
INTERNATIONAL EXECUTION AGAINST JUDGMENT DEBTORS

PORTUGAL

By

Helena Soares de Moura
Morais Leitão, Galvão Teles, Soares da Silva & Associados
Lisbon, Portugal

*Release 2010-2
Issued April 2010*

Oceana[®]
NEW YORK

OXFORD

UNIVERSITY PRESS

Oxford University Press, Inc., publishes works that further Oxford University's objective of excellence in research, scholarship, and education.

Copyright © 2010 by Oxford University Press, Inc.

Published by Oxford University Press, Inc.
198 Madison Avenue, New York, New York 10016

Oxford is a registered trade mark of Oxford University Press
Oceana is a registered trade mark of Oxford University Press, Inc.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior permission of Oxford University Press, Inc.

Library of Congress Cataloging-in-Publication Data

International execution against judgment debtors / Dennis Campbell, general editor;
Center for International Legal Studies.

p. cm.

Includes index.

ISBN 978-0-379-01253-8 (alk. paper)

1. Conflict of laws—Executions. 2. Judgments, Foreign. 3. Judicial assistance.

I. Campbell Dennis. II. Center for International Legal Studies.

K7683.I58 1999

341.7'8—dc21 98-2074

CIP

Printed in the United States of America on acid-free paper.

Note to Readers:

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is based upon sources believed to be accurate and reliable and is intended to be current as of the time it was written. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. Also, to confirm that the information has not been affected or changed by recent developments, traditional legal research techniques should be used, including checking primary sources where appropriate.

(Based on the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.)

You may order this or any other Oxford University Press publication
by visiting the Oxford University Press website at www.oup.com

Table of Contents

A. INTRODUCTION	1
B. APPLICABLE STATUTES	2
C. INTERNATIONAL CONVENTIONS	2
D. POLICY AND PROCEDURE	3
i. In General	3
ii. Authenticity and Propriety	3
iii. Final Judgment	3
iv. Proper Jurisdiction	3
v. Lis Pendens and Res Judicata	4
vi. Service of Process	5
vii. Public Policy	5
viii. Domestic Private Law	5
ix. Defenses against Recognition	6
x. Verification by the Judge	7
E. PROCEDURAL ANALYSIS	7
i. Competent Court	7
ii. Initiating the Action	8
F. DECREE OF REVIEW	8
G. EXECUTION OF JUDGMENT	8
i. Execution for Payment of a Certain Amount	9
ii. Execution for Delivery of a Certain Item	10
iii. Execution for an Intangible Right	11
H. RIGHTS OF APPEAL	11
I. VALUATION OF ACTION	12

PORTUGAL

Helena Soares de Moura
Morais Leitão, Galvão Teles, Soares da Silva & Associados
Lisbon, Portugal

A. INTRODUCTION

Portugal has a long tradition as a country in which foreign judicial decisions are recognized and enforced, as long as they meet certain requirements and are submitted to a Portuguese court for review and confirmation. The review system is provided in the Code of Civil Procedure. Before the *exequatur* process, the foreign decision has no effect in Portugal.

According to article 1094 of the Code of Civil Procedure, no decision on private rights issued by a foreign court or arbitrator has effect in Portugal, regardless of the nationality of the parties involved, unless it has been reviewed and confirmed. Under Portuguese law, a foreign decision results in execution and *res judicata* only after its review and confirmation.

However, certain aspects of the decision may be admissible, even without court recognition. Article 1094, number 2, of the Code of Civil Procedure states that review is unnecessary when the decision is presented as evidence in a proceeding pending before Portuguese courts.

The judge is allowed to consider the foreign decision as evidence. Article 365 of the Civil Code establishes that documents issued in a foreign country, in accordance with the law of that country, have the same evidentiary value as documents of the same nature issued in Portugal. It also should be noted that the foreign decision supplies complete evidence of the facts referenced as found by the foreign judge based on those documents, as well as of those based on the personal perception of the judge. This assumes that the foreign documents already have been authenticated.

The review procedure applies not only to those decisions issued by a court, but also to those issued by other authorities, as long as those authorities have the power to judge private rights.

B. APPLICABLE STATUTES

As noted above, the procedure for recognition and enforcement of foreign judgments in Portugal is set out in the Code of Civil Procedure in articles 1094 *et seq.* These provisions establish the requirements for recognition of a foreign decision, the defenses available to be used against the recognition request, and the specific procedural steps.

