

Shift in responsibility

José Carlos Soares Machado and Luísa Pereira of SRS Advogados analyse how the shift in responsibility rule in interlocutory injunctions could cut the length of court disputes

Under Portuguese civil procedural law, interlocutory injunctions (or interim injunctions) were created to provide a judicial response or reaction where a party, needing to ensure the validity and/or enforceability of a right, required a judicial order in a short time span.

Getting a favourable interlocutory injunction rests squarely on the allegation and on the proof in the specific legal requirements of the injunction. With regard to the Portuguese regime, in interlocutory injunctions the plaintiff must demonstrate before the court that there is: a probability of the existence of the plaintiff's right (*fumus boni iuris*); a well-founded fear of serious and permanent damage to his/her right; and that the situation and/or right demands an urgent judicial decision which cannot be submitted to the normal delay of a judicial proceeding (*periculum in mora*).

The urgent nature of interlocutory injunctions is the ground for the entire legal regime set forth in the Portuguese Civil Procedural Code and is the foundation of the interlocutory injunction's core principles: the provisory nature of the injunctory decision and its (legal) effects; and the instrumentality between the interlocutory injunction and the main proceeding.

The provisory nature of the injunction determines that a plaintiff must bring the main proceeding, which rules over the legal dispute in definitive terms, within a 30-day period, under penalty of expiration of the proceeding. This regime is easily understandable taking into consideration that the law does not demand irrefutable or hardcore evidence for the injunction to be given. The legal standard regarding evidence is lower for interlocutory injunctions, in general terms, when compared to that of common civil proceedings.

The instrumentality is closely related to the provisory nature of the proceeding, since it determines that the interlocutory injunction is dependent on the main proceeding.

The classical paradigm of an interlocutory injunction is grounded on its provisory nature and instrumentality. However, this paradigm is frequently challenged and contradicted by the dynamic and ever-changing reality of interlocutory injunctions and their underlying rights.



www.srslegal.pt



José Carlos Soares Machado

Partner and head of dispute resolution, SRS Advogados

Lisbon, Portugal

T: +351 213 132 000

F: +351 213 132 001

E: soares.machado@srslegal.pt

W: www.srslegal.pt

About the author

Partner and head of the dispute resolution department at SRS Advogados, José Carlos Soares Machado is a regular adviser to leading national and international companies on litigation matters.

With more than 35 years of experience, José Carlos is also a leading lawyer on corporate and international arbitration matters. He is an arbitrator with the Associação Comercial de Lisboa and the Centro de Arbitragem Comercial (Arbitration Centre of the Portuguese Bar Association). He is assistant professor at the Universidade Nova de Lisboa (Faculty of Law at the NOVA University of Lisbon) and chairman of the *Círculo de Advogados de Contencioso* (Portuguese Litigation Lawyers Circle).

José Carlos' expertise as an expert litigator, negotiator and arbitrator, lies in procedure, believing that litigators should not specialise in sectors, but rather in the rules of procedure in order to increase their client's chances of success. He has been a speaker at numerous seminars and conferences and has published several books and articles in specialised publications. Arbitration Country Practice Guide etc.

In this regard, it is important to differentiate between the two types of legal protection granted under an interlocutory injunction. Conservatory injunctions are those in which the judicial decision, following



Luísa Pereira

Associate, SRS Advogados

Lisbon, Portugal

T: +351 213 132 000

F: +351 213 132 001

E: luísa.pereira@srslegal.pt

W: www.srslegal.pt

About the author

Luísa Pereira has recently been promoted to associate, having completed her traineeship. She holds a master's degree in forensic legal sciences from the Universidade Nova de Lisboa (Faculty of Law at the NOVA University of Lisbon) and has a degree in law from the Faculdade de Direito da Universidade de Lisboa (Faculty of Law of the University of Lisbon).

the plaintiff's claim, are aimed at maintaining the *status quo*. This may refer either to a factual or material situation that the plaintiff intends to preserve or to a certain legal or contractual right the defendant intends to keep unharmed.

