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GETTING THE DEAL THROUGH

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Portugal

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Litigation

1 What is the structure of the civil court system?

The civil court system deals with private law issues, namely contractual, commercial, family and employment issues. This system is organised into a hierarchical three-tier pyramid structure:

- first instance courts (one judge);
- appeal courts (three judges); and
- the Supreme Court (three judges, as a general rule).

The first level of jurisdiction is composed of several county courts, which are usually divided into specialised courts according to specific matters (eg, civil, commercial, family or labour courts), as well as depending on the amount in dispute (local and central courts).

Furthermore, within the appeal courts there are five district appeal courts that, other than in exceptional circumstances, only decide as high instance courts, meaning that all disputes must be held in the first instance courts.

There is also a Constitutional Court, which oversees the constitutionality of legislation and to which parties may appeal if they consider that the rules applied by the judge are unconstitutional.

Recourse to the state courts is the most widely used dispute resolution mechanism in Portugal, although ADR methods such as arbitration are becoming increasingly popular, particularly among the biggest companies.

As a result of a large number of disputes resolved within the state legal system, Portugal frequently makes changes and improvements to the system structures (building new courts, adopting new technologies, etc). Furthermore, the power to deal with simple matters (eg, divorce or succession proceedings) has been transferred to other state or private entities, which has allowed the legal system to work much more efficiently.

2 What is the role of the judge and the jury in civil proceedings?

In Portugal, there is no jury in civil proceedings.

The role of the judge within the Portuguese legal system is to actively conduct the proceeding and to ensure its efficiency. The judge may instigate any diligences he or she finds relevant to the proceeding (eg, order evidence-finding procedures), as well as refuse those that seem unnecessary.

However, in civil proceedings, this active inquisitorial role is moderated, since the parties also play an important role. 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, and his or her decision may only rule against the defendant to the extent requested by the claimant.

3 What are the time limits for bringing civil claims?

According to Portuguese law, the general time limit 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 and a five-year limit for proceedings regarding debts, which are periodically renewed.

Moreover, there is a specific time limit for consumer rights, for 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, establishment, food and beverage credits, within the relationship between the consumer and the provider of the goods. The Supreme Court has determined that the sixth months rule is also applicable to telecommunication services.

The creditor's intention to exercise its right will interrupt the time limit (by means of a written judicial notification), thereby causing it to start to run anew.

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

4 Are there any pre-action considerations the parties should take into account?

In Portugal, there are no pre-action considerations that the parties should take into account or steps they must take before issuing proceedings.

5 How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement?

To start a civil proceeding, the claimant presents a petition directly to the competent court accurately defining the claim or claims. The court office receives the petition and serves the defendant, providing him or her with the petition and all the documents presented by the claimant. The civil proceeding is initiated at that time.

It is important to note that all civil proceedings are run on an electronic platform named Citius.

6 What is the typical procedure and timetable for a civil claim?

The claimant presents a written application to which the defendant usually has 30 days to reply. In the event that the defendant presents a counterclaim within the defence, the claimant has 30 days to respond.

All written applications are concluded and sent to the judge, who will analyse the formal issues that arise therefrom.

The judge has the power to refuse a petition or a counterclaim if the formal requisites are not complied with. After formally analysing the written applications, the judge schedules a preliminary hearing at which a conciliation process takes place and the parties, together with the judge, discuss the relevant facts and issues that will be brought to the final hearings. Following the above-mentioned proceeding, the judge will schedule the final hearings, during which the witnesses will be heard and other relevant evidence taken. The judge has the inquisitorial power during the final hearing; that is, notwithstanding the fact that the questioning of witnesses is subject to the chosen facts, the judge may pose the questions he or she may deem necessary to form his or her opinion on the case.

Once the hearing is concluded, the judge shall deliver his or her decision within 30 days.

All documents that support the parties' positions shall be filed with the written applications, or up until 20 days before the final hearing, subject to a fine for lateness.

