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Legal Practice Guides

Litigation

Portugal

Contributed by Morais Leitão, Galvão Teles, Soares da Silva & Associados, RL

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Portugal

Doing Business In

Doing business in a new territory you may encounter unexpected problems. In this section we offer some basic advice. The best advice, of course, is to instruct a law firm based in the territory which knows how local problems can be overcome.

Chambers & Partners employ a large team of full-time researchers (over 140) working in their London office. They interview thousands of clients each year. The advice in this section is based on the views of clients with in-depth international experience.

Country Profile

Radical austerity measures following the 2011 EUR78 billion bailout granted by the EU and the IMF have failed to reverse a negative trend in the numbers recorded by the country's economy.

Given the state of the Portuguese domestic market, many key players in the country have tapped into foreign markets, boosting their exporting operations. According to market sources, one of the risks faced by Portugal in the immediate future is deflation.

In July 2013, the Portuguese coalition government was on the brink of collapse and political commentators warn that it may struggle to complete its full term, due in 2015. The Portuguese government, however, says it will complete the bailout programme as planned in June 2014 without the need for further EU support. Portugal's economic forecast does look brighter, with a predicted return to growth of 0.8% in 2014 after contracting in 2013.

Business Culture

Portuguese people are said to be friendly, open and affable. Personal relationships play a significant role within this society, and lobbying is seen as perfectly acceptable. "*K nowing the right people will not tip the balance, but at least it will open some doors,*" a source admits.

In true Mediterranean fashion, business and pleasure are often combined in Portugal, with sources noting: "*Good business is always conducted in a good restaurant.*" Therefore, investors seeking to enter the Portuguese market are advised to travel to the country, meet people face-to-face and establish a presence there. International businesspeople suggest: "*In Portugal, you can't build a business long-distance: you either need a local partner, or you have to move to the country.*"

Issues of transparency have been significant for some interviewees. "*Through concerns of transparency we have had to shut down deals in the past,*" one reports. However, anti-corruption measures have recently been implemented by the government, and there is a rising awareness amongst the general public.

Legal Market

The top of the Portuguese legal market is dominated by a number of large and highly reputed local ensembles. These are joined by a handful of regional firms with a strong presence in Spain and Portugal. Global firms tend to operate 'best friend' agreements with domestic partners.

Lawyers in Portugal are praised for their "*vast legal knowledge, put into sound practical advice.*" Experienced businesspeople applaud lawyers' "*proactive attitude, reaching out, trying to understand the business model and our needs.*" Other sources indicate, however, that "*Portuguese lawyers could be more flexible and pragmatic.*"

Commentators suggest that clients "*do not choose a special firm for litigation*" in Portugal, but instead request a litigator through their usual firm. Sources report that "*complex commercial cases are hardly ever dealt with by a sole practitioner.*"

Fees in Portugal have reportedly gone down dramatically over the past three years. Hourly rates for a partner range between EUR200 and EUR400, while associates may charge EUR150-EUR200 an hour.

Judiciary

The judiciary are generally held in high esteem, with interviewees describing judges as "*very impartial, very serious*" and "*one of the biggest strengths of the courts.*" However, sources suggest that the judges' level of expertise and experience may vary, particularly in relation to more complicated cases. Interviewees note: "*We have some very good judges but when a transaction is complex, you can sometimes see that the judge is dealing with it for the first time. This is not what you want in a multimillion-euro case.*" Experts advise that "*the best judges are in Lisbon*" because of their exposure to more complex disputes.

Judges are circulated between courts at the beginning of each judicial year (September 1st) which can result in "*a judge coming from a family court dealing with commercial cases.*" As a result, commentators suggest that judges "*may not have adequate experience*" and call for them "*to become more specialised.*"

Experienced businesspeople draw comparisons with other EU jurisdictions, in that "*a French judge is in a much better position to decide about a commercial dispute because he is more specialised.*" Ultimately there is optimism that "*the youngest generation of judges is prepared to specialise*" and that a positive shift will occur within the judiciary. Experts point out that the success of the new Civil Procedure Code will "*very much depend on the way the judiciary act towards it.*"

Court Process

The court system in Portugal has long been regarded as"*very complicated to work with.*" However, sources report that "*things are changing in general due to reform.*" The implementation of a new Civil Procedure Code in September 2013 has been well received by a number of experienced businesspeople: "*We can really be optimistic.The new code has all the instruments to allow action to be taken more quickly and with more quality.*"Overall, the court system is "*getting better but is still not brilliant*" and "*still has a long way to go.*"

The length of the judicial process has been widely criticised by a number of professionals, with one suggesting that time scales are "*one of the biggest issues*" in litigation. Interviewees indicate that speed "*changes from court to court, from judge to judge.*" Efficiency is the "*weakest part of commercial litigation*" and delays have been exacerbated by the economic downturn. Experienced businesspeople cite a "*lack of means to process all of the work,*" including insufficient numbers of court staff, as a major cause of delays. "*A good decision*

made five years after the claim has been filed is ultimately a bad decision," reflects one professional.

There is little consensus as to the length of time proceedings may take, but interviewees suggest that the process will "*hardly ever be less than one year; anything more than two years would be abnormal but not unusual,*" and "*decisions of the first instance will never take less than two years.*" Businesspeople note that "*we'll have to wait and see if the new civil procedure speeds the process up.*" Insolvency cases take precedence, which slows progress and blocks the courts. An observer remarks that "*judges do not have time to judge on anything not regarding insolvency, and even in insolvency there is a long delay.*" The Appeal and Supreme Courts are reportedly more efficient. Here the judicial process is "*shorter,*" with a time frame of "*three to four months.*" Unlike lower courts, the Appeal and Supreme Courts "*do not have delays.*"

Experts warn that "*documents requested by judges must be translated,*" and translations are organised by the parties themselves. "*If the other party raises doubts it will have to be certified. But it mainly just concerns formal documents and not e-mails or faxes,*" interviewees explain. Sources universally praise the electronic platform used for submitting court documents, suggesting that it is "*state-of-the-art*" and "*one of the most sophisticated interfaces in the world.*" Parties can "*submit anything to the court and it will immediately be sent to other lawyers and parties involved.*" The ability to upload documents means that "*everyone has access to everything and it helps a lot.*" The platform, known as 'CITIUS', is seen to be much more cost-effective and efficient than traditional hard-copy methods.