This matter has been traditionally governed in Portugal in accordance with provisions contained in the Code of Civil Procedure of 1876, articles 1087 *et seq.*, and the Code of Civil Procedure of 1939 and 1961, articles 1100 *et seq.*

The Code of Civil Procedure was amended by Decree-Law Number 303/2007 of 24 August 2007, which revised and revoked several provisions in the Code. The amendments came into effect on 1 January 2008 and are only applicable to proceedings filed after that date.

The reform of the Code of Civil Procedure also modified article 1094 regarding the need of the procedure for recognition and enforcement of foreign judgments in Portugal in order to exclude the rules established in conventions and EC Regulations in that the previous wording only mentioned treaties and special laws.

C. INTERNATIONAL CONVENTIONS

Portugal acceded to the Brussels Convention of 1968 after signing the San Sebastian Convention of 26 May 1989. For the Brussels Convention to enter into force in Portugal, approval by the Parliament and ratification by the President of the Republic were required. Ratification had to occur prior to 31 December 1992. Parliament approved the Brussels Convention under Resolution Number 34/1 of 24 April 1991, and the President ratified it by Decree Number 52/91 of 30 October 1991. This Convention has been in force in Portugal since 1 July 1992.

Portugal also has ratified the Lugano Convention of 16 September 1988, regarding judicial competence and the execution of decisions in civil and commercial matters. This Convention was approved under Resolution Number 33/91 of 24 April 1991, and ratified through Decree Number 51/91 of 30 October 1991.

Council Regulation (EC) Number 44/2001, often called the “Brussels I” Regulation, largely replaces the regime first established on a multilateral basis by the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

Council Regulation (EC) Number 44/2001 came into effect on 1 March 2002 and replaced the Brussels Convention (except as to Denmark, the Netherlands Antilles, and French overseas territories). The Regulation encompasses all the main civil and commercial matters apart from certain well-defined matters (such as those involving public law, personal status, matrimonial property, wills and succession, insolvency, social security, and arbitration).

D. POLICY AND PROCEDURE

i. In General

The requirements for a foreign decision to be confirmed, defined in article 1096 of the Code of Civil Procedure, are summarized and analyzed below.

ii. Authenticity and Propriety

There must be no doubts about the authenticity of the document in which the foreign judgment is contained or about the propriety of the decision. According to the principle of *locus regit actum*, the authenticity of the document must be established in accordance with the law of its country of origin. The decision must be authenticated by a Portuguese Consulate and then translated. The translation must be authenticated by a notary public or a Portuguese Consulate.

As to whether the judge should determine that the decision is proper in itself, or whether the decision is in conformity with the respective grounds, the Portuguese doctrine is that, in accordance with the system of formal review, the first method is adequate.

iii. Final Judgment

The judgment must be definitive and final under the law of the country in which it was issued, i.e., it may not be subject to ordinary appeals.

Although the party requesting recognition of the judgment does not need to prove that it is definitive, the court of review may ask the plaintiff to prove that the decision is final. If the court learns that the judgment is not definitive, article 1101 of the Code of Civil Procedure requires that confirmation be denied.

iv. Proper Jurisdiction

The decision must have been issued by a court whose jurisdiction has not been provoked in *fraus legis*. The relevant rules are contained in articles 65 and 65A of the Code of Civil Procedure, which establish that the international

jurisdiction of Portuguese courts depends on the verification of any of the following, without prejudice to the rules provided in treaties, conventions, EC regulations, and special laws:

1. The defendant has his domicile in Portugal;
2. The proceeding has been filed in Portugal, according to the rules of territorial jurisdiction laid out in Portuguese law;
3. All or part of the facts giving rise to the cause of action occurred within Portugal; and
4. The suit has been filed before a Portuguese court, and there is any connection of a real or personal nature between the lawsuit and Portugal.

Foreign legal entities are considered domiciled in Portugal if they have a branch, agency, subsidiary, or delegation in Portugal. The decision must have been issued by a foreign court with jurisdiction, i.e., as to which the applicable conditions contained in article 65 of the Code of Civil Procedure, as described above, have been verified.

