

# International Civil Fraud

**Jurisdictional comparisons**

**First edition 2014**

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# Foreword

## **Louis Flannery**

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It gives me great pleasure to introduce this work on international civil fraud, covering 24 jurisdictions, from as far afield as Russia, Kenya, and Cayman Islands. The idea was inspired by *Arbitration World*, a publication that is now in its fifth edition, in which practitioners from countries across the world wrote a chapter about arbitration in their home jurisdiction. The world is getting smaller while civil fraud is becoming more prevalent, and when the two concepts clash, it almost invariably involves a multi-disciplinary exercise, where mutual collaboration across borders becomes critical to the success of the venture, whether that be in bringing or defending the proceedings.

And, of course, although the globe is shrinking as fast as communication is increasing in speed and quality, the need for some cross-frontier learning in the modern world is greater than ever. With the dismantling of trade barriers and an international business expansion that could not have been conceived of a century (or even a half century) ago, the ability to commit fraud has mushroomed and the need to deal with its consequences has become a vital part of ensuring that international trade is not contaminated by the wrong sort of commerce.

As General Editor of this work, my task has been to achieve a quality of writing and a consistency of approach by the authors, as far as that is possible. But as different legal systems have evolved in different ways, producing different juridical and jurisprudential patterns, so one has had to treat the cloth according to the weft and warp, in making as seamless a quilt as possible. That has not been an easy task, once it becomes clear that no two jurisdictions treat the concept of 'civil fraud' in quite the same way. Of course, we know that common law countries rarely codify anything, so that the concepts are almost entirely judge-made. By contrast, many civil law jurisdictions have set down the relevant principles in their Codes, although no two of those are identical either. But I hope the reader will see the high quality product of the many great legal minds that have produced these chapters, and will benefit from the similar approach to the structure of each chapter.

The aim has been to ensure that any user of the work would quickly consult the relevant country chapter in order to find out a little more about the relevant legal theory, as well as the practice and procedure, concerning civil fraud. A little knowledge may be a dangerous thing, but we hope that it is safer than guesswork and more efficient than engaging lawyers in the jurisdiction concerned before they are needed. Although the treatment

differs from country to country, the same concepts arise time and again: is interim relief available? What is the juridical basis for a civil fraud? What forms can it take? How quickly can the courts move? What about supporting court orders from abroad? Of what relevance are aspects of criminal law (high in Russia, low in England)? We hope to have included all the relevant questions, within a tight framework, so that each chapter contains the essential material; nothing more, and hopefully nothing less. That will be for you to judge, but please do send me any comments or queries (by email to [louis.flannery@shlegal.com](mailto:louis.flannery@shlegal.com)) and we will ensure that the second edition will take into account suggestions, complaints, praise and criticism.

I hope the book will prove an invaluable reference work to any practitioner engaged in civil fraud with a cross-border element. The contacts section at the back of the book provides readers with details of the authors from all the jurisdictions represented, to whom any detailed questions or queries can be addressed. Those contributors have formed a network of knowledge and experience sharing, which we hope leads to the occasional fruitful collaboration, either between contributors, or for contributors from the practitioner-readers of this work.

It remains for me to thank Stephenson Harwood's Leonie Parkin for her help in compiling the work (and for writing the UK chapter), as well as each contributor for their superb effort in producing the gemstones that make up this treasure trove of a book. Last but not least, my thanks to Emily Kyriacou and Magda Wika for their almost infinite patience and diligence in seeing the process move from an idea to a reality.

London, November 2013

# Portugal

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### **1. THE BASIS OF CIVIL FRAUD OBLIGATIONS UNDER PORTUGUESE LAW**

Portugal has a civil law system. Legal provisions are contained in statutes. EU legislation is also a source of law.

Case law also plays an important role in the system, however. When applying statutes, the Portuguese courts refer to previous judicial interpretations of, and opinions on, case law.

Civil fraud obligations are contained in Articles 227, 253 and 254 of the Portuguese Civil Code (CC).

### **2. THE MAIN ELEMENTS OF CAUSE OF ACTION IN PORTUGAL BASED ON CIVIL FRAUD**

Civil fraud (*erro provocado por dolo*) includes both active and passive fraudulent behaviours.

According to Article 253 of the CC, fraud refers to the use of any suggestion or artifice by a party or third party to mislead the other party or to continue the other party's mistake.