Following a major reform of the system in September 2013, the costs associated with litigation have increased. Prior to these changes "*going to the court was cheap.*" Now, however, court fees have "*increased hugely,*" and are cited as a cause for concern by a number of sources: "*Court fees form a very significant part of the overall litigation costs.*" Interviewees report that there is "*no limit for the court fees*" and that "*you pay based on the value of the lawsuit.*" Consequently, "*courts are very expensive.*" Experienced businesspeople suggest that the increase in court fees aims to "*make everyone think twice before going to court.*"

For larger, international law firms rates are reportedly stable despite "*even the biggest companies pressing for much lower firm rates.*" Hourly rates have, for some firms, remained "*the same for the past three years.*" Hourly rates for a partner on commercial litigation are "*about EUR400,*" whilst trainees bill "*EUR100.*"

Alternative Dispute Resolution

Arbitration is considered to be "*increasing in popularity,*" with interviewees reflecting that "*the arbitration courts have never been as busy as they are now.*" Whereas "*ten years ago there were only four or five firms doing arbitration,*"businesspeople report that "*right now everyone wants to do arbitration.*"

Sources indicate that the reasons for this increased uptake are that "*arbitration courts run faster than normal courts*" and arbitration "*can be cheaper.*" Experts emphasise that "*in almost all relevant contracts there is an arbitration clause, many with the ICC and Lisbon and Porto.*"

However, some interviewees suggest that arbitration is "*only used by big companies*" and that "*domestic arbitration is marginal.*" Nevertheless, the consensus amongst interviewees is that arbitration is the most common method of alternative dispute resolution. Meditation, on the other hand, is not widely utilised. Market experts assert that "*mediation may succeed eventually but not during the next couple of years.*"

Law & Practice

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The litigation team at **Morais Leitão, Galvão Teles, Soares da Silva & Associado** is noted for its experience in handling a wide variety of litigation and arbitration for domestic and international clients. The department has expertise in disputes ranging from commercial, corporate, administrative, constitutional, tax, labour, criminal, IP and competition law among other areas, both in the Portuguese system and abroad.

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General information

1.1 Structure of the legal system

Portugal's legal system is a civil law system.

As per civil proceedings, the Portuguese legal system should not be qualified as adversarial or inquisitorial. The civil procedure is based on the dispositive principle, which means that the parties are responsible for alleging the facts, gathering evidence and determining the nature of the evidence they choose to provide.

The court's role is primarily to conduct and oversee the proceedings to ensure that the evidence given is within the rules. It then weighs the evidence, according to pre-existing rules, to render its judgment.

The court may, however, on its own initiative, request any evidence that it deems necessary to reach its decision, based on the facts lawfully acknowledged by it. Indeed, under Articles 411, 417, 452, 467 and 526 of the Civil Procedure Code (hereinafter "CPC"), the Court may call the parties to testify, order expert witnesses, call witnesses to testify and ask the parties or third parties to disclose documents or other evidence to support the facts. Witnesses' testimonies are taken by the parties' lawyers, but the parties' testimony is taken by the judge.

As stated in Articles 1 to 4 of the Portuguese Civil Code (hereinafter "CC"), the Portuguese sources of law are the following: (i) immediate sources – law (generic dispositions from the empowered state authorities) and corporative dispositions (emerging from representative organisms which cannot be contrary to legal imperative dispositions); (ii) custom – customary rules may only be considered if allowed by law and not contrary to the principle of good faith; (iii) general principles of equity (the courts may only decide according to such principles when the law specifically allows it, when the parties agree on it and the rights are non-disposable, or when the parties have previously given their agreement).

Binding precedent does not exist in the Portuguese legal system. Case law is merely a complementary source of interpretation and application of the law. In certain circumstances the Supreme Court may be called upon to render a uniform opinion on a legal question, but the uniform opinion adoptedby the Supreme Court may be disputed in future cases by any court.

Legal doctrine is also not a source of law; it can only be used in the interpretation or clarification of other sources of law.

1.2 Structure of the courts

The Portuguese judicial system has the following categories of courts (*Cf.* Article 209 of the Portuguese Constitution): the Constitutional Court; the judicial courts; the Administrative and Tax Courts; the Court of Auditors; maritime courts; Arbitral courts; and Justices of the peace ("*Julgados de Paz*").

During a state of war, military courts may be created (*Cf.* Article 213 of the Portuguese Constitution).

Amongst judicial courts there are also specialised courts such as:the Court of Commerce; the Court of Intellectual Property; the Court of Competence, Regulation and Supervision.

In order to understand the Portuguese court system it is necessary to distinguish between judicial jurisdiction and administrative and tax jurisdiction.

The judicial courts have general jurisdiction in civil and criminal matters but also exercise jurisdiction in all matters not assigned to other courts.

They are organised in three divisions: the Supreme Court (with jurisdiction over the whole country); the second instance judicial courts, which by rule are courts of appeal (typically, one per judicial district and two in the Oporto judicial district); and the district courts (first instance).

The first instance judicial courts fall into three categories depending on the subject matter and the amount of money in dispute: courts with general jurisdiction; courts with specialised jurisdiction (criminal cases, family matters, minors, labour law, trade, maritime affairs and enforcement of sentences); and those with specific jurisdiction (e.g. civil, criminal or mixed divisions, civil or criminal benches, civil or criminal benches dealing with underage children).