Under article 65A of the Code of Civil Procedure, and without prejudice to the rules provided in treaties, conventions, EC regulations, and special laws, the jurisdiction of Portuguese courts is exclusive in the following cases:

1. Actions involving real property within Portugal;
2. Bankruptcy and insolvency proceedings regarding a person domiciled in Portugal or legal entities (including companies) with their registered office in Portugal;
3. Actions concerning the validity of the acts of constitution or dissolution of legal entities (including companies) with their registered office in Portugal, as well as the validity of the resolutions taken by their boards;
4. Actions concerning the validity of the acts of registration in public registries of any rights subject to registration in Portugal; and
5. Enforcement procedures concerning assets located in Portugal.

v. Lis Pendens and Res Judicata

The judgment cannot be confirmed if the same action is pending before or already has been judged by Portuguese courts, unless the summons from the foreign court was given first. The judge will be able to deny *exequatur* only if the Portuguese court was the first to receive the suit.

vi. Service of Process

The defendant must have been served process and, if the defendant did not present opposition, the process must have been served personally; otherwise, the judgment cannot be confirmed.

It should be noted that even if the law of the country of the court of origin dispenses with the requirement of service of process, such dispensation is irrelevant for the purpose of determining whether the service was proper.

vii. Public Policy

The foreign judgment may not contain any decisions that violate the principles of Portuguese public policy. In determining compliance with this requirement, the judge must evaluate the decision itself, and not the grounds on which it is based.

With regard to public policy, some commentators have established the distinction between the demands of the Constitution and those of the recognition of rights, pointing out that in the same cases, the offense to public policy is not constitutionally fatal. In such cases, public policy concerns should not be used to prevent the recognition of a decision based on principles and rules diverging from those contained in Portuguese public policy. Otherwise, the Portuguese court of review would be reviewing the merits of a foreign judgment, while the system only allows for the formal control of a judgment.

Public policy must be considered in terms of its contemporary character. Thus, when reviewing a foreign decision, the judgment must be examined in light of the public policy principles in force at the time of the recognition procedure. The judge should not deny recognition based on principles and concepts that no longer correspond to the dominant juridical sentiment of the nation. On the other hand, the judge should deny confirmation if, at the time it is requested, the decision offends current public policy, although it might not have done so when it was issued.

viii. Domestic Private Law

If issued against a Portuguese national, the foreign judgment may not run counter to the provisions of Portuguese private law. The court must decide whether the question should be governed by Portuguese law, in accordance with Portuguese rules of conflicts of law. If not, this specific requirement will not apply, and the decision as to whether or not to recognize the judgment must be made in light of the other requirements.

If Portuguese law is applicable, the judge must decide whether the decision is in compliance with the principles of Portuguese law. If not, the judgment will not be recognized. This requirement is not intended to defend the applicability of Portuguese law in all circumstances, because the requirement applies only when a foreign judgment has been issued against a Portuguese national.

The requirement is intended to protect the interests of a Portuguese national from harm by a foreign judgement if the outcome would have been more favorable for the person if Portuguese law had been applied. Thus, *exequatur* should be denied only if the application of Portuguese law would lead to a more favorable decision. This means Portuguese citizens should be treated by foreign judicial authorities in accordance with Portuguese law, when Portuguese law is applicable.

However, the requirement must be interpreted in light of article 31, number 2, of the Civil Code. Under that article, juridical decisions made in accordance with the laws of the usual country of residence of the declarant are recognized in Portugal, provided the foreign law is applicable.

In fact, article 31, number 2, of the Civil Code refers to both direct recognition, i.e., to recognition through a decision issued by a Portuguese court, and to indirect recognition, i.e., through recognition of foreign decisions. The denial of confirmation would, in such cases, be a violation of the provision establishing the principle of international recognition of foreign judgments.

ix. Defenses against Recognition

The request for confirmation can be attacked based on a lack of required verification, as described above. However, article 1100 of the Code of Civil Procedure establishes that it also is possible to attack the foreign judgment on grounds provided in article 771 of the Code of Civil Procedure, which concerns the appeal procedure known as *Reviso*. This procedure may be invoked on the following grounds:

1. When a criminal court decides the foreign judgment was obtained through bribery, prevarication, or judicial corruption;
2. When a document is presented that was unavailable to the party in the proceedings in which the foreign judgment was issued, if such document would be sufficient to result in a more favorable decision for the losing party; or
3. When the lawsuit is based on a simulated claim by the parties and the court did not use the powers granted to it by article 665 because it was unaware of the fraud.

x. Verification by the Judge

Article 1101 of the Code of Civil Procedure establishes that the court must verify *ex officio* whether the conditions are met regarding authenticity and propriety, public policy, and domestic private law, in accordance with article 1096. The court will deny confirmation if, during the examination of evidence during the proceedings, or through knowledge derived through the performance of its judicial functions, it establishes the absence of jurisdiction, *lis pendens*, *res judicata*, service of process, or the impossibility of the appeal of the judgment.