On the contrary, anticipatory injunctions aim to anticipate, to the largest possible extent, the final decision of the dispute. Anticipatory injunctions are also applicable in cases where the plaintiff's need for legal protection ceases after a certain date and/or event. In these situations, an anticipatory injunction is the only legal remedy that the plaintiff can use to protect his/her right from serious and permanent damage.

Shift in responsibility

With regard to anticipatory injunctions, civil procedure regimes have tried to adapt and establish rules and solutions suited to their particularities.

The main issue that can arise from anticipatory injunctions is the possible repetition of the legal action brought before the court in the interlocutory proceeding. The possible repetition of a lawsuit translates into a loss in the principle of procedural economy

and in the *res judicata* principle.

For instance, in the Italian civil procedure regime Italian lawmakers, in a 2005 legislative amendment, set forth a provision which prevents the interlocutory proceeding from expiring in the event that the interlocutory decision correctly anticipates the final decision of the main proceeding.

Portuguese procedural law had a similar legal framework, previously laid out under the Portuguese Administrative Procedural Code.

Under article 121 of the Code, an administrative interlocutory proceeding can become definitive if the following requirements are met: i) the court finds that there is sufficient evidence; ii) the proceeding is not complex; or iii) if the urgency of the final decision determines as such. Once the requirements are met, the court may, after the parties state their positions in the matter, give the final decision on the dispute.

These legal solutions may be considered potentially harmful to other legal principles, such as the adversarial principle and the principle of party disposition, since, in many cases, the interlocutory injunction is declared without a prior hearing of the defendant. Also, the principle of party disposition includes the obligation on the defendant to present the grounds of the judicial proceeding and prohibits the courts from taking decisions without prior allegation and proof.

Given the abovementioned disadvantages of other legal regimes, the rule set forth in the Civil Procedural Code aimed to mitigate these inconveniences and establish a mid-term solution.

More specifically, Portuguese lawmakers tried to provide a solution to this issue in the Portuguese Legal Reform of the Civil Procedural Code, enacted in 2013. This new Civil Procedural Code established a new provision on this matter under article 369.

According to the legal provision, the plaintiff may ask the court for a shift in responsibility, meaning that the responsibility of the burden of bringing the main proceeding is shifted to the defendant.

In the event that a shift in responsibility is declared by the court, the defendant would then have to bring a legal action in order to challenge the judicial recognition, in the interlocutory injunction, of the plaintiff's right, as results from article 371 of the Civil Procedural Code.

The defendant is granted a 30-day period/deadline in which he has to present the main proceeding, under penalty of conversion of the interlocutory decision into a final

decision based on the existence of the plaintiff's right.

However, the shift in responsibility entails the fulfilment of the following requirements: the proof brought to the interlocutory injunction is sufficiently reliable to give the court a firm conviction of the invoked right's existence; the nature of the interlocutory proceeding is able to determine the final settlement of the dispute.

Despite the letter of the law, under the civil procedural regime, an interlocutory injunction is always provisory. That being said, this requirement may not be interpreted as being so demanding in the sense that the court will only grant the shift in responsibility in the event the plaintiff proves the full extent of the claimed right.

The subject of the main proceeding, in most cases, will be the allegation and proof by the defendant of the non-existence of the plaintiff's right (*acção de simples apreciação negativa*).

This means that the main proceeding's purpose, from the defendant's point of view, is to obtain a judicial decision that solely declares that the plaintiff's right does not exist or that it may not be recognised to such an extent.

According to article 343 of the Portuguese Civil Code, in judicial proceedings that aim to declare the non-existence of a certain right, the burden of proof of the existence of the alleged right is shifted to the defendant.

In the end, and in a considerable number of cases, the main consequence of shifting the burden of bringing the main proceeding is the shift in the burden of proof.

Practical issues

Other than this change in the burden of proof, one of the main issues that can arise from the shift in responsibility relates to the legal means the defendant can use in reaction to a judicial decision granting the shift.