7 Can the parties control the procedure and the timetable?

The conducting of the procedure depends on the judge; however, the judge will always try to schedule the important steps of the proceeding through discussion with the parties.

8 Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

The parties only have to present the evidence they find relevant to support their position.

Nevertheless, in the event that one party possesses relevant documents that are not filed, the other party may request that such is filed, and the judge may order the presentation of the documents in a party's possession.

9 Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

According to Portuguese law, the documents exchanged between lawyers, or between the lawyer and its client, are privileged.

In order to be able to file such documents, the lawyer in question must request the Bar Association to allow such filling.

All other documents should be presented if so requested by the judge.

10 Do parties exchange written evidence from witnesses and experts prior to trial?

No, in Portugal, parties do not exchange any kind of written evidence prior to trial.

11 How is evidence presented at trial? Do witnesses and experts give oral evidence?

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

Documents may be filed up until 20 days before the final hearing, but the parties are subject to a fine.

Each party may indicate up to 10 witnesses.

The witnesses give oral evidence during the final hearing. Any experts will provide a written report, and they may also be called to the hearing in the event that the parties or the judge request clarifications of their reports.

12 What interim remedies are available?

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

It is also possible to obtain a freezing injunction or a search order to protect a party's right.

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

13 What substantive remedies are available?

Under Portuguese law, available remedies include:

- injunctions: an order that obligates the defendant to do something, or restrains the defendant from doing something (see question 12);
- declaration proceedings: a statement by the court of the plaintiff's legal rights; a statement by the court convicting the defendant (eg, to fulfil contractual obligations) or a statement by the court authorising a legal reality exchange (eg, divorce, annulment of a contract); and
- enforcement proceedings (see question 14).

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 shall be determined in monetary terms, which includes direct losses and loss of profits. Portuguese law also foresees compensation for moral damages.

14 What means of enforcement are available?

Under Portuguese law, there is a specific enforcement proceeding. This enforcement proceeding may be used to obtain the performance of a specific obligation such as the payment of a debt, the delivery of a certain object or the performance of a certain action, which result from a court decision or from other enforcement title (eg, certified extrajudicial settlement agreement).

If a court order is disobeyed, the creditor, besides initiating an enforcement proceeding, may claim a penalty payment.

15 Are court hearings held in public? Are court documents available to the public?

Generally, court hearings are public within civil proceedings.

All documents, such as pleadings, witness statements, court orders, etc, are available to lawyers in the respective court section. However, when the proceeding is an injunction (of any kind), this rule changed, and neither the hearings, nor the documents, are public.

16 Does the court have power to order costs?

The court has the power to order payment of costs. The costs ordered by the court may be the general cost of a civil proceeding (which is determined at the end of the proceeding), or may be fines applied to the party (eg, for late filing of documents).

17 Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

According to the Bar Association rules, the agreements between lawyers and theirs clients that determine that the fee will exclusively depend on the result of the proceeding are prohibited.

Party funding is not usual in Portugal. But the Portuguese Law doesn't forbid the parties to use third-party funding or to share the risk with a third party.

18 Is insurance available to cover all or part of a party's legal costs?

Yes; insurance policies are available that cover all or part of a party's legal costs.

19 May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Yes, class actions were introduced in Portugal by the 1976 Portuguese Constitution.

Although they are not usual, they can still be found in the jurisprudence, especially when decisions are made that concern interests of the community, such as environmental hazards. They can also be used to defend private interests, such as consumer rights.

Within the scope of a class action, the plaintiff represents, by his or her own initiative and with the waiver of power of attorney, every other rightful person entitled to file the action that has not exercised his or her right to opt out.

20 On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

The parties can appeal from unfavourable decisions for an amount greater than €2,500 for Appeal Court decisions and €15,000 for Supreme Court decisions.

The parties' appeal may be related to the facts that the judge considered proven or not proven, in the event the parties consider such decision 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 of further appeal to the Supreme Court, unless the Appeal Court decision confirms the first instance decision on the same exact terms.