It also includes the situation where one party conceals facts that it knows are of importance to the other party. However, where the law imposes no duty to inform (known as good faith *culpa in contrahendo* (fault in conclusion of a contract) rules), the failure to inform a party that it is mistaken does not constitute fraud.

Under Article 253 of the CC, there are three main elements of a cause of action based on civil fraud:

- a party is mistaken;
- the mistake was caused or disguised by the other party or by a third party;
- the misleading party or third party made use of suggestions, artifice or deception to cause or disguise the mistake.

A party who makes use of customary suggestion or artifice that is socially or commercially acceptable does not commit civil fraud, under the doctrine of *dolus bonus* (permissible deceit). This exclusion is designed to cover instances such as the baker who claims he 'makes the best chocolate cake in the world' or the supermarket chain that advertises that it has 'the lowest prices in the market', even though the maker of the statement knows that it is untrue.

In some cases, fraud is also punishable under criminal law. The most common type of criminal fraud in Portugal is swindling (*burla*). In many instances, such behaviour may amount to both civil and criminal fraud.

Swindling is committed when the perpetrator dishonestly portrays facts, causing someone to act in a way that results in that person or a third party suffering economic loss (Article 217 of the Portuguese Criminal Code (CrimC)).

Swindling can be committed by natural and legal persons.

Certain other frauds (such as tax fraud and social security fraud) are also punished under criminal law.

### **3. REMEDIES AVAILABLE UNDER PORTUGUESE LAW IN RELATION TO CIVIL FRAUD**

The remedies available for civil fraud are avoidance, restitution and damages. These remedies are granted through declaratory actions (under the Code of Civil Procedure (CCP)). If the defendant does not meet its payment obligations voluntarily, the claimant can use the court judgment to take enforcement action against the defendant (involving seizure of the defendant's assets to satisfy the debt owed).

#### **Avoidance and restitution**

If a party is induced into entering a contract by fraud, the mistaken party can avoid that contract (*Article 254, CC*). Note that:

- If the mistake is caused by one of the parties to a contract, the other party is fully entitled to avoid that contract.
- If the mistake is caused by a third party, the mistaken party can only avoid the contract when the other party knew or ought to have known of the fraud.

Avoidance is not excluded even where both parties have defrauded one another.

If a third party directly acquires any right by virtue of the contract, a party can only avoid that contract if the third party committed the fraud, or knew or ought to have known of the fraud (*Article 254, CC*). This provision expressly protects a third party acting in good faith.

At the same time as seeking to avoid a contract, a party can claim restitution of whatever he supplied under the contract. If restitution in kind is impossible for any reason, the mistaken party can claim payment of the corresponding value (*Article 289, CC*).

#### **Pre-contractual liability and damages**

A claim for damages for civil fraud can be made in addition to (or instead of) avoidance.

Damages for fraud are claimed on the basis of pre-contractual liability (*responsabilidade pré-contratual*), and more precisely, on the basis of fault in conclusion of the contract (*culpa in contraendo*) (*Article 227, CC*). Under this doctrine, there are duties to negotiate in good faith when forming a contract. A party that has negotiated in bad faith (*mala fide*) is accountable for any damages caused to the other party.

The doctrine of pre-contractual liability imposes a duty to inform. It is the breach of this duty that gives rise not only to fraud, but to the pre-contractual liability.

### **Claiming damages within a criminal procedure**

If the fraud constitutes a crime (such as swindling), the defrauded party can file a complaint with the authorities, which will then bring a criminal action against the swindler.

Criminal actions are decided exclusively by specialised criminal courts, but the defrauded party can bring a civil claim for damages within the criminal procedure. The court then decides the criminal matter and the civil claim for damages within the same proceedings.

## **4. DAMAGES; BASIS OF CALCULATION**

Damages for civil fraud are calculated to restore the mistaken party to the position he would have been in if the contract had not been concluded. They cover the loss that the mistaken party has suffered and any gain of which he has been deprived.

Net compensation is fixed by the court whenever simple restitution is not possible or does not sufficiently cover the claimant's losses. This is determined by working out the difference between the current economic situation of the injured party and the one that he would have been in if not for the injury. If the net value of the damages cannot be calculated exactly, the court awards an equitable amount, in accordance with its findings of fact.