The law obliges the judge to verify that the foreign decision is authentic and proper, does not contain decisions in conflict with Portuguese public policy, and does not violate the provisions of Portuguese law if the situation could be resolved in accordance with the rules of conflicts of law under Portuguese law.

E. PROCEDURAL ANALYSIS

i. Competent Court

According to articles 71 and 1095 of the Code of Civil Procedure, the court responsible for the recognition of foreign decisions is the court of second instance (*Tribunal da Relação*) of the jurisdiction in which the person against whom the decision is to be enforced is domiciled. If the defendant does not have a domicile, or if the person has domicile and residence in a foreign country, the competent court will be the one where the person is located, unless that person is not found within Portugal. In that case, the competent court will be the one where the plaintiff is domiciled, unless that is in a foreign country. In that case, the Lisbon Court of Second Instance serves as the competent court.¹

If the defendant is a company, the court will be that of the place of the main administration, or the branch, agency, or delegation, depending on whether the proceeding is against the headquarters or the branch.²

If there is more than one defendant, the competent court is that of the domicile of the largest number of defendants. If the number is equal, the plaintiff can select which court will assume jurisdiction.³

1 Code of Civil Procedure, article 85, number 3.

2 Code of Civil Procedure, article 86.

3 Code of Civil Procedure, article 87.

ii. Initiating the Action

The plaintiff begins the proceedings by presenting an initial petition (*Petição Inicial*) in which the plaintiff must:

1. Identify the parties and state in which court the action will be filed;
2. Indicate the form of process;
3. State the factual and legal background of the action;
4. Formulate the pleading; and
5. Identify the value of the claim.

The plaintiff may request evidence at this stage. If the petition is filed in accordance with the above requirements, the judge will order it to be served on the defendant and require a response (*Contestação*) to be lodged within 15 days. If the defendant presents a response, the plaintiff has 10 days to answer.

If no response is filed, the defendant is considered to have admitted to the pleading contained in the petition. Once these filings are made and any other actions the judge considers necessary are completed, the file will be available for examination for 15 days by both parties and by the *Ministério Público* so they may prepare and present their arguments.

As to the judgment itself, the majority of the judges who comprise the court make a decision. The president of the court has the determining vote. If necessary, the case will be reconsidered by the judges.

F. DECREE OF REVIEW

The Portuguese confirmation system generally results only in a formal review. As a rule, the court examines the regularity of the foreign decision and does not review its merits. However, there is an exception to this rule.

Under article 771, item (c), review arises in those situations in which a previously unknown document is presented to the court, and the document is sufficient to modify the decision so it is more favorable to the losing party. In practice, the judge would have to analyze the factual grounds of the foreign decision and, in so doing, review it on its merits, though only to a limited degree.

G. EXECUTION OF JUDGMENT

Once the foreign decision is recognized by the *Tribunal da Relação*, in order to be enforceable, it must be executed. The enforcement procedure is provided

in articles 801 *et seq* of the Code of Civil Procedure. Article 45, number 2, of the Code of Civil Procedure establishes three types of executions, namely:

1. Execution for payment of a certain amount;
2. Execution for delivery of a certain item; and
3. Execution for an intangible right.

Article 465 of the Code of Civil Procedure provides that the common execution procedure must adopt a single form of process. The rules provided for execution for payment of a certain amount are applicable to execution for delivery of a certain item and to execution for an intangible right.

i. Execution for Payment of a Certain Amount

The first phase of the execution procedure begins with the filing of the request for execution in the competent court, as provided by article 810. The request must contain the following:

1. Description of the facts on which the claim is based if they are not mentioned in the execution title;
2. Designation of the execution agent;
3. Request of excuse of previous notification of the debtor before seizure; and
4. Indication of the assets to be seized.

Once the request is filed, the immediate service of summons of the debtor may be made through the agent of execution without intervention of the court or the judge may intervene to proffer a preliminary order. The law establishes the cases in which a preliminary order prior to the notification of the debtor is not applicable.

The enforcement of judgments and arbitral awards is not subject to preliminary orders by the judge, and the agent of execution may seize the assets of the debtor before the debtor receives notification of such proceedings.