21 What procedures exist for recognition and enforcement of foreign judgments?

It is possible to enforce a foreign judgment in Portugal; the law foresees a special confirmation procedure which is decided by the competent Appeal Court, after which the decision may be enforceable.

To be granted a confirmation, certain conditions must be met, such as:

- there must be no doubt regarding the authenticity of the document containing the decision;
- the decision must be final according to the country where it was rendered;
- the jurisdiction of the foreign court must not have been determined fraudulently, and the object of the decision must not fall within the exclusive international jurisdiction of the Portuguese courts;

- the same case must not be pending in other courts;
- the defendant must have been properly notified, according to the foreign court law, and the principle of an adversarial proceeding must have been followed; and
- the confirmation must not lead to a result incompatible with Portuguese and international public policy.

Furthermore, Portugal is party to international conventions and treaties that set out the conditions under which a judgment issued in one state can be enforceable in another.

Within the EU, specific regulations (eg, Regulations No. 44/2011 and No. 2201/2003) set out such conditions.

22 Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Yes. The Portuguese court may request or be requested, by means of a letter rogatory, to provide any type of judicial assistance, such as obtaining oral or documentary evidence.

Furthermore, EU Regulation No. 1206/2001 sets out the rules that must be followed.

Arbitration

23 Is the arbitration law based on the UNCITRAL Model Law?

Yes. Portuguese arbitration law is based on the UNICITRAL Model Law.

24 What are the formal requirements for an enforceable arbitration agreement?

The arbitration agreement must be in writing.

This requirement is met by a written document signed by the parties, an exchange of letters or other means of telecommunication that allows written evidence, including data interchange.

25 If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

If there is no relevant rule or arbitration agreement, the Arbitration Act establishes that three arbitrators will be appointed. For this purpose, each party appoints one arbitrator, and those two arbitrators will appoint the third one, who is the president.

The Arbitration Act determines that each party may freely challenge the named arbitrators with grounds; namely, the existence of facts that may impact on the impartiality and independence of the arbitrator.

26 Does the domestic law contain substantive requirements for the procedure to be followed?

The Arbitration Act contains substantive requirements for the procedure to be followed.

The Arbitration Act is very innovative, and offers great flexibility on procedural matters. Nevertheless, some provisions address important framework issues, such as due process principles, place of arbitration, language of the proceedings, initial phase of the proceedings (statements of claim and defence), cooperation of national courts when third parties or any of the parties do not voluntarily cooperate in the taking of evidence, and experts appointed by the tribunal.

27 On what grounds can the court intervene during an arbitration?

State courts may only intervene where so provided in the Arbitration Act.

Such intervention is foreseen regarding different matters, for example:

- when the evidence to be taken depends on the will of one of the parties or of third parties and these refuse to cooperate, a party may, with the approval of the arbitral tribunal, request from the competent state court that the evidence be taken before it, the results thereof being forwarded to the arbitral tribunal;
- state courts shall have the power to issue interim measures dependent from arbitration proceedings, irrespective of the location where these take place, in the same terms as they may do in relation to proceedings before state courts;
- when such matters were not regulated in the arbitration agreement, the parties may request the competent state court to reduce the amounts of the fees or the expenses and respective advance payments fixed by the arbitrators, whereby that state court may define the amounts it deems adequate after having heard the members of the arbitral tribunal on the issue; and
- in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator's appointment, or in arbitration with three arbitrators if the arbitrators appointed by the parties are unable to agree on the president's appointment such arbitrator shall be appointed, upon request of any party, by the state court.

Unless otherwise agreed by the parties, recourse to a state court against an arbitral award may be made only by an application for setting aside in accordance with the Arbitration Act. The circumstances that allow this recourse are very restrictive.

