Litigation in Portugal

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Sociedade de Advogados, RL

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1. Introduction

In assessing the viability or the exposure resulting from a claim, lawyers should be able to give clients an estimate of the costs involved, a timeline of the procedures, including appeals and more importantly on the merits of the claim.

This briefing provides an overview of proceedings, which may help foreign clients to understand some of the formalities surrounding Portuguese civil and commercial procedures.

Most clients have concerns in deciding to initiate a claim or when they receive notice that a claim has been filed against them. Their concerns increase if they have not in the past been involved in other disputes in Portugal. Among other things, plaintiffs and defendants alike express concerns about the lengthiness of the procedures, the court expenses and the lawyers fees and more importantly with the outcome of the procedure. A say often used by more responsible lawyers in advising their clients will be "a bad settlement is better than a good claim", meaning that clients should be willing to trade the uncertainty, cost and length of the procedure for a quick and reasonable settlement out of court. Nevertheless, one must be prepared to fight in court to protect its rights. Filing a claim against a defaulting plaintiff is in many occasions the best way of solving a dispute and sending a message to the market that you will not take lightly defaults of your customers or suppliers.

In order to be able to be fully aware of the consequences of litigation, lawyers should be able to give clients an estimate of the costs involved, a timeline of the procedures, including appeals and more importantly on the merits of the claim. On several occasions plaintiffs and defendants have not properly assessed the merits of their case and the risks they face in going into litigation. A reasoned review of the matter will both help clients understand their real chances of success and help prepare the strategy in case you really need to go to court.

Foreign clients will also need help in understanding the law that applies to the specific matter at hand as well as a good understanding of the procedural rules that apply in Portugal. Most foreign clients will be intrigued with the formalistic approach of Portuguese procedures. This article serves as an introduction to Portuguese civil and commercial procedures.

2. The legal framework

2.1. Background

Portugal's legal system has its routes in Roman law. The first effort to codify Portuguese law dates back to the XV century.

After the French Revolution and following the enactment of the Napoleonic Code that repealed French common law in 1804, Portugal approved its first Civil Code in 1867. Other codes were approved in the XIX century, including but not limited: the Commercial Code of 1888, the Code of Civil Procedure of 1876 and the Criminal Code of 1852.

Presently most of Portuguese civil and commercial law is either codified or set out in statutes of law. Notwithstanding, case law still plays a considerable role, as judges look to precedents for guidance and support of their decisions.

2.2. The Portuguese code of civil procedure and International conventions

The main procedural rules in what regards civil procedural in court, appeals, judgement and the enforcement of judicial and arbitral decisions were codified by the Portuguese Code of Civil Procedure ("CPC") approved by Decree-Law 44129, of 28 December 1961 as amended from time to time.

Portugal is a party to various international Conventions, such as the Hague Conferences on Private International Law, in what regards civil and commercial matters, whether on procedural and substantial aspects. A few examples are (i) Convention of 1 March 1954 on civil procedure, (ii) Convention of 5 October 1961 abolishing the requirement of legalisation for foreign public documents, (iii) Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial Matters, (iv) Convention of 1 February 1971 on the recognition and enforcement of foreign judgments in civil and commercial Matters, (v) Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters, and (vi) Convention of 14 March 1978 on the Law Applicable to agency.

3. The Portuguese judicial system

3.1. Court hierarchy

Like most other European judicial systems, courts are organised in territorial circumscriptions, which are then divided according to the various fields of law.

When the object of the lawsuit is a civil matter – such as the payment of a sum of money – the hierarchy of the court will be relevant to determine whether the matter can be appealed to the appeal courts or to the Supreme Court of Justice.

In general, the court of first instance is the court where the judgement takes place and the evidence is produced.

If one of the parties is dissatisfied with the decision issued by the court of first instance, it may appeal to a court of appeal (*Tribunal da Relação*). In certain cases, having regard to the financial value in stake or the interests concerned, the decision issued by the court of appeal, may still be challenged by way of a second appeal to the highest Portuguese court in appeal matters, the Supreme Court of Justice (*Supremo Tribunal de Justiça*).

