

DISPUTE RESOLUTION PORTUGAL



Disputes in business are inevitable; they can arise from all sorts of issues from financial problems to breaches of contracts. What really matters is how these disputes are handled, and ultimately, resolved. To find out about the ins and outs of dispute resolution and the challenges often faced, we speak to José Carlos Soares Machado, Partner and Catarina Matos da Cunha, Associate from SRS Advogados in Lisbon, Portugal.

What are the common causes of disputes between businesses in Portugal? If you are able to do so please detail a specific case you have been involved in.

These are some of the most common causes of disputes between businesses in Portugal:

- Financial litigation (NPL's, loan agreements, security provided and consequences of breach)
- Breach of contracts (either concerning termination of contracts, breach of distribution agreement clauses, representations and warranties which are breached, etc...)
- Debt Recovery
- Insolvency

One of the cases in which SRS has been recently involved concerns a dispute between three companies, the cause for this dispute was, precisely, the breach of the agreements entered into between the parties.

Our client is one of the major Spanish construction companies and, in the course of its activity, entered into a contract with a Portuguese company for the supply of goods (industrial goods) necessary for the construction it had undertaken in one of the Portuguese seaports.

Simultaneously, it entered into other agreement with another company (second defendant) whereby this company undertook the obligation of conduct daily tests to control the quality of the materials used in the construction (materials which had been supplied by the first defendant).

During the construction, and despite the testing that had been made to the products, it was noticed that the materials supplied were defective and were causing extensive damages.

Given the large amount of the damages, the company decided to file a lawsuit against both mentioned companies for defective performance of the agreements entered into between the parties and requesting the payment of a compensation.

Given that the Portuguese economy is now on the path to growth, have you seen signs that legal disputes have lessened over the past six months?

The growth of the Portuguese economy is not necessarily correlated with the decrease of the number of legal disputes. On the contrary, during the economic recession, the number of legal disputes lessened because of the companies' lack of resources to request legal assistance.

We can only point out that there has been an increase of debt recovery procedures and insolvencies due to the economic downturn, however, beyond that, we can't say there has been an overall increase of disputes.

What available strategies do you have at your disposal for dealing with corporate disputes? Can you describe your thought process when assessing which type of legal remedy to use?

In Portugal there is a wide range of alternative dispute resolution procedures, such as:

- Negotiation;
- Mediation;
- Conciliation;
- Arbitration.

In Portugal, most of the companies tend to prefer to start a judicial proceeding first and then, during the timing of a judicial action, negotiate with the counter party the possibility of a settlement. In these cases, the role of the lawyer is pretty much related with the negotiation work and, considering that it is important to foresee the out coming risks, the Clients tend to use lawyers for the negotiation proceeding rather than working on their own.

Do laws and regulations differ for domestic companies as opposed to foreign companies?

Yes, in some matters the laws and regulations differ, for example, the rules on territorial jurisdiction are different if the parties are Portuguese or foreign. There are specific regulations that only apply to foreign companies, such as, laws that grant tax privileges.

Clearly most clients wish to avoid litigation, what do you advise companies to do to stop legal disputes escalating?

In what concerns, specifically, the issue of debt recovering we have been advising the companies to prevent disputes by (i) sending notice letters in advance, (ii) negotiating interests (in some cases its preferable to withdraw the payment of interests than to initiate a legal action), (iii) giving the chance to the debtor to pay the debt in installments, and (iv) not letting the debt accumulate to a point at which the amount overdue is high.

In some matters we advise the companies to insert arbitral clauses in order to avoid court jurisdiction. Nevertheless, we always advise our Clients not to enter into business agreements without, at least, the review of the contracts by a lawyer in order to prevent litigation situations that may damage the Client.

Do you feel the Portuguese legislative framework does enough to reassure foreign investors that legal disputes in the jurisdiction will be dealt with fairly and in a progressive manner?

Portugal has had severe changes in the legal framework and specifically in what concerns the judicial system. The recent changes in the legal system have allowed Portugal to gain a position in what concerns the attraction of foreign investment.

In fact, the recent financial crisis that Portugal (and other European countries) has faced, has allowed it to open its market to several foreign investment companies, as well as has had a positive impact on the production results of the country. The fact that the economy went almost bankrupt in Portugal, forced the stake holders of the major sectors in Portugal to adopt several measures to make our products and our companies more competitive.

A brand new Procedural Code entered into force recently and if we were to describe this reformation in one word it would be "celerity".

Although there have been changes in the proceeding itself and its connected rules, the fact is that 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 what concerns their procedural decisions

The role of the Judge within the Portuguese legal system is to actively conduct the proceeding and to ensure its celerity. The Judge may generate any diligences they find relevant to the proceeding (v.g order evidence-finding procedures), as well as refuse those that seem unnecessary.

However, in civil proceedings, this inquisitorial/ active 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. Furthermore, the Judge may only decide on issues raised by the parties as well as the decision may only condemn the defendant to the extent requested by the claimant. The conduction of the works depends on the Judge; however, the Judge always tries to schedule the important steps of the proceeding by discussion with the parties.

On the other hand, new rules on jurisdiction and judicial organization came into force in Portugal this year. The government's purpose was, again, to simplify the jurisdiction structure and also to bring more specialization to each Court.

The first level of jurisdiction was composed by three hundred and eleven county courts which

usually were divided into specialized courts, depending on specific matters (commercial, family or labour courts, for example), as well as depending on the amount of the dispute.

Currently, after the new Law came 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 also depending on the amount of the dispute.

Thus, instead of having 311 courts, there only will be 23 divided in sections, whereby the territorial jurisdiction of each court is extended. Also, a few of the former courts were closed and some of them were converted in "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. This is the court of last appeal.

How do you see your practice area progressing for the rest of 2014 in to 2015?

Since Portugal has been facing severe changes in its judicial system and with the increase of investment, it is expected that 2015 will be a productive year for the area. **LM**



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