The Administrative Courts include the first instance administrative and tax courts, the central administrative courts (north and south), and the Supreme Administrative Court (with jurisdiction over the whole country).

Conflicts of jurisdiction between courts are decided by conflict courts, regulated by law.

Court sessions in civil (as well as in criminal proceedings) are usually open to the public (*Cf.* Article 163 of the CPC). Nevertheless, the public may be excluded from hearings to: (i) protect the parties' dignity, intimacy of their private or family life; or (ii) safeguard public morals or to guarantee the court's normal functioning and the effectiveness of its decisions (e.g. injunction procedures or freezing orders) (*Cf.* Article 206 of the Portuguese Constitution and Article 164 of the CPC).

Public disclosure covers the right to access to the proceedings, and to obtain copies. Third parties may access court records only if they are considered to have a legitimate interest in such access.

1.3 Costs

During the proceedings both parties are required to make payments on account for costs (calculated by reference to the amount in dispute) and are also responsible for the payment of their own expenses and their own lawyers' fees.

When the court renders its decision, it determines the total amount of costs (calculated by reference to the amount in dispute and considering, amongst other criteria, the conduct of the parties and the complexity of the matter) and the proportion of costs to be borne by each party, if they are both held partially responsible. If there is only one losing party it shall bear the full amount of the costs. At the end of the proceedings the winning party may request from the losing party the payment of the judicial costs incurred by the former by sending a statement of its costs including the amounts paid for legal tax, expenses, lawyer, and enforcement agent fees. The winning party may request the payment of the expenses and lawyers' fees, but in the latter case limited to 50% of the amount of court fees paid by all the parties (*Cf.* Article 533 of the CPC and Articles 25 and 26 of the Judicial Costs Rules).

If the claimant succeeds against multiple defendants, all of them will be liable for paying a certain proportion of the costs and the claimant can only recover costs from each defendant in the same proportion (except if the multiple defendants are considered jointly and severally liable in the court's judgment).

1.4 Funding

Third-party funding has not been implemented in Portugal and, as far as we know, it has not been used. The principle of contractual freedom provides, though, that legal costs may be paid by a third party, but such party's right to recover those costs is limited to the agreement reached with the party in the proceedings. In other words, the third party is not entitled to recover such costs within the proceedings, because only the parties to the proceedings are bound by the court order.

An arrangement whereby the lawyer's fees exclusively depend on the outcome of the dispute is forbidden by the Portuguese Bar Association Code (*Cf.* Article 101).

Attorneys' fees may be composed of a fixed part (according to criteria such as the time spent, the complexity of the issue or the importance of the service provided) that may be complemented by a success fee in view of the results obtained.

Initiating a Lawsuit

2.1 Statute of Limitations

In general, the statute of limitations is for 20 years including contract liability claims (*Cf.* Article 309 of the CC). Nevertheless, there are several exceptions to this general rule including (but not limited to) the following:

Non-contractual liability and strict liability. The general limitation period is three years, starting from the date when the illicit act is known by the claimant. However, this period may be extended according to a longer criminal statute of limitation if the illicit act may, in theory, be held to have occurred at the same time as a criminal offense;

When the claim is based on rents due by lessees, interest, dividends from companies, alimonies, and any periodically renewable benefits. The statute of limitations is five years, starting from the date when the right can be exercised.

In certain cases – for example, issuing a formal demand letter or starting a lawsuit – the statute of limitations period may be *suspended* (the time of suspension is not counted when assessing if the statute of limitations has expired) or *interrupted* (a certain fact or act may interrupt the statute of limitation period). In these cases, a new period for the statute of limitation starts from the act or fact causing the interruption).

2.2 Filing

There are no prerequisites to filing a lawsuit.

However, in some cases issuing a formal demand letter may be necessary to avoid exceeding the statute of limitations or to produce other effects – for example, to determine the initial date for the claim of interests – but that is not a prerequisite to filing a lawsuit.

In most cases mediation is not a prerequisite. For more details see **9 Alternative Dispute Resolution p.1029**.

2.3 Jurisdictional requirements for defendants

According to Article 62 of the CPC, the international jurisdiction of Portuguese courts is determined by the following criteria:

- When according to Portuguese territorial jurisdiction rules, the lawsuit may be filed in a Portuguese court;
- When the facts determining the cause of action took place in Portugal;
- When the rights of the plaintiff may only be made effective by a lawsuit filed in Portuguese courts or when starting a lawsuit in a foreign country may present relevant difficulties for the plaintiff and if at the same time there is a powerful connection between the lawsuit and the Portuguese legal system.

The territorial jurisdiction of Portuguese courts is determined notably (but not exclusively) by the following criteria:

- *Forum rei sitae*, when the claim is related to real estate, the territorial jurisdiction is determined by the respective geographic location (*Cf.* Article 70 of the CPC);

- When the claim is related to the fulfilment of any obligations arising from contracts the jurisdiction lies either in the courts of the place where those obligations should have been fulfilled or in the courts of the defendant's place of residence (*Cf.* Article 71, paragraph 1 of the CPC);
- When the claim is based on non-contractual liability or strict liability the territorial jurisdiction belongs to the courts where the relevant events took place (*Cf.* Article 71 paragraph 2 of the CPC).

The criteria to establish international jurisdiction of Portuguese Courts do not differ from (civil) court to court.

Furthermore, EU Regulation 44/2001 on jurisdiction is fully applicable in Portugal.

One should highlight that, whenever a situation occurs in which Portuguese courts are internationally competent pursuant to provisions of the Civil Procedure Code or of EU Regulation 44/2001, they will consequently be internationally competent for the legal suit; the doctrine of *forum non conveniens,* as followed in some common law jurisdictions, does not apply in the Portuguese legal system.