3.2. Remedies available to court and general powers exercisable by the court

In general, the court is given the power to make a decision as to any matter to be determined in the proceedings, to order the payment of a sum of money (in any currency), to grant an injunction against a party, to order the performance of a contract obligation, to order the rectification, setting aside or cancellation of a deed or other documents, to declare a divorce or separation, to proceed on the division of assets caused by the death of his owner, etc..

The court may also, following a request of an interested party or on its sole accord:

- Give instructions as regards the preservation, custody, inspection, detention of property owned by or in the possession of a party to the proceedings;
- Give instructions as to the preservation of evidence in the custody of a party;
- Order a party to give warranties to ensure the payment of any due costs;
- Make peremptory orders prescribing a time limit for compliance;
- Continue proceedings in the absence of a party in the event such party fails to be present at a oral hearing or fails to comply with any orders issued by the court; and
- Order provisional measures during the proceedings, including requiring a party to make an interim payment on account of the claim or the costs of the process.

3.3. The court's powers

The Code of Civil Procedure establishes the Court's powers and duties with regard to the conduct of the proceedings.

The court must, in all instances, conduct the proceedings in a fair and impartial manner in order to give each party a reasonable opportunity to present his case and to adopt suitable procedures to the dispute in question.

There are a few general law principles which guide the court and parties on all the procedural rights and obligations. We list some of the most relevant principles expressly set forth in the CPC, namely in articles 1 to 3 A:

- Rights of defence, including the prohibition of self defence, the rights to a fair defence, access to justice, irrespective of financial difficulties, the right to receive an equal treatment, the right to challenge court decisions, right to answer to requests of the counterparty in a reasonable time and right to a fair trial;
- Duty of collaboration between the parties and the court, including the bona fides between the parties and court, the right to request for production of evidence to be taken by the court or documents to be presented by the counterparty, the right to request for provisional and interim measures in urgent cases and right to be informed on all documents and evidences presented in court; and
- Right of notice regarding all the acts and decisions taken in the process, in an adequate form as to permit its full understanding and consequent right to claim that the proceedings are void or null for lack of notice to the defendant or any such violation of relevant procedural rules.

There are a few resemblances in the judicial proceedings in what regards the civil law and the common law systems. Some of the most relevant common institutes are:

- A frivolous lawsuit: a lawsuit is brought in spite of the fact that both plaintiff and his lawyer knew that it had no merit. Therefore, by wasting the court's time resources and legal fees, it may result in sanctions being levied by the Court upon the party or the lawyer who brings the action;
- The abuse of process: which prohibits the misuse or perversion of the court process;
- The statute of limitations: law which sets forth a time bar commencing after certain events have occurred;
- Time constraints: If the party fails to respond within the time limit provided for his action, he risks having the case or issue decided against him by default or in his prejudice.

4. The procedures

4.1. Precautionary measures

Prior or jointly to filing a complaint, if a party fears that due to the length of the proceedings, the debtor will take advantage and transfer his assets or organize his own insolvency, he may apply to the court for interim measures.

The court has the power to order interim or precautionary measures against the debtor's assets, provided that the plaintiff has proved the fulfilment of two requirements: (i) the existence of a credit against the debtor, (ii) the risk that the debtor transfers his assets to elude the creditors.

The purpose is both to anticipate the final judgment on the merits for a certain period so as to ensure its enforcement. The debtor will be prevented from disposing of his assets or mortgages will be registered on them so as to avoid their disposal or to prevent that if he sells or otherwise transfers any of his assets they may be recovered from subsequent acquirers.

As way of example, the court may at the request of the Creditor, order:

- Attachment by way of mortgage on real property, or by deposit of business assets and valuable securities; and
- Preventive attachment of movable property or sums of money that belong to the debtor.

To enable such measures, the plaintiff must be able to prove that the claim has a chance of succeeding and that there is a real risk he will not be able to recover the debt.

