a simplified judicial procedure. These are sought after for simple and small claims (not exceeding EUR15,000).

12.2 ADR Within the Legal System

Both civil society and the Portuguese government have been encouraging the promotion of ADR in recent years, particularly arbitration.

Nevertheless, there have also been some legislative and executive efforts to promote other ADR, notably mediation and conciliation.

Tax, IP and consumer arbitration are becoming increasingly popular following recent legislative changes.

Public mediation systems have been set up, including in the justices of peace. There have also been legislative changes to promote private mediation and ensuring its alignment with EU regulation as well as international standards; for example, confidentiality and other structuring principles are legally ensured, as well as suspension of limitation periods with the triggering of a mediation process, and direct enforceability of mediation agreements in specific circumstances.

ADR mechanisms available in Portugal are voluntary in nature but there are cases in which resorting to arbitration is compulsory, for example, in some sports, IP, employment and consumer disputes.

In Portugal, there are no sanctions for unreasonably refusing ADR.

12.3 ADR Institutions

In general, ADR institutions are efficient, well organised and keen to promote the use of ADR.

The most reputed Portuguese arbitration and mediation centre is the Arbitration Centre of the Portuguese Chamber of Commerce and Industry, which provides modern and well-tested arbitration and mediation rules.

13. Arbitration

13.1 Laws Regarding the Conduct of Arbitration

The Portuguese Arbitration Law is based on the UNCITRAL Model Law on International Commercial Arbitration, which lays down principles as fundamental as the autonomy of the parties and the arbitration clause, the principle of *Kompetenz-Kompetenz*, equality of the parties, fair process and the definitive character of the arbitral award.

Some particular features of the Portuguese Arbitration Law include:

- the provision of a specific criterion for the arbitrability of disputes (mainly interests of an economic nature);
- the provision of the negative effect of the principle of *Kompetenz-Kompetenz*;
- the impossibility for the parties to resort to anti-suit injunctions to prevent the constitution or functioning of the arbitral tribunal; and
- the express regulation of multi-party arbitration and third-party intervention.

Domestic arbitral awards can be enforced in Portugal under the same terms as state court decisions.

In respect of foreign arbitral awards, Portugal is a signatory to the New York Convention and has used only the reciprocity reservation.

13.2 Subject Matters Not Referred to Arbitration

Any dispute relating to interests of an economic nature can be referred to arbitration, provided it is not subjected by law exclusively to jurisdiction of the state courts (eg, criminal or insolvency disputes) or to compulsory arbitration. The main criterion regarding the arbitrability of the dispute is therefore the economic nature of the dispute.

However, an arbitration agreement concerning disputes not involving any interests of an economic nature is also valid provided the parties would be able to settle the disputed right.

The state and state-owned bodies can resort to arbitration if they are legally authorised to do so, or where the case involves a private law dispute.

13.3 Circumstances to Challenge an Arbitral Award

As a rule, under the Portuguese arbitration law, arbitral awards are not appealable, unless parties expressly agree otherwise.

An arbitral award made in Portugal may be set aside in specific cases, which mirrors the New York Convention. Portuguese superior courts are experienced in challenges of arbitral awards and have been known to consider international standards and case law.

13.4 Procedure for Enforcing Domestic and Foreign Arbitration

Domestic arbitral awards can be enforced in Portugal under the same terms as judgments by state courts.

In respect of foreign arbitral awards, the recognition procedure may depend on the applicability of the New York Convention. In any event, state courts are prevented from reviewing the merits, focusing only on the recognition requisites.

14. Outlook and COVID-19

14.1 Proposals for Dispute Resolution Reform

In 2021, the Portuguese government presented draft legislation to amend the Code of Civil Procedure. This proposal consists of changes intended to make the judicial system more efficient. It also aims to tackle the increased backlog in pending cases as a result of reduced court activity during the pandemic and to clarify some points that generated case-law controversies.

The proposed measures include streamlining expert evidence, limiting the use of pre-trial hearings and the number of witnesses for each fact that needs to be proven by evidence, extending the use of written testimony, allowing judgments to be rendered orally, and streamlining appeals.

This draft legislation is currently under discussion in parliament and is expected to come into force in 2023 or later.

14.2 Impact of COVID-19

Like other countries, Portugal was hit hard by the pandemic. Emergency legislation was passed by the Portuguese government and parliament as early as March 2020 to relieve the burden on businesses and individuals and support economic recovery. Provisional measures suspending certain time limits, procedural acts in court proceedings and limitation periods came into force. Along with lockdown measures, these have had a significant impact on the operations of the Portuguese courts. Some provisional measures are still in force, as the impacts of the pandemic are not yet over – especially those that stem not from COVID-19 directly but from the consequences of battling it.

At the time of writing, the activity of the Portuguese courts has resumed to virtually normal levels.

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Authors

Rita Samoreno Gomes is a partner and co-head of the dispute resolution practice at PLMJ, specialising in corporate and financial litigation. She has 20 years' experience, focusing primarily on advising clients, mainly international corporations, banks and financial institutions, in legal actions relating to private enforcement, consumers class actions, and disputes relating to financial instruments issued or sold through financial intermediation, civil liability of directors and corporate disputes. Rita has worked on cases of great significance and complexity, representing leading Portuguese and international corporations.

Petra Carreira is a managing associate in the dispute resolution practice at PLMJ. With more than ten years' experience, she works in Portugal and internationally, specialising in corporate and commercial litigation, private enforcement and insolvency and restructuring. For one year, she was a guest lecturer on economic and business law at the Católica Lisbon School of Business and Economics.

PLMJ

Avenida Fontes Pereira de Melo, 43
1050-119 Lisbon
Portugal

Tel: +351 213 197 300
Fax: +351 213 197 400
Email: plmjlaw@plmj.pt
Web: www.plmj.com

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