2.4 The initial complaint

The initial complaint must comply with several requirements (*Cf.* Article 552 of the CPC) and should:

- Designate the court in which the lawsuit is filed and identify the parties, indicating their names, residence or offices and, if possible, civil and tax identification numbers, professions and workplaces;
- Indicate the business address of the plaintiff's lawyer;
- Indicate the type of proceedings ("*forma de processo*");
- State the cause of action ("*causa de pedir*"), which includes the facts and legal arguments supporting the claim;
- State the request ("*pedido*") at the end of the initial claim;
- State the value of the claim ("*valor da causa*");
- Indicate the list of witnesses and other means of evidence.

Relevant evidential documents, as well as any power of attorney, and proof of payment of court fees, must be presented together with the initial claim.

In most cases, the initial claim and annexes are submitted to court through an online platform (referred to as "*citius*").

The plaintiff may unilaterally change the cause of action and the request presented in the initial claim (by means of an ad hoc request) in the following cases (*Cf.* Articles 264 and 265 of the CPC). The plaintiff may:

- Alter the cause of action if there is a confession made by the defendant and accepted by the plaintiff during the lawsuit. The alteration request should be made within ten days of the acceptance;
- Reduce the request for damages. This may be requested at any time;

- Until the end of the trial in the first instance court, extend or develop the request provided that such extension or development is the result of the primary request.

If the defendant agrees, the plaintiff can change the cause of action and/or request at any time in the first court instance and appellate court.

When confronted with supervening facts (occurring after the submission of the initial claim or the defence, or acknowledged by the party only after the submission), any party may present supervening applications ("*articulados supervenientes*") to the court, exposing such facts, prior to the end of the trial in first instance.

2.5 Serving proceedings

There is no procedure to inform an adversary that it has been sued or will be sued, unless the defendant is a lawyer. In such case, under the Portuguese Bar Association Rules, the plaintiff's lawyer is obliged to inform the defendant that they will start a judicial procedure against him/her.

The court is responsible for service (*Cf.* Articles 225 and 226 of the CPC). The court will issue a formal initial notification to the defendant ("*citação*") that according to standard procedures may be sent either by electronic means, post, the court's clerk, or execution agents ("*agentes de execução*").

The initial formal notification is composed of: (i) a copy of the initial claim and documents presented by the plaintiff; and (ii) a notification letter by which the defendant is informed about the conditions and the deadline to present an answer as well as any documents in support of its defence.

When the defendant's whereabouts are unknown the Court may decide to summon the defendant by edictal ("*citação edital*"). In this case, several warnings should be displayed in public places and/or published in at least two newspapers.

2.6 Failure to respond to a lawsuit

If the defendant does not respond, the court must verify whether the service has been made in accordance with legal procedures and, if it finds any irregularities, order the repetition of the service.

If, having been correctly served, the defendant still does not respond, the facts presented by the plaintiff in his/her initial claim are considered proven (*Cf.* Articles 566 and 567 of the CPC) with the following exceptions:

- Facts challenged by one of the defendants in a lawsuit with several defendants;
- If the defendant is legally incapable (e.g. minors);
- Facts for which law requires written evidence to be provided.

If defendants fail to respond when duly summoned, the file is made available for examination for a period of ten days, first to the plaintiff's lawyer and then to the defendant's (if the defendant has named an attorney, despite not having presented a response). Both lawyers are given the opportunity to present written allegations within that period of time and the court shall subsequently issue its ruling.

2.7 Class action

There are no class actions in the Portuguese legal system as they are known and applied in the US judicial system.

However, under Portuguese law (*Cf.* Law no. 83/95, of August 31st) there is a citizen's action ("*acção popular*") by which a citizen may submit a claim before a court based on the violation of his and other citizens' rights (notably regarding Public Health, Environment, Cultural Public Assets).

The law establishes an opt-out mechanism (*Cf.* Articles 14 and 15) by which all citizens that may be deemed to be represented by the initial plaintiff may declare before the court that they refuse such representation. In that case, they can either participate in the lawsuit as co-plaintiffs or not participate at all. In the latter case the citizens will not be affected by the court's final decision.

As an exception to the general rules in civil proceedings, the court may issue a preliminary dismissal decision if the claim should be considered unlikely to succeed.

Please note that the citizen's action is not frequently used in Portugal.

Pretrial Proceedings

3.1 Dismissing the lawsuit

According to Portuguese civil procedural law, parties cannot move to dismiss a lawsuit.

However, the court may reject or dismiss a lawsuit if the plaintiff's claim does not comply with the legal requisites or it may issue a dispositive decision (not necessarily depending on a motion from the parties) without producing evidence (e.g. if the statute of limitation has expired or if there is no legal connection between the claim and the defendant) (*Cf.* Articles 278 and 595 of the CPC).

3.2 Dispositive motions

The parties cannot present dispositive motions before the court. However, in its answer the defendant may present arguments for a rejection decision from the court.

3.3 Joinder

Interested parties not named as a plaintiff or defendant may join a lawsuit as explained below.

Principal intervention ("*intervenção principal*"): if the interested party has the exact same interest in the lawsuit as the plaintiff or the defendant, it may join the lawsuit by assuming along with them the position of plaintiff or defendant (as the case may be) (*Cf.* Articles 311 to 320 of the CPC).

The joining party may present its own claim/defence (which is admissible only prior to the end of the written pleadings phase) or adhere to the claim/defence presented by the existing parties by means of an ad hoc request stating a wish to adhere to the existing claim (which is admissible at any time before the final decision is reached by the court).

Assistance ("*assistência*"): if the interested party does not have the exact same interest as the plaintiff or the defendant, but has some kind of advantage ifa decision is issued in favour of one of them, it may join the lawsuit by assuming the position of assistant and supporting such party (*Cf.* Articles 321 to 332 of the CPC).