As in most European systems, Portuguese courts will specify the assets that may be covered by the measure, up to the amount adequate to the claim.

Notwithstanding, there are assets and goods that may not be attached, to ensure the normal standard of living of the debtor and family, such as clothing, food, a portion of the wages, salaries and certain furniture.

The debtor has a right of defence even in interim measures. The debtor may challenge the measure, applying that the attachment is lifted, whether by way of opposition or appeal, depending on whether he raises matters of fact or matters of law, or by giving a performance bond.

If none of these defences are raised, the creditor may convert the attachment into an enforcement order, after the final judgment is rendered.

In this respect, the court ordering interim measures will usually not be the same court hearing the case on the merits. Furthermore, some measures may be based on a unilateral lawsuit, whereas others are based on adversarial proceedings. In the first case, the creditor has requested the court that the debtor is not notified of the proceedings before the court order is issued, therefore avoiding the risk of the debtor's non-compliance. In the second case, the debtor is entitled to challenge the request before the court orders the attachment.

4.2. The claim

Litigation begins when the plaintiff files a petition to the court, named "petição inicial", detailing what the defendant has done or failed to do that caused damage to the plaintiff and specifying the basis, factual and legal, for his claim against the defendant.

Under Portuguese law, the claim will assume different forms depending on specific circumstances, such as the object of the request, its financial value or other reasons.

The purpose of the claim is generally to recover sums of money, but it may also be to obtain the performance or non-performance of an action (such as duty to do something or the duty to refrain from doing something).

4.3. The defence

After being served with a plaintiff's claim, the defendant will usually have a short deadline in which to respond to the plaintiff, typically twenty to thirty days. The deadline to respond depends on the type and importance of the lawsuit filed in court. The response time varies according to the nature of the lawsuit and the value of the claim. The defence is always provided in writing in the form of a briefing addressed to the court, named "contestação", where the defendant will attempt to (i) contradict the facts alleged by the plaintiff or (ii) deny the merits of the lawsuit or (iii) have the claim dismissed on procedural grounds.

There are two different types of defences, depending on whether the defendant raises procedural questions in an attempt to stop the procedures at

the beginning or it responds to the merits of the case by denying the facts or rights alleged by the plaintiff.

Examples of the first type of defence are the lack of jurisdiction of the court, the lack of legal capacity of the defendant to respond, or the existence of time bars for the exercise of rights by the plaintiff. These cases are seen as exceptions to the discussion of the merits of the case, as the judge, if he/she accepts the Defendant's arguments, will dismiss the case without going into a deeper analysis of the facts and legal basis of the claim.

Differently, where no such exceptions exist or are raised, the defendant may simply dispute the merits of the case by responding to the plaintiff's claim whether by denying all or part of the facts or by submitting a counterclaim. This denial may be general, but it can also imply the acknowledgement by the defendant of certain facts alleged by the plaintiff.

4.4. The establishment of the relevant facts

After the claim and defence are filed in court, the judge will set out a list of settled issues (*relação de factos assentes*) and a list of questions (*base instrutória*). The first list sets out the facts that are proved by the documents submitted to the court or acknowledged by both parties, as opposed to the facts in contradiction, in relation to which the parties must produce compelling evidence in court.

In more complex cases, before fixing the facts acknowledged by both parties and the facts in discussion, the court may call the parties for a preliminary hearing, with the purpose of:

- Attempting to settle the case;
- Assessing and deciding on the exceptions raised by the defendant, insofar as the result of such assessment is the dismissal of the case prior to going into the merits;
- Setting out the list of settled issues and list of the questions; and
- Ordering the submission of evidence.

Subsequently, if the parties do not wish to settle and if no procedural exception exists that would lead the court to dismiss the case, the parties will be required to specify the instruments of evidence that support their position. These may include:

- The deposition of witnesses;
- The submission of documents;
- Medical or technical information, regarding the injuries claimed by the plaintiff and others sustaining the facts described in their respective briefings; and

- Reports of expert witnesses and any documents used by these experts in preparing their reports and forming their opinion.

