

DISPUTE RESOLUTION GUIDE 2014



More speed less haste

José Carlos Soares Machado and **Catarina Matos da Cunha** of **SRS Advogados** analyse Portugal's dramatically changing civil court system, which is striving for swiftness and simplicity

Portugal has been facing severe changes in its judicial system. Due to impositions of the Troika intervention in Portugal, the judicial system was one of the target sectors to be reformed.

However, the changes had already begun before the new reforms were implemented. It is worth mentioning that Portugal is the only European country with a unique online platform which connects the courts to the lawyers. This means that every application, document and judicial act must be filed using this online system, called Citius. This innovative system allows lawyers to be permanently connected to the courts and able to obtain information on the status of the proceeding with a mere mouse-click.

In brief terms, Citius is a platform to which lawyers have access 24 hours a day to all their judicial proceedings, and through which lawyers are notified of court decisions, interim rulings, notifications. It is also the platform that lawyers use to send their applications to court and to notify the counter parties.

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This is undoubtedly one of the most relevant and useful tools that have been implemented in the Portuguese court system. It reduces the communication time between lawyer, court and counterpart lawyers, who are now permanently in contact.

The efficiency of this tool has had an impact not only on a lawyer's communication with the courts, but also on court officials, who can now focus on important procedural issues, rather than having to spend 80% of their time preparing notifications to be sent to lawyers and analysing the notifications received from the parties.

Aside from software innovation, the Portuguese civil court system has also seen severe changes in the Portuguese Procedural Code.

New Procedural Code

A brand new Procedural Code entered into force recently, and its driving principle appears to be a focus on speed.

Although there have been changes in the proceeding itself and its connected rules, the purpose of this reform was to shorten the average time a proceeding takes in a first instance court. The judges have been given a higher level of discretion in their procedural decisions.

The role of the judge within the Portuguese legal system is to actively conduct the proceeding and to ensure its swift conclusion. The judge may generate

any diligences they find relevant to the proceeding (such as ordering evidence-finding procedures), and refuse those that seem unnecessary.

However, in civil proceedings, this active inquisitorial role is moderated, since the parties play an important role as well. It is up to them to instigate the proceeding and they may terminate it at any time, subject to procedural rules. Further, the judge may only decide on issues raised by the parties and the decision may only condemn the defendant to the extent requested by the claimant. How the proceeding is conducted depends on the judge. However, the judge always tries to schedule the important steps of the proceeding by discussing it with the parties.

On September 1 2014, new rules on jurisdiction and judicial organisation came into force in Portugal. The government's purpose was to simplify the jurisdiction structure and also to bring more specialisation to each court.

The first level of jurisdiction was composed of 311 county courts which would normally be divided into specialised courts, depending on specific matters (commercial, family or labour courts, for example) and on the amount of the dispute.

Now that the new law has come into force, there are 23 county courts in the country – generally one per county – and each of those courts is divided into sections depending on specific matters and on the amount of the dispute.

Therefore, instead of having 311 courts, there only will be 23 divided into sections, where the territorial jurisdiction of each court is extended. Also, a few of the former courts have been closed and some of them converted into so-called proximity sections; that is, divisions of the county court intended only to provide information, receive documents, pleadings and applications, and conduct trial hearings whenever the judge deems necessary.

The structure of the appeal courts did not change. In Portugal, there are five appeal courts which, other than in exceptional circumstances, only decide as higher-instance courts. There is one Supreme Court, and this is the court of last appeal.

Outside this structure, there is a Constitutional Court, which oversees the constitutionality of legislation to which parties may appeal in the event they consider the rules applied by the judge to be unconstitutional.

Judicial courts represent the most used dispute resolution method in Portugal, even though alternative dispute resolutions, such as arbitration, are becoming more popular, particularly among the largest companies.

As a result of the large number of disputes resolved within the state legal system, Portugal has frequently changed and improved the system by, for instance, building new courts and adopting new technologies. Additionally, the power to deal with simple matters (divorce, for example) has been transferred to other state or private entities. This has helped the legal system to function more effectively and expeditiously.

Civil court organisation

In Portugal, the civil court system deals with private law issues, and particularly commercial, family or employment issues.

This system is organised into a hierarchical three-tier pyramid structure as follows: (i) first instance court (decisions taken by one judge); (ii) appeal court (decisions taken by three judges); and, (iii) Supreme Court (decisions taken by three judges, as a general rule).