The assistant may join the lawsuit at any time before the final decision is reached by means of an ad hoc request or a claim/defence (the latter being admissible only if the assisted party was still in due time to submit such claim/defence). During the lawsuit, the assistant is subject to the same procedural rights and duties as the assisted party. However, it is not able to practice any acts that the latter has lost the right to exercise, nor adopt an attitude which is in opposition to it.

Opposition ("*oposição*"): if, during a lawsuit between two or more parties, someone claims to have a right that is totally or partially incompatible with the right invoked by the plaintiff, such person may join the lawsuit by assuming the position of opponent (*Cf.* Articles 333 to 350 of the CPC).

The opponent may join the lawsuit before the final audience is scheduled or, if the final audience has already been scheduled, before a final decision is reached. For this purpose, the opponent must file a claim, which must comply with the requirements provided for the initial claim by the plaintiff.

Discovery

Discovery is not available under Portuguese law, whether in civil cases or criminal cases. A party may, however, under Article 429 of the CPC and after the proceedings have commenced, request that the other party present specific documents. In order to do so, the party must identify a particular document (not a class of documents nor information regarding a certain issue) and indicate which facts it intends to prove with the requested documents. It is essential that the requesting party is not able to obtain the document by any other means.

The court may ask the parties (or a third party) to disclose documents or other evidence to support the facts in dispute (*Cf.* Article 417 of the CPC).

Refusal to provide the documents may be freely assessed by the court for proof purposes and/or to invert the burden of proof. This refusal may result in the imposition of fines against the non-complying party.

4.1 Legal privilege

Pursuant to Article 87 of the Portuguese Bar Association Rules, lawyers are bound by attorney-client privilege.

Attorney-client privilege covers all the facts, documents or information, directly or indirectly, concerning professional matters that are disclosed by the client to the lawyer in the exercise of his professional duties.

Attorneys can request a waiver of the attorney-client privilege if the following requirements are met: (i) previous authorisation of the Portuguese Bar Association; and (ii) allegation and proof that the waiver of the attorney-client privilege is absolutely necessary for the defence

of the personal dignity, rights and legal interests of the attorney, his client or the clients' representatives.

Attorney-client privilege extends to other lawyers who intervene in the matter as well as to the lawyer's employees.

Article 71 of the Portuguese Bar Association Rules states that the correspondence and documents exchanged between client and attorney cannot be confiscated by the courts, unless they are related to a criminal offence in proceedings where the lawyer has been named as defendant.

Article 195 of the Portuguese Criminal Code states that the violation of secrecy by a person obliged to respect it (which includes lawyers via Article 87 of the Portuguese Bar Association Rules) is a crime punishable with imprisonment up to one year, or a financial penalty.

Any act committed in breach of the attorney-client privilege may not be used in court as evidence (*Cf.* Article 87, paragraph 5, of Portuguese Bar Association Rules).

In-house counsellors are equally bound to respect this rule, provided that they are duly registered in the Portuguese Bar Association and are not mere legal advisers. According to the Portuguese Bar Association Rules the employment contracts of such lawyers are admissible, provided that the employer does not restrain the independence of the lawyer or violates the principles of the profession (*Cf.* Article 76, paragraph 3 and 4).

The Portuguese legal system is based on the principle of contractual freedom which includes, within the limits of the law, freedom to contract, freedom to select the type of business, and freedom of stipulation. Based on such principles, parties to a contract may stipulate the protection of information not covered by attorney-client privilege.

Trials

5.1 Structure

In Portugal civil trials are public and must be fully recorded.

They are conducted in the presence of the empowered judge and the parties' counsel; the parties themselves may also be present.

At the time scheduled the court clerk makes sure all summoned witnesses and parties are present and then invites counsel to enter the hearing room. The judge enters the room after all counsels and parties are assembled. All participants must rise when the judge enters.

The judge usually begins by attempting to get the parties to settle. In the event no agreement is reached or possible (depending on the type of dispute at issue), a hearing will follow as described below (*Cf.* Article 604 of the CPC):

Parties' testimonies:

- When witness testimonies are requested, either by the counterparty ("*depoimento de parte*") or by the party itself ("*declarações de parte*"), the trial will begin with those testimonies. The defendant's witnesses will be heard before the claimant's witnesses'.

- The parties should indicate the topics on which the witnesses will be testifying. The examination will be conducted under oath by the judge. The attorneys can subsequently address the court for further clarification.
- If in his/her testimony, a witness acknowledges certain facts that are unfavourable to the party, the confession will be recorded and cannot subsequently be withdrawn. Moreover, when questioned about a fact that the party should be aware of, even a plea of ignorance will be considered as a confession.

All remaining declarations made by the parties' witnesses will be evaluated by the judge.

Exhibition of films or audio records:

- As a general rule, trial hearings are public and can be attended by the general public with or without interest in the case. However, if any of these means of evidence are presented by the parties, the judge may limit the presentation to the parties, their attorneys, and other specific members whose presence is relevant.

Clarifications from experts (for more details please see 5.3 Expert Testimony p.1025):

- After an expert report is filed in court, the parties can request that the experts be summoned for the hearing in order to clarify the statements made in that report under oath.
- Experts are appointed by the court if it is determined that the facts require special expertise. A court-appointed expert must be impartial and qualified. Written expert opinions by party-appointed experts – which are unusual in Portuguese court proceedings – are not treated as expert evidence, but as part of the respective party's pleadings.

Witness Testimonies:

- Each party has the opportunity to call ten witnesses to testify on his/her behalf, unless the complexity of the case justifies a higher number. The witnesses may be examined by the appointing counsel about all relevant facts at issue, and they can be cross-examined by opposing counsel about the content of his/her testimony. Witnesses can only testify about facts that they have actually experienced or have special knowledge of. As a consequence, expert witnesses are not expressly admitted by Portuguese law, even though some judges allow this, especially when some of the relevant facts are highly technical. Written testimonies are exceptional under Portuguese law.
- Any further means of evidence may take place at a later stage of the proceedings by suggestion of the parties or the court, namely judicial inspections of the place where the facts occurred.