The state court that sets aside the arbitral award may not deal with the merits of the issue or issues decided in the award; such issues must be submitted, if any party so wishes, to another arbitral tribunal in order to be decided by the latter.

28 Do arbitrators have powers to grant interim relief?

The Arbitration Act fully provides for interim measures, adopting the extended section of the UNCITRAL Model Law, as reviewed in 2006.

The arbitral tribunal can grant interim measures if it deems this necessary in relation to the subject matter of the dispute. Only three requirements must be fulfilled: there is a serious probability that the requesting party will succeed on the merits; there is sufficient evidence of the risk of harm of his or her rights; and the harm resulting from the interim measure does not substantially outweigh the damage the requesting party wishes to avoid by the measure.

It is important to mention that ex parte decisions are also applicable. Such is allowed through the request for a preliminary order, which the arbitral tribunal can grant if it considers that prior disclosure of the request for the interim measure may frustrate its purpose.

29 When and in what form must the award be delivered?

The award shall be made in writing and shall be signed by the arbitrator or arbitrators. Unless otherwise agreed by the parties, the arbitrators may decide the merits of the dispute in a single award or in as many partial awards as they deem necessary.

Unless the parties have agreed, up to the acceptance by the first arbitrator, on a different time limit, the arbitrators shall deliver the final award on the dispute brought before them to the parties within 12 months from the date of acceptance of the last arbitrator.

30 On what grounds can an award be appealed to the court?

The general rule applicable to arbitration awards is that there is no possibility of appeal. However, if the parties decide to accept the possibility of an appeal, this will have to be written in the arbitration agreement. The appeal is only acceptable if the decision is not taken by arbitrators deciding ex aequo et bono.

This provision is based on that found in the Model Law, but introduces some specific aspects.

31 What procedures exist for enforcement of foreign and domestic awards?

Under Portuguese law, there is no need to recognise a domestic arbitral award, which may be enforced in the same manner as judicial court decisions.

As for foreign awards, if the decision is issued by an arbitral tribunal constituted in a state that is a signatory to the New York Convention, there is a simplified procedure for recognition. For the decisions issued by a state that is not signatory of the New York Convention, the procedure is more detailed and requires formal verification of the accomplishment of public order rules.

32 Can a successful party recover its costs?

Unless otherwise agreed to by the parties, the award shall determine the proportions in which the parties shall bear the costs directly resulting from the arbitration. The arbitrators may furthermore decide in the award, if they deem such fair and appropriate, that one or some of the parties shall compensate the other party or parties for the whole or part of the

Update and trends

The most recent reform to the Portuguese Procedural Code took place in September 2013 and the courts and agents related to the Portuguese justice (in which lawyers are included) are still adapting to the latest profound changes. This reform had the main purpose of providing a more flexible, simple and fast civil justice.

Although there are no proposals for a new reform, it is possible that some further adjustments to the recent reform will take effect.

reasonable costs and expenses that they can prove to have incurred owing to their participation in the arbitration.

Alternative dispute resolution

33 What types of ADR process are commonly used? Is a particular ADR process popular?

In Portugal, in addition to arbitration, the ADR processes are negotiation, mediation, conciliation and processes before justices of the peace.

Proceedings before justices of the peace are very popular, as they involve a non-state court that decides smaller cases (up to an amount of €15,000) in a much quicker and cheaper way, while providing the same legal certainty as state courts.

34 Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

The parties may determine, by agreement, that any dispute arising between them is subject to an ADR process (of any kind) before arbitration or litigation. However, this is not mandatory under Portuguese law.

Miscellaneous

35 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

Over the past few years, new legislation has confirmed the internet as a principal means of communication between lawyers and courts.

Since 2013, Portuguese civil first instance proceedings are exclusively carried out on Citius, an electronic platform, which allows lawyers to initiate the proceeding, present written applications, notify other parties and receive all the information relevant to the proceeding. Citius is also used by the court to send all notifications to the parties during the proceeding, and even to notify them of the final decision, as well as the costs.

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