## **5. AVAILABLE INTERIM RELIEF**

Relief is available pending a trial if, in the interim, there is justified fear of serious harm being caused to the claimant that would be otherwise difficult to remedy.

There are two types of interim relief that are provided for in Articles 377 and following of the CCP:

- common interim relief; and
- specific interim relief.

There is no interim relief specifically designed for a cause of action involving civil fraud.

The specific interim relief of seizure of the defendant's assets (*arresto*) is available when the claimant has a justified fear that the defendant will lose or dispose of those assets, and those assets that would serve as security for payment of the claimant's damages. Seizure of the defendant's assets may be subject to the payment of a deposit to the court by the claimant, as the latter may be responsible for any illegal damages caused by the seizure.

If a debtor fraudulently performs any act or enters into any agreement that diminishes his property or assets (such as an unwarranted donation) the creditor can bring an action (known as a revocatory or Paulian action (*impugnação pauliana*), under Articles 610 and following of the CC) against such an act. If an agreement is made for consideration (*oneroso*), the agreement can only be set aside if it is proved that both the debtor and the third party acted in bad faith. On the other hand, if the debtor assigns its assets to a third party free of charge, it does not need to be proved that the parties were acting in bad faith in order to set the agreement aside. For this purpose, acting in bad faith means being conscious that the action will inflict harm on the creditor(s).



Interim relief can be claimed before the main action is brought, to ensure the effectiveness of that claim. However, where a claim for interim relief is brought before the main action, the claimant must file the main action within 30 days of the decision that grants the interim measure (see also Question 8).

A claim for interim relief gives rise to urgent proceedings, which means that the court of first instance must decide the matter within two months.

The announced reform of the PCPC entered into force on September 1, 2013. This reform gives the court the power to enact a final decision on the merits of the case within an interim procedure, if the judge finds that the evidence provided to the court by the parties is sufficient to render a final decision. In this (exceptional) case, the interim relief will not be dependent on the submission of a main action.

## **6. BARS TO RELIEF FOR CIVIL FRAUD**

### **6.1 Delay**

Judicial proceedings in Portugal tend to experience delay, especially at first instance level. Official information provided by the Ministry of Justice indicates that, in 2011, civil proceedings took an average of 29 months to be decided at first instance.

The CCP is currently being reformed, one of its main objectives being the reduction of delay in civil proceedings, which is perceived to be one of the biggest problems with the Portuguese judicial system.

In 2011, criminal proceedings took an average of nine months to be decided at trial, according to the Ministry of Justice. However, criminal proceedings for the offence of swindling took an average of 19 months to be concluded at trial stage.

No official information is available regarding how long criminal investigations (preceding the trial) take. However, this phase is commonly known to be lengthy. While such investigations are required to be completed in six to 18 months (depending on the type of crime and complexity of the proceedings), there are no legal consequences for failure to meet these deadlines.

### **6.2 (Lack of) good faith**

Lack of good faith of the claimant is not a bar to relief for civil fraud. Indeed, the law expressly allows avoidance of contract even where the fraud has been committed by both parties (Article 254, CC). As a result, a fraudulent party can avoid a contract if the other party has acted fraudulently. However, if a party has entered into a contract while aware of the other party's deceit this would likely not constitute fraud, because the party is not mistaken and therefore is not defrauded (see section 2).

### **6.3 Applicable limitation periods**

If a party has entered into a contract in error as a result of fraud, the mistaken party can annul the contract within a year of becoming aware of that error.

A claim for damages for civil fraud lapses three years after the mistaken party became aware of the existence of his rights, subject to the general limitation period for civil fraud of 20 years. As a result, if a mistaken

party only becomes aware of his right to compensation 20 years after the occurrence of the fraud, the claim is time-barred.

If the fraud constitutes a crime, the limitation period for the civil right to compensation is raised to the limitation period for the offence in question, if the latter is longer. In relation to swindling, the statute of limitations is five or ten years, depending on the seriousness of the conduct and on the value of the fraud. This starts to run from the date that the crime is committed, but can be interrupted or suspended as provided by law.

#### **6.4 Position of good faith purchaser for value without notice (innocent third parties)**

The effects of avoidance of a contract are retrospective. This means that even if the object of the contract has been assigned to a good faith third party, restitution is still possible by means of an action for recovery of property.