Final oral statements:

- After all means of evidence are produced, the parties' counsels will have one hour to produce their final oral statements on the case. Within those statements they should highlight the facts they believe were or were not proven based on the evidence produced, the applicable legal rules, and the overall consequences resulting therefrom. Each counsel will have 30 minutes to reply to the counterparty's statements. These timings can be extended or reduced by the court according to the complexity and value of the case.

Nonetheless, the court is free to alter this sequence, either at the parties' request, or to consider that some other order would be more suitable for the case at issue.

In theory, the trial/hearing should be continuous and only be interrupted if absolutely necessary, but it can be suspended and continued on a different day if it is not possible to go through all the agenda on the same day. The next hearing should be scheduled for the next available date possible, according to the judicial agenda of the court and of all counsel involved.

The final decision should be issued in writing within 30 days from the end of the trial. Counsel will be notified through the judicial online platform (*Citius*).

Please note that the judge must ensure that the trial and the proceedings are adequate to the case. This means that the judge may use their powers to moderate the procedure to the type of case that is being subject to trial and it should effectively manage the lawsuit in order to obtain the best decision possible through a fair trial ("*princípio da adequação formal*" and "*dever de gestão processual*") (*Cf.* Articles 6 and 547 of the CPC)

Jury trials can only take place in criminal procedures and even then only in very restricted circumstances and cases.

5.2 Evidence

As a general rule each party has the burden of submitting and proving those facts upon which his/her claim or defence is based (*Cf.* Article 342 of the CC). Everything that remains uncontested by the other party is considered proven, and only contested facts are subject to the taking of evidence. If a fact is contested by the opponent, the other party must describe the evidence upon which it intends to rely to prove that fact. If necessary, the court will then render an order for the taking of such evidence and evaluate the outcome.

Pursuant to the approval of the new Civil Procedure Code in force as of September, 2013, all evidence should be presented by the parties with their written statements and must be presented before the trial hearing (*Cf.* Article 552 of the CPC). In principle, after that the proper moment to present any other means of evidence or to modify any of those previously presented will be at a pretrial hearing ("*audiência prévia*"), typically held between the judge and the opposing counsel to establish the main facts under dispute and to organise (and, if possible, schedule) the next steps of the proceedings.

Prior to the approval of this new statute, the parties often held particular forms of evidence until the trial stage for strategic purposes in order to surprise the counterpart or a certain witness, and it was actually possible to bring new documents to the case at any moment, albeit upon payment of a certain fine.

Now, as from September 2013, the only exceptions to this general rule are:

- Up to 20 days before trial, the parties can alter or increase (in light of the legally established limit) their list of witnesses. Should this be the case, the counterparty will have five days to amend his/her own list of witnesses accordingly. It is noteworthy that, contrary to what occurs with written witness statements or within the pretrial hearing, any and all witnesses resulting from these subsequent amendments will necessarily have to be brought

before the court by the appointing party, as it will not be possible to request that the court summon them for this purpose.

- In addition, up to 20 days before the trial, the parties can file documents that were not presented along with the written statement they refer to at the risk of a penalty (except when they prove that they were not able to present them before).
- After that, and even during the trial, the parties can only present documents that could not have been presented earlier and that only became necessary due to a recent and subsequent event. This was already possible within our former Civil Procedure Code, but the rule was seldom used, as the courts freely admitted the presentation of documents at any time on payment of a fine.
- Reports of lawyers, professors or technicians can be presented at any time of the proceedings before first instance courts.
- Judicial inspections of the place where the facts that are disputed occurred, or of the things or persons at issue, may also occur at any stage of the proceedings and, especially when suggested by the court, may also be requested and conducted during trial.
- In addition, at any time of the proceedings the court itself can summon a witness to testify if it is led to believe that a certain person, who was not called by the parties, may be aware of facts relevant to the case.

5.3 Expert testimony

Expert evidence is permitted at trial (*Cf.* Article 467 and 604, paragraph 1 (c) of the CPC).

Expert evidence is conducted by means of a written report to be presented to the court and sent to both parties before trial, and is based on certain specific questions posed by the parties and relevant data and documentation provided for that purpose.

The expert evidence may be given by just one expert appointed by the court or by three experts: one appointed by each party, and one by the court.

The request for such evidence should be made with the initial written statement and no later than the preliminary hearing. Nonetheless, the court itself may request such evidence, if deemed necessary, even if that requires suspending the trial hearing for that purpose.

Experts may be summoned in order to clarify their statements, but they will not be examined as witnesses (*Cf.* Article 604, paragraph 1 (c) of the CPC). Their input will be limited to the scope of the report without rendering an opinion on the facts.

Nonetheless, in some cases, the court enables the parties to call as a witness someone with no particular awareness regarding the case but with specific knowledge useful for the comprehension of the technical facts at issue or for the explanation of certain technical documents that were filed. However, the testimony of any such witness will be weighed by the court and will undoubtedly be given less weight than actual expert evidence.

Settlement

6.1 Court approval

Court approval is necessary for the parties to settle a lawsuit (*Cf.* Article 290 of the CPC).

If the parties agree to settle before the proceeding is definitely terminated, the court will need to confirm the validity of the terms of the settlement agreement (e.g. if no non-disposable rights are at stake).

In addition it is also noteworthy that upon the approval of Law 29/2013, of 19th April 2013 which approved the general principles applicable to mediation in Portugal, the court may also at any time refer the parties to mediation, staying the judicial proceedings for that purpose. If an agreement is reached during the mediation proceedings, it will be remitted for the court's confirmation. If no agreement is reached, judicial proceedings will follow.