Unlike most common law systems, there is no investigative phase designed to permit the litigants to obtain substantial information as regards both the facts of the case and the opponent's position.

4.5. Trial

In broad terms, the plaintiff must satisfy the burden of proof by producing compelling evidence to have a decision in his favour. On the other hand, the defendant must produce evidence in respect of the facts and rights that he alleged with a view to weaken or destroy the relevance of the facts presented by the plaintiff.

If a counterclaim has been filed, the defendant will also have the burden of proof as to the facts that support such claim.

Prior to or at the trial, each party may call witnesses or submit documents and exhibits to support their position. Usually, the plaintiff will present the proof in the first place, followed by the defendant.

After evidence has been presented and discussed, the parties are required to present their pleadings of fact dealing with the issues listed in the list of questions.

The hearing will then be suspended to allow the court to assess the evidence and issue a decision on the matters listed in the list of questions.

The decision rendered by the court will depend on the depositions, documents, expert reports and any other relevant proof presented to the court.

The parties have the right to challenge the decision on the grounds of deficiency, contradiction, obscurity or excess of the court's ruling. It may be that the court has omitted evidence produced to support its decision on the facts or has considered proved contradicting versions of the same facts.

If no challenge is presented to the court's decision on the facts that were deemed proved, the parties will be required to present their closing remarks on the matters of law.

After hearing the parties or reviewing their closing remarks, the court will issue its decision, which will contain a ruling on the applicable law and on the merits of the case.

5. Challenging the decision

Common reasons for challenging a court's decision are errors in the interpretation or application of the law by the court or disregard of evidence. Both have different effects. If the challenge is based on a misinterpretation of

the law, the affected party will ask the appeal court to review the trial court interpretation or application of the law and deliver a different decision.

Differently, if the challenge is based on the argument that some evidence was disregarded, the party may ask the court to set aside the court's decision and order a new trial, whether by annulling the judgment or by ordering that some facts should be subject to additional instruments of evidence.

The appeal court will usually review the case based on misinterpretation or misapplication of the law and leave the findings of fact untouched.

If the appeal is based on factual grounds, the decision delivered by the Appeal Court may (i) confirm the ruling if it finds no error or, (ii) if an error is found, reverse the ruling or (iii) order the court of first instance to conduct a new trial.

Ordinary appeals may be divided in two forms, depending on the appeal being made on the grounds of procedural matters and preliminary decisions or on the grounds of substantive law matters and final decisions:

- Appeal on procedural or preliminary decisions (*recurso de agravo*); and
- Appeal on substantial matters and final decisions (*recurso de apelação*).

The decision rendered by the court of first instance is considered an enforcement title even if an appeal was filed against such decision.

That means that the decision will be immediately enforceable regardless of any appeal except in the cases set out in the applicable laws, namely appeals regarding legal status of private parties and appeals on issues of ownership and possession, by the defendant, of his private domicile. In these cases, if an appeal is filed, a party may not enforce the decision until the court of second instance decides on the appeal.

After a ruling is given by the Appeal Court, the parties may also appeal to the Supreme Court of Justice (*recurso de revista*), except the decision of the Appeal Court that confirms the decision of the Court of First Instance. In this case, the parties may only appeal if the question in discussion has a legal or social relevance or if the decision is in opposition with another decision of the Appeal Court or the Supreme Court.

The appeal to the Supreme Court of Justice, considered an ordinary appeal, is restricted to matters of law, such as the violation of substantive law, whether by error in the interpretation or in the application of the law.

The review (*recurso de revisão*) is an extraordinary appeal. This type of appeal is residual, as it is provided only to allow a party to appeal from a decision even when the time-limit to challenge a decision in ordinary cases has already occurred.