In order to start a civil proceeding, the claimant presents a petition in court (by using the Citius system), setting out the alleged right, with the amount requested.

The court receives the petition and notifies the defendant, providing them with the petition and all the documents presented by the claimant, and the civil proceeding is initiated at that time.

After being served by the court of the initial claim, the defendant usually has 30 days to reply with a counter claim. In the event the defendant presents a counter claim within the defence, the claimant has 30 days to reply.

All these written applications are sent to the judge, who will analyse the formal issues arising.

The judge has the power to refuse the petition without any other diligences if the formal requirements are not followed (for example, if one of the parties is considered illegitimate).

After formally analysing the documents, the judge schedules a preliminary hearing where a conciliation process takes place and the parties, together with the judge, discuss the relevant facts and issues which will be taken to the final hearing. The judge decides which facts are relevant to the case and which facts the parties will have to prove by providing evidence.

After the above-mentioned proceeding, the judge will schedule the final hearing where the witnesses will be heard and other relevant evidence taken. During the final hearing, the judge has inquisitorial power – that is, even if the questioning of the witness is subject to the facts chosen, the judge may pose questions he deems necessary to form an opinion on the case. Once the hearing is concluded, the judge has 30 days to decide the matter.

All documents that support the parties' position must be filed within the written applications, or until 20 days before the final hearing, subject to a fine that the court may apply if it considers that such documents could have been presented before. The parties must present the evidence they find relevant to support their position.

Nevertheless, in the event that one party has relevant documents which are not filed, the other party may request such filing and the judge may order the presentation of the documents in their possession.

As for client and lawyer privilege, according to Portuguese law, the documents exchanged between lawyers or between lawyer and client are privileged.

In order to be able to file such documents, the lawyer in question must request the Bar Association to allow such filing. All other documents, if requested by the judge, should be presented.

All evidence provided must be presented in the petition (claimant) or in the defence (defendant).

The witnesses give oral evidence during the final hearing, while the experts elaborate a written report and may also be called to the hearing, in the event the parties or the judge request their clarifications.

In general terms, within civil proceedings, court hearings are public. All documents such as pleadings, witness statements and court orders, are available

to the lawyers in the respective court section. However, when the proceeding is an injunction (of any kind), this rule is changed and neither the hearings nor the documents are available to the public.

According to Portuguese law, the general time limit for bringing civil claims is 20 years. However, this time limit may be shortened according to the nature of the right claimed. Namely, there is a three-year limit for compensation for damages not arising from contractual liability; a three-year limit for unjust enrichment; a five-year limit for proceedings regarding debts periodically renewed; and, moreover, there is a specific time limit for consumer rights, according to which there may be a two-year limit for a trader to claim credits resulting from a supply of goods or six months to claim accommodation establishments, food and beverage credits, within the relationship between the consumer and the provider of goods.

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The creditor's intention to exercise its right will interrupt the time limit (by means of a written notification), which will then start again.

It is not possible for parties to agree to suspend time limits for bringing civil claims.

Remedies

The Portuguese Procedural Code establishes a wide range of interim remedies, by allowing a party to file for injunction proceedings to protect their alleged right.

In order to protect a parties' rights, it is also possible to obtain a freezing order or a search order.

There is the possibility to file for an injunction in support of foreign proceedings.

Under Portuguese Law, the available remedies include: (i) injunctions: an order that restrains or obliges the defendant to do something; (ii) declaration proceedings: a statement by the court of the plaintiff's legal rights, a statement by the court convicting the defendant (to fulfill contractual obligations, for example) or a statement by the court authorising a legal reality exchange (divorce or annulment of a contract, for example); (iii) enforcement proceedings.

Regarding declaration proceedings, Portuguese law does not provide for punitive damages, as the creditor is only entitled to compensatory damages. When restitution of the original situation is not possible, compensation will be determined in money, which includes direct losses and loss of profits. Portuguese law also foresees compensation for moral damages.

Enforcement

According to Portuguese Law, there is a specific enforcement proceeding that may be used either to obtain a payment of a debt or to force the accomplishment of a court decision (to force the delivery of a certain object or the counterparty to carry out a certain action).