Please note that in most situations parties may also reach an extrajudicial settlement by which they agree that the plaintiff will dismiss the lawsuit. In these cases there is no need for the court's approval.

6.2 Confidentiality

The settlement of a lawsuit can remain confidential and this is usually the main goal of settlements.

For that particular purpose, the parties usually submit a written statement informing the court of the settlement and requesting its approval without filing the actual settlement agreement terms. Moreover, according to the Portuguese attorney's code of professional conduct, the parties are expressly prevented from disclosing any details of the negotiations that gave rise to the settlement agreement.

Damages & Judgment

7.1 Rules relating to damages

The general rule is that the party obliged to compensate for damages must restore the situation to that which would have existed if the event that led to the damage had not occurred (*Cf.* Article 562 of the CC). Whenever this is not possible, the indemnity should be calculated in terms of monetary value (*Cf.* Article 566 of the CC).

The compensation should include the loss suffered directly as a result of the event that led to the damages and also any profits that the injured party failed to obtain as a consequence of that event (*Cf.* Article 564 of the CC). The indemnity may also include future damages, if foreseeable.

Compensation for moral damages may be awarded. The amount of this compensation is determined on grounds of equity (*Cf.* Article 496 of the CC).

The party claiming for damages does not need to determine the exact extent of the damages. The party may ask for more damages if in the course of the lawsuit it concludes that the existing damages are higher than the ones previously asked for (*Cf.* Article 569 of the CC).

When the party's liability is based on negligence and the extent to which they were at fault, the financial situation of the plaintiff and of the defendant and other circumstances justify that option; the indemnity may be determined on grounds of equity in an amount lower than the existing damages (*Cf.* Article 494 of the CC).

Portuguese law does not allow punitive damages in the same way as is possible under US law. However, Portuguese law allows parties to agree that, in the event of default, the party in default will be bound to pay liquidated damages (meaning the setting of an amount intended to be an estimation of the future damages likely to occur) or real penalty clauses (in the sense of setting an amount which is not intended to be an estimation of future damages but rather a real penalty for default). Both the amounts of liquidated damages and penalty clauses are subject to possible reductions by the court at the request of the party which is bound to pay, if they are found to be manifestly excessive.

7.2 The collection of interest

With regard to contractual liability cases, when the obligation is already due, a party may collect interest based on the period before judgment is entered. However, this does not occur in non-contractual liability cases. In non-contractual liability cases interest is only due from the moment the defendant is summoned.

In both contractual and non-contractual liability cases a party may collect interest accruing after judgment is entered.

7.3 Non-monetary relief

Under Portuguese law, a party may request the specific performance of a contract, e.g. a promissory contract. In this case the court's decision produces the same effect as if the contract had not been breached (*Cf.* Article 830 of the CC).

With regard to fungible facts, a party may request that the fact is rendered by another person at the expense of the debtor (*Cf.* Article 828 of the CC).

In the case of non-fungible facts (except regarding facts which depend on scientific or artistic qualities of the debtor), a court may impose on the debtor the payment of a sum of money per day (or week or month) of delay or per act of breach, whichever is more convenient in the specific case (*Cf.* Article 829 -A of the CC).

7.4 Enforcement procedure

Portugal acceded to the Brussels Convention of 1968. Portugal has also ratified the Lugano Convention of 16 September 1988, regarding judicial competence and the execution of decisions in civil and commercial matters. EU Regulation 44/2001 came into effect on 1 March 2002 and replaced the Brussels Convention (except in relation to Denmark, the Netherlands Antilles, and French overseas territories).

According to Article 978 of the CPC, 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.

The court responsible for the recognition of foreign decisions is the court of second instance ("*Tribunal da Relação*").

The law obliges the judge to verify that: (i) the foreign decision is authentic and proper; (ii) it does not contain decisions in conflict with Portuguese public policy; and (iii) if the situation could be resolved under Portuguese law (in accordance with the rules of conflicts of law), that it would not violate its provisions.

The plaintiff begins the proceedings by presenting an initial claim ("*Petição Inicial*").

The plaintiff may request evidence at this stage. If the claim is filed in accordance with the legal requirements, the judge will order it to be served on the defendant and require an answer to be lodged within 15 days. If the defendant presents an answer, the plaintiff has ten days to reply. If no answer is filed, the defendant is considered to have admitted to the pleading contained in the initial claim.

The Portuguese confirmation system generally results in a formal review. As a rule, the court examines the regularity of a foreign decision and does not review its merits. However, the review of the foreign decision's merits may occur in at least two situations: (i) when the foreign decision may be deemed in conflict with Portuguese public policy; and (ii) when the parties submit a document that is sufficient to modify the decision of the foreign court.

Under Portuguese procedural law the general rule is that both parties can appeal any decision or order of the court during the recognition process.

Once the foreign decision recognition procedure is final the foreign decision may be executed in Portugal.

Appeal

8.1 Grounds for appeal

The general rule is that a party may appeal to the court of second instance ("*Tribunal da Relação*") when the value of the lawsuit is higher than EUR5,000 and the decision is unfavourable to the appealing party in an amount higher than EUR2,500.01 (*Cf.* Article 629 of the CPC). The court of second instance decides both on legal and factual issues.

A party may appeal to the Supreme Court when the value of the lawsuit is higher than EUR30,000 and the decision is unfavourable to the appealing party in an amount higher than EUR15,000.01.

The Supreme Court only rules on legal issues and, in most cases, cannot revoke the second instance judgment concerning the proven facts.

In most cases the parties cannot move to the Supreme Court if the first and the second instance courts have issued identical decisions with similar grounds.

The general rule is that the appeal does not suspend the proceedings unless the appealing party pays a deposit or presents a bank guarantee.