Restitution is only impossible:

- if the third party has acquired adverse possession of the property (*usucapião*). The applicable term varies, according to a number of factors, from three to 20 years of uninterrupted possession.
- in the case of immovable or movable assets subject to registration, when the third party has registered the asset's title before restitution is claimed. Real estate property is always subject to public registration in Portugal. However, only certain types of movable property are subject to registration, for example, automobiles and vessels.

Note that the rights of a good faith third party are not recognised if restitution is claimed within three years of the acquisition.

### **7. ASPECTS OF PLEADING FRAUD IN PORTUGAL**

#### **7.1 Lifting the corporate veil**

As a general rule, the corporate veil cannot be lifted to pass on civil liability of a Portuguese company to the natural persons that acted as its representatives or partners. However, it is possible to lift the corporate veil in civil liability cases where the veil is being used in an illicit or abusive manner to harm third parties.

When a fraud constitutes a criminal offence, the representatives (directors or others) who acted on behalf of the company can be personally liable for both the criminal offence itself and for the civil compensation that may derive from it. Criminal liability of the legal person and the natural person are independent of each other, meaning that either can be convicted even if the other has been acquitted.

In certain cases, even if a natural person is found not guilty of a criminal offence, a natural person who acted as a representative of a convicted legal person (company) may be jointly and severally liable. The veil is then lifted in the sense that the natural person is responsible for the payment of any penalties and compensation that the company has incurred.

#### **7.2 Settlements/exclusion clauses**

Exclusion of liability clauses are generally not admissible under Portuguese law. A clause in which a creditor renounces any rights in advance is null and

void (Article 809, CC). However, the parties can contract to pre-establish the amount of damages available on the breach of certain obligations, through what is known as a comminatory clause (*cláusula penal*). Such a clause may apply in any case of breach of a contract, as provided for in the contract.

### **7.3 Extension of limitation**

If the fraud constitutes a criminal offence, the limitation period for bringing a civil claim for damages is extended to the limitation period applicable to the criminal offence, which is longer than the ordinary civil liability limitation (see Question 6.3).

### **7.4 Punitive damages**

Punitive damages are generally not available in Portugal, as they are not provided for by law.

However, a court can award future damages, as long as they are predictable. If future damages are not determinable at the time that the court makes its decision, the calculation of the damages can be postponed for consideration in later proceedings (such as enforcement proceedings).

While punitive damages are generally not available in Portugal, pleading fraud in a civil claim gives the mistaken party the ability to avoid the contract and claim damages on the basis of pre-contractual liability. Avoidance is a particularly effective remedy in Portugal as it has retroactive effect.

### **7.5 Standard of proof**

Under Portuguese law, a claimant bears the burden of proof. In the case of fraud, the claimant must prove that he was mistaken and that the mistake was intentionally caused or disguised by the misleading party by use of suggestion, artifice or deception. As a result, pleading fraud imposes a somewhat higher standard of proof on the claimant than an ordinary civil case would do.

Note, however, that where a claimant entered into a contract because of an error caused by fraud, the mistaken party is entitled to annul the contract within a year of becoming aware of that error (see Question 6.3). In these types of cases, the defendant must prove at the time of the claim that the one year limitation period has already lapsed. This means that it is up to the defendant to prove that the claimant became aware of the mistake more than one year before bringing the action, which may be difficult to do.

### **7.6 Lawyers' duties when pleading fraud**

Lawyers are not subject to a higher duty when pleading civil fraud cases.

## **8. BASIC REQUIREMENTS IN RELATION TO ISSUING PROCEEDINGS; APPLYING FOR INJUNCTIVE OR INTERIM RELIEF; OR SERVING PROCEEDINGS ABROAD**

### **Issue of proceedings**

A civil action for a declaration begins with the filing of the pleading by the claimant, which contains information on the type of relief requested and the cause of action. The pleading should be addressed to the competent civil

court (which is usually, and unless special provisions apply, the district court of the domicile of the defendant).

Once the claim has been filed, the defendant is notified so that he can exercise his right of defence. The defendant has 30 days from notification to lodge his defence, and, in some cases as provided by law, he may also present a counter-claim, within that same term. If the defendant presents such a counter-claim, the claimant may respond, within a term of 30 days.

When the exchange of pleadings is complete (this is conducted by the parties and the court's secretariat), the hearing begins. As a general rule, all documentary evidence should be presented with the written pleadings.