Once notified of this request, the debtor may oppose such proceedings (*Oposição à Execução*) within 20 days from service of summons. The filing of the opposition suspends the execution proceedings, though the seized assets can be strengthened or replaced.

The second phase is the attachment of the debtor's assets. In principle, all the debtor's possessions can be attached. However, articles 822–824 of the Code of Civil Procedure establish several exceptions, such as those required for

essential needs of the debtor or sacred articles. Other assets are partially attachable, e.g., the debtor's remuneration or pension. The creditor may designate the items that he intends to attach, not being subject to any *gradus executionis*. The creditor may designate intangible rights for attachment, even if the debtor owns movable or immovable property.

The attachment of movable goods, immovable goods, and rights are addressed in separate sections of the Code of Civil Procedure. The attachment of movable and immovable assets consists of their physical seizure. The attachment of rights involves notifying the debtor (*debitor debitoris*) that such rights are being seized.

Once the attachment is made, convening of the creditors and prioritization of the debt follows. In this phase, those creditors who have a guarantee *in rem* for the attached goods can claim payment of the respective debts. Both the debtor and other creditors can present their opposition to those claims. The judge will decide not only which credits are to be recognized, but also which will have priority in payment.

This is followed by the payment phase, which can consist of:

1. The delivery of money to the creditor;
2. The adjudication of certain attached goods to the creditor, if the creditor so requests. However, the value must be equal to or greater than the value determined by the judge;
3. The consignment of income arising from certain attached goods, before ownership is adjudicated or sold, mainly in cases involving immovable goods; or
4. The sale of the attached goods.

In certain cases, the sale will be non-judicial, such as stock sold on the stock exchange, goods of reduced value (sold, in certain cases, through private negotiation), or movables (sold in private auctions when requested by the debtor and a majority of the creditors with guarantees on the movables to be sold). More commonly, however, the sale will be judicial, made through sealed bids, and persons having preferential rights to the sales proceeds will be notified so that they can exercise these rights if desired.

ii. Execution for Delivery of a Certain Item

The second type of execution is for the delivery of a certain item, as provided for in articles 928 *et seq.* of the Code of Civil Procedure. In this type of execution, the plaintiff will ask the court to deliver the movables or immovables that are due.

The delivery will take place before the defendant is notified of the request. The debtor can present his objections within 20 days. In the objection, the debtor can assert that he has made improvements to the goods and wants compensation for them. If the movable or immovable is not found, the plaintiff may request payment equal to its value.⁴

iii. Execution for an Intangible Right

The procedure for execution for the rendering of an intangible right is found in articles 933 *et seq.* of the Code of Civil Procedure. This procedure is applicable when someone is obliged to render an intangible right within a certain time and does not comply with that obligation. The creditor will request the rendering by another person or compensation for the damage suffered as a consequence of failure to render.

The debtor can oppose the execution within 20 days. The creditor can appoint experts to determine the cost of rendering the right and, based on their report, indicate goods of the debtor that can be attached that are equal in value to the amount that has been determined.

H. RIGHTS OF APPEAL

Under Portuguese procedural law, both parties can appeal any decision or order of the judge during the recognition process. Regarding the appeal of the final decision on the confirmation itself, one must distinguish between two situations.

Article 1102 of the Code of Civil Procedure establishes that the parties may interpose the *Revista* appeal, governed by articles 721 *et seq.* of the Code, if the decision is reviewed on its merits, which occurs only when article 722, number 1, of the Code applies. The specific ground for this type of appeal is violation of substantive law, which can be an error in the interpretation or application of the law, or an error in the determination of the applicable legal provision. It also is possible to allege any of the causes of nullity of the court decision provided for in article 668 of the Code of Civil Procedure.

When the *Revista* appeal is appropriate, the party can allege the violation of procedural law or the violation of substantive law. However, an error in the consideration of evidence and determination of the facts of the action may not be challenged in this form of appeal, except in the case of an offense to an

⁴ Code of Civil Procedure, article 931.

express provision of law, which requires a certain kind of evidence for the finding of fact, or which fixes the weight of a certain type of evidence.

I. VALUATION OF ACTION

In accordance with article 305 of the Code of Civil Procedure, a predetermined value, expressed in legal tender, must be assigned to any court action. This value represents the immediate economic utility of the pleading.

For the purposes of court costs and other legal charges, the value of the action is fixed according to the rules in the Regulation of Procedural Costs.