8.2 Time limits and triggering events

The general rule is that the appealing party has 30 days to appeal to the higher court in the event that the appeal is to the court of second instance (*Cf.* Article 638 of the CPC). If the

appeal includes the impeachment of the proven facts through a review of the recorded witnesses or party statements, then the appealing party has 40 days to appeal.

However, in some specific cases (e.g. freezing orders) the appealing party has only 15 days to appeal.

The defendant in the appeal always has the same term to present an answer.

The first instance court will then decide whether the appeal should be accepted. If it is accepted, the case is sent to the higher court.

On the basis of historic evidence, it is estimated that the second instance courts take on average between six months and one year to decide an appeal, and that the Supreme Court will take on average three to six months to issue a final decision.

Alternative Dispute Resolution

In Portugal, "alternative dispute resolution" comprehends every means and proceedings of dispute resolution which are used as alternatives to resorting to State courts. Accordingly, this designation encompasses negotiation, mediation, conciliation, arbitration and also, in Portugal, a specific category of tribunals named "*Julgados de Paz.*" The latter, although created and funded by the State, may be characterised as 'multi-doors tribunals' offering the possibility of resolving, alternatively or successively, several categories of disputes of minor economic dimension (not exceeding EUR15,000.00), by means of mediation, conciliation and adjudication.

Mediation

In Portugal, private mediation is still quite an unusual method of dispute resolution.

Although Portugal does have some public mediation systems, specifically targeted at family, labour, minor criminality and small civil claims filed before the so-called *Julgados de Paz,* the Portuguese society is still quite reluctant to choose mediation as an actual dispute resolution option. It is possible to cite several reasons for this, but the most significant seems to be the lack of awareness of mediation and of its exact scope and process, even amongst our lawyers and legal professionals.

Nonetheless, since mediation has gained more and more attention abroad, in 2009, the Portuguese Parliament included in our CPC some new rules intended to promote private mediation in Portugal. These changes were very significant, as they clarified that the parties can use mediation before bringing a civil or commercial dispute before court, that the judge itself may at any time suggest the parties try mediation and, most importantly, that time limitations are suspended from the date the intervention of a mediator is requested (Law no. 29/2009, of June 29th).

More recently, the Portuguese Parliament approved a first statute settling the general principles applicable to both public and private mediation, which apart from defining the proceedings and from highlighting that mediation is strictly confidential, also determines that, in the event a claim included in a mediation agreement is filed before the court, the competent

judge should stay the proceedings and refer the case to mediation, upon the defendant's request (Law no. 29/2013, of April 19th).

Conciliation
Conciliation may be found in judicial and arbitral courts.

In judicial courts the parties may request a formal hearing for conciliation purposes or the judge may decide to do it (*Cf.* Article 594 of the CPC).

In such cases, the judge should actively promote a settlement between the parties. If a settlement fails to succeed the reasons for such failure must remain on record. Concerning conciliation in arbitration, some arbitration rules contemplate the possibility for arbitrators to conciliate the parties; however, this possibility is very seldom used in Portugal.

Arbitration
Arbitration has been recognised and practised in Portugal since the Middle Ages. The former Portuguese arbitration law (Arbitration Act of 1986), despite adopting a significant number of concepts of modern theory of arbitration, was scarcely influenced by the UNCITRAL Model Law. Having been in force for more than 25 years, the 1986 Arbitration Act began to show very clear signs of insufficiency with respect to the current needs of arbitration users. As a consequence of this widely shared perception and with the aim of promoting and developing the Portuguese jurisdiction as a seat for international arbitration proceedings, in mid-2011 the Government submitted to the Parliament a proposal for a new law on voluntary arbitration. After all steps of the legislative process were completed, a new Arbitration Act was enacted, thus becoming Law no. 63/2011, of December 14th. The new Portuguese law is essentially based on UNCITRAL Model Law on International Commercial Arbitration (with the amendments adopted in 2006), but deviated from it in several points, and has also added to that basis a number of provisions which its drafters have considered necessary, taking into account the experience of applying the 1986 Arbitration Act for a quarter of a century. Some innovative changes of the new Portuguese arbitration law, which differ in relation to the Model Law, are the following:

- The main rule regarding the arbitrability of the dispute – the disposability of rights criterion – has been replaced by the economic nature of the disputed interest criterion;
- The negative effect of the principle of *kompetenz-kompetenz* has been specifically foreseen in the law, conferring primarily jurisdiction to arbitral tribunals, except in cases where the arbitration agreement is manifestly null and void, inoperative or incapable of being performed;
- It was expressly established that the parties cannot resort to anti-suit injunctions to prevent the constitution or functioning of an arbitral tribunal;
- As an innovation in relation to the Model Law, the Portuguese arbitration law expressly regulates issues related to multiparty arbitration, in particular the constitution of the arbitral tribunal. Based on the Dutco case law, this law provides for the possibility of the State court appointing all members of the arbitral tribunal where multiple parties fail to jointly appoint an arbitrator;
- In contrast to other recent arbitration laws, Portuguese law expressly regulates the third party intervention. For that purpose, the law requires that the party be bound by the arbi-

tration agreement and, with respect to subsequent adherence to the arbitration agreement, that all other parties and arbitrators accept such adherence;
- Portuguese law determines that international arbitration is deemed to occur if "*interests of international trade are at stake.*" Thus, in opposition to a subjective criterion based on the domicile of the parties set out in the Model Law, Portuguese arbitration law defines international arbitration based on an objective criterion.

Recognition and Enforcement of Foreign Arbitral Awards

Only in 1994 did Portugal ratify the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (NYC). After a period of lack of familiarity of our higher courts with the subject matter, and with the contents and implications of the NYC, the 2011 Arbitration Act fully regulates recognition proceedings in line with the requirements of the NYC, and expressly confers jurisdiction to a high court (appellate court). Nonetheless, the Supreme Court of Justice has a small margin for intervention regarding issues of recognition.