The law provides for a preliminary hearing, where the parties should discuss the possibility of a settlement and, if the case is to proceed to trial, the judge should set out the subject matter of the dispute and the themes to be subject to evidence in trial. The court can also make a decision on the merits of the case before the hearing, if the judge believes that the exchange of pleadings provide him with all the necessary elements to issue a final decision on the case.

Except in this case where the court decides on the merits before the hearing, a trial hearing takes place. Within the trial hearing, the parties present their evidence by testimony. At the end of the trial the parties present oral pleadings both on the facts and evidence that was made and on the legal issues under consideration.

The judge then issues a decision, taking into account all evidence and legal arguments presented by the parties to the court.

Most court decisions can be appealed at least once.

In general terms, proceedings are conducted on the basis of the adversarial principle (*princípio do contraditório*), although there are some exceptions.

In criminal cases, a matter may begin with the filing of a complaint by the offended party. When the authorities finish their investigation and conclude there are grounds to bring criminal charges against the alleged perpetrator, the Public Prosecutor's Office also gives the offended party the opportunity to lodge a written claim for compensation/damages.

The offended party can participate in the trial by submitting evidence to the court and cross-examining defence witnesses. However, the case is conducted by a magistrate of the Public Prosecutor's Office.

The final decision is given in relation to both the civil claim and the criminal charge. The defendant can appeal the decision on conviction. If the defendant is acquitted or partially convicted, the Public Prosecutor and/or the offended party can appeal the decision.

### **Application for injunctive or interim relief**

In Portugal, interim proceedings are usually dependent on the main claim. If an application for injunctive or interim relief is made before the main claim, the interim proceeding will be attached to the main proceedings once they are brought. If injunctive or interim relief is applied for during the main proceedings, the application should be addressed to the court dealing with the main action; the two proceedings are then consolidated.

As referred to above, the PCPC reform has introduced the possibility of the

court issuing a final decision on the case, without the need for the claimant to bring a main action afterwards, if there is a certainty on the existence of the right that is being claimed and if the nature of the interim relief is adequate to a just and definitive decision on the subject matter in dispute, as long as the other formal legal requirements are met. If this decision is taken there will be a reversion of the responsibility for action (*inversão do contencioso*), which means that the defendant will have the burden of bringing an action to challenge the existence of the recognised right of the claimant.

In any case, an application for injunctive or interim relief must contain short evidence concerning the right that is under threat and an explanation of the grounds on which there is a fear of serious harm. The court of first instance must decide the matter within two months.

In some cases, such as seizure, the interim measures are enacted by the court without observing the adversarial nature of proceedings, that is, without the summoning or knowledge of the defendant, to better ensure the effectiveness of the measure. This is one of the few exceptions to the adversarial principle in Portuguese civil law procedure. Note that the claimant may have to pay a deposit if seizure is sought (*see Question 5*).

Interim measures can also be sought within a criminal procedure, in the same way that they are brought in civil proceedings.

### **Service of proceedings abroad**

The Portuguese courts can issue letters rogatory to serve proceedings abroad (*Article 176, CCP*) at the request of the parties to a judicial procedure. The letters rogatory, signed by the judge, are sent directly by the secretariat of the court to the relevant foreign authorities or courts.

The content of the letter rogatory is restricted to what is necessary for due diligence, and may be issued only to collect evidence, where the foreign authority will make no decision..

## **9. PROCEDURE AND REQUIREMENTS FOR ENFORCING INTERIM INJUNCTIONS FROM ABROAD IN PORTUGAL**

In general, interim injunctions from abroad are subject to review and confirmation by the Portuguese courts (*Article 1094, CCP*). Otherwise, they are not effective in Portugal, and consequently, cannot be enforced.

A request for review and confirmation should be addressed to the Court of Appeals for the judicial district in which the defendant is domiciled.

However, note that a decision of a tribunal of a member state of the European Union or the European Free Trade Association is recognised in Portugal without the need for any procedure (*Article 33, Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Regulation)*). In relation to enforcement, a decision given in a member state can be enforced in Portugal at the request of the party concerned (*Article 38, Brussels Regulation*). This request should be addressed to the Portuguese district court (*tribunal de comarca*) of the place of domicile of the party against whom enforcement is sought, or to the district court of the place of enforcement (*Article 39, Brussels Regulation*).

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