In the event that an interlocutory injunction is decided with the waiver of the preliminary hearing of the defendant, the party may challenge the interlocutory injunction.

On the other hand, the defendant may appeal the court's decision to grant a shift in responsibility during the final appeal of the interlocutory decision.

The appeal is limited to the Court of Appeal, meaning that the decision is not challengeable before the Supreme Court of

Justice, unless the issue brought before the Court is always appealable.

Current legal practice

From our experience within the scope of the dispute resolution practice, both the courts and law practitioners have held multiple interpretations of the extent of this shift in responsibility in anticipatory injunctions.

There has been an open debate among law practitioners over the sufficiency and reliability of the evidence presented by a defendant in an interlocutory injunction. They have not found a common answer. Does this legal requirement demand that the defendant present the same amount of evidence he would present in the main proceeding?

Since the subject is open to debate, it is prudent for the plaintiff to present, in the interlocutory injunction with a request regarding the shift in responsibility, all possible means of evidence. The courts are much more demanding in regard to the probative value of the evidence and can only decide to shift the responsibility once they are in possession of all probative elements deemed possible.

Another debate is taking place around the question of whether a defendant is bound to request the same legal protection from the court in both the interlocutory injunction and the main proceeding.

This requirement would, in a common civil proceeding, be a direct consequence of the principle of party disposition. However, in the field of the interlocutory injunctions, there usually is a difference between the precautionary protection and the definitive protection of a certain right, which can only be provided by a final ruling of the case.

Critical analysis

As previously mentioned, and resulting from the provision of article 369 of the Civil Procedural Code, the procedural mechanism of the shift in responsibility was aimed at anticipatory injunctions.

Since the Portuguese lawmaker intended to obviate the problems and inconvenience of other legal regimes, it did not go as far to make the initial purpose of the shift in responsibility possible.

Given the requirements of the mechanism, it is still possible to repeat a legal proceeding brought before the courts. The main difference is that the new proceeding will be brought by

the defendant, instead of the plaintiff. However, the defendant will still hold the burden of evidence and the responsibility of proving the right.

This may be deemed a disadvantage of the Portuguese regime but, simultaneously, it is a signal of prudence and caution in the matter of anticipatory injunctions.

On the other hand, the shift in responsibility rule presents, in our view, several advantages.

In its present form, the legal regime is able to assure the constitutional right to a fair trial (*direito ao processo equitativo*), on the basis of article 20 No. 4 of the Portuguese Constitution, since it can only be assured with the full proof of the main proceeding's object.

Furthermore, in the cases in which – and this occurs more often than one would think – the content of the interlocutory injunction is similar to the main proceeding, the need to bring the main proceeding represents a duplication of effort, with the inherent costs, that can now be avoided.

Once an interlocutory injunction is issued by the court, the defendant evaluates whether the grounds are strong enough to revert the interlocutory injunction issued by the court. In this sense, the shift in responsibility may result in efficiency gains.

There are other kinds of efficiency gains inherent to this legal mechanism. Before the existence of the shift in responsibility rule, the plaintiff would have to prove in the main proceeding all the facts that had already been proved in the interlocutory injunction, regardless of how clear the evidence was. Now, the defendant has the possibility of challenging in the main proceeding solely the facts which could, in a reasonable assessment, be subject to a contrary decision. This could, once again, avoid an unnecessary duplication of efforts and costs, allowing the parties and the court to focus on the disputed facts.

Finally, it is important to emphasise that, in the event the defendant does not bring the main proceeding, the plaintiff will be able, under this mechanism, to obtain a definitive decision on a dispute in a short period of time.

In accordance with the aforementioned, interlocutory injunctions are urgent proceedings which are ruled in a much shorter period of time than the main proceeding. Therefore, if the means of evidence are so clear that the defendant, after the interlocutory injunction is issued, decides not to lodge an appeal nor to bring the main proceeding, the plaintiff will have obtained a definitive ruling in a much shorter period of time than what was possible before 2013.