If a court order is disobeyed, the creditor, besides initiating an enforcement proceeding, may claim a penalty payment (*sanção pecuniária compulsória*).

The enforcement proceeding is carried out by an enforcement agent, who is designated by the creditor. There have been dramatic changes in the enforcement proceeding regime. Previously the courts had responsibility for enforcement proceedings, which has recently been transferred to the enforcement

agent who now conducts the works under supervision of the court.

Under the new enforcement proceeding regime, it is quicker to seize debtor's assets and recover the amounts due to the creditor. The fact that the tax authorities, social security services and land registry offices are now fully connected to the same system, makes it is easier to track the debtor's assets in order to seize.

After seizure, the assets are sold with the purpose of paying the proceeding costs and the creditor's debt.

Costs

The costs claimed by the court may be the general cost of a civil proceeding (which is determined at the end, apart from the judicial tax paid with the filing of the applications) or may also include possible fines applied to the party, for example, for late filing of documents. A party who does not pay the court fees will be immediately served for an enforcement proceeding.

No win no fee agreements between lawyers and their clients (*quota litis*) are not allowed by the Portuguese legal system. However, a complementary success fee is common procedure.

Appeals

The parties can appeal decisions involving an amount above €30,001 (\$38,879). The parties' appeal may be related to facts (whether the judge considered them proven or not proven) in the event parties believe the decision about the facts should have been different, according to the evidence taken. The appeal may also challenge the part of the decision that applies the law to the case, when the parties do not agree with the legal framework.

In general terms, there is a right to a further appeal, to the Supreme Court, unless the appeal court decision confirms the first instance decision on the same exact terms.

In general terms, the Portuguese appeal courts are quick in taking decisions. The average time for an appeal court, or the Supreme Court, to issue a decision in a normal case is just six to eight months.

Foreign judgements

It is possible to recognise foreign judgments, as the law foresees a special confirmation procedure, after which the decision may be enforced.

In order to be granted a confirmation, certain general and formal conditions must be met, such as: (i) there must be no doubts regarding the authenticity of the document containing the decision; (ii) the decision must be final according to the country in which it was given; (iii) the jurisdiction of the foreign court must not have been determined fraudulently and the object of the decision must not fall within exclusive international jurisdiction of Portuguese courts; (iv) the same case must not be pending in other courts; (v) the defendant must have been properly notified, according to the rules of the foreign court law, and the principle of an adversarial proceeding must have been followed; (vi) the confirmation must not lead to a result incompatible with the Portuguese state international public policy.

Additionally, there are international conventions and treaties in force that set out the conditions under which a judgment issued in one state is enforceable in another.

Within the EU, there are specific regulations (such as Regulation 44/2011 and 2201/2003) which set out such conditions. The Portuguese courts may request or be requested for (by means of a letter rogatory) any type of judicial assistance, such as to obtain oral or documentary evidence.

Further, there is a specific EU regulation (Regulation 1206/2001) which sets out the rules that must be followed.



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About the author

José Carlos Soares Machado graduated from the faculty of law of Lisbon University in 1976. He has practised law for more than 30 years, and has been consistently recognised as a leading civil and commercial litigation lawyer.

Since 2011, he has been a partner and head of the litigation and arbitration department at SRS Advogados.

Soares Machado is a professor at the law faculty of Nova University of Lisbon and is a member of the ILA International Commercial Arbitration Committee. He has also been the representative of the Minister of Justice on the Portuguese Insolvency Administrators Supervisory Committee since 2005.

Soares Machado is a former president of the Lisbon Bar Council, and a member of the Portuguese Bar Association National Board of Directors, and of its National Supreme Council, and an arbitrator at its arbitration centre. He is a member of the Portuguese Arbitration Association and has been an arbitrator in numerous cases. Soares Machado is the author of several published works on constitutional law, corporate law, real estate law, and professional ethics.



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Catarina Matos da Cunha has advised both national and international companies and individuals on commercial and civil litigation, insolvency issues and enforcement. She advises companies in various industry sectors, such as financial institutions, media, IT, consumer goods, oil and construction.

She has a great deal of experience in financial litigation, and Matos da Cunha's court experience allows her to have an in depth knowledge of dispute resolution matters.

Matos da Cunha graduated from the Católica University of Lisbon with a law degree. She has been with SRS Advogados for the last six years and has been a member of the Portuguese Bar Association since 2003.