The review is used in cases where it is shown that the decision was taken as a result of a crime committed by the judge in the performance of his/her

duties, some documents or experts' reports presented to court were found to be false, new documentary evidence that the party could not have known at the time of the trial is found that would justify the review of the decision, a party was not properly served of the proceedings or when the litigation was dissimulated by the parties in order to obtain an illegal or fraudulent result. The review may be filed in court within five years after the decision from the court of first instance was issued.

6. Enforcement of judgments

Court judgments as well as deeds that atest the existence of a legally binding obligation are considered enforcement titles, which entitle their holder to initiate enforcement proceedings without the nedd of further proof of the exitence of such obligation.

Enforcement for the recovery of sums of money may take one of the following forms:

- Attachment of movable assets and securities: the assets are placed under the court's control and sold whether by sealed bids, auction, private sale or public deposit;
- Attachment of bank deposits: the debtor's accounts are blocked and their credit balance seized;
- Assignment of receivables: the debtor's receivables are seized;
- Assignment of earnings: a part of the debtor's wages or salary is seized; and
- Distraint of real property: the property is seized and sold to pay the enforced credit.

6.1. Enforcement procedures

The enforcement procedure begins with the submission of an enforcement request to the court, based on an enforcement title, which must specify, among other things:

- The purpose of the enforcement; and
- The amount owed to the creditor.

The creditor should also, when filing the enforcement request, appoint an enforcement agent. If the creditor fails to appoint an enforcement agent, the court shall appoint one from an official list.

The enforcement agent shall be responsible for certain tasks throughout the enforcement proceedings, in particular for the distraint and sale of the seized assets.

Once the court has reviewed the enforcement request, it will notify the debtor to pay the debt or challenge the enforcement request. the debtor may then

challenge the enforcement request alleging that (i) the enforcement request was not based on a valid enforcement title, (ii) the court is not competent, (iii) any procedural requirement was not fulfilled, (iv) the debtor was not notified or that the debtor's notice in the previous claim was null and void, (v) the debt is uncertain, undue or undetermined, and (vi) the obligation was modified or extinguished. This challenge, as a rule, will create a stay on the proceedings, except if the debtor was notified prior to the distraint order. In this last case, the challenge will only create a stay if the debtor gives a bail or challenges the authenticity of the private document that was presented as enforcement title.

After the debtor's assets are known and identified, the enforcement agent will issue the distraint order.

The distraint order may be challenged by the debtor, which may create a stay of the proceedings if the debtor gives a bail. The distraint order may be challenged on the grounds of: (i) inadmissibility or invalidity of the distraint order or (ii) order the seizure of assets that cannot be seized, such as public assets and non-transferable property.

After seizing the debtor's assets, the enforcement agent will notify the creditors that hold any security interest over the debtor's assets to lodge their claims.

The claims presented by the creditors must be based on a valid enforcement title. If such enforcement title is not available, the creditor may request a stay of proceedings while he obtains an enforcement title.

The enforcement agent shall notify the debtor, the creditor and the remaining secured creditors of all lodged claims to enable them to challenge such claims based on any facts that have modified or extinguished the relevant obligation.

It is for the court to confirm the claims lodged by the secured creditors and rank all debts.

6.2. Methods of sale of the debtor's assets

There are four different forms of sale, namely: (i) sealed bids where the enforcement agent sets a date for the opening of the proposals in court, being the minimum bid price of 70% of the assets' base value, (ii) auction, that is carried out by an auctioneer appointed by the enforcement agent, (iii) private sale, in cases where the sale is deemed urgent or the creditor has proposed a buyer or a price, which is accepted by the debtor and the remaining creditors, (iv) public deposit, where the assets are deposited with the court and the sale is carried out within one month after publication of the relevant notices.

6.3. Forms of payment to the creditors

The discharge of debts may be made by (i) delivering of the seized cash amounts, (ii) foreclosing the seized assets following the request by the petitioner or by other creditor, (iii) assigning proceeds in respect of

immoveable or moveable assets that are subject to public registration following the request by the petitioner and (iv) paying the creditor with the proceeds of the sale of the seized assets.