

Portugal

General

Where security has been created in the form of a mortgage, and if the parties do not agree to enforce the mortgage extra-judicially, the enforcement proceedings must be carried out in court.

However, where security has been created in the form of a pledge, the parties may agree that the lender may enforce the pledge without recourse to court enforcement proceedings, by way of an extra-judicial enforcement.

In order to commence an enforcement proceeding (*acção executiva*) in court, the lender must have an enforcement title (*título executivo*) (i.e., the right to go straight to enforcement).

In the event that the lender does not have an enforcement title, the lender will have to first obtain a court decision recognising the claim, and then proceed to enforcement. Pursuant to Portuguese law, a contract signed by an obligor under which payment obligations (in amounts which are, or can be, determined) have been agreed, is only deemed to be an enforcement title if it has been duly authenticated by a notary or any other entity with the power to do so.

In the context of a loan secured by a mortgage or a pledge, a public deed granted by a notary creating the mortgage or the pledge agreement, together with the loan contract signed by an obligor under which payment obligations (in amounts which are, or can be, determined) have been agreed and duly authenticated by a notary or any other entity with the power to do so, will be deemed as executory titles.

Enforcement of Mortgages

(a) Filing of Enforcement Request by the Lender to the Court

The lender requests the enforcement of the mortgage credit and the seizure of the mortgaged asset.

The lender may also request the seizure of other assets (i.e., rent generated by the property and/or bank accounts) of the debtor.

(b) Court Notifies Debtor of the Enforcement Request and Seizure of Assets

The debtor may decide to pay, oppose (twenty days to file opposition), or not oppose and not pay. If the debtor opposes, it can provide a deposit to suspend the enforcement proceedings. The lender is notified of the opposition in order for it to contest.

(c) Seizure of Assets

The enforcement agent seizes the mortgaged asset (by electronic communication directly to the Land Registry office).





If the mortgaged asset is insufficient to pay the debt (i.e., because of low market value, existence of various mortgage creditors, etc.), the enforcement agent can seize other assets of the debtor (the lender may request it to do so initially).

(d) Court Notifies Other Creditors

The court notifies other creditors with mortgages over the same asset, the State, and the Tax Authorities.

Other creditors submit their respective claims within fifteen days.

(e) Court Issues Decision of Ranking of Creditors

The ranking of creditors in enforcement proceedings is as follows:

- (i) court expenses involved with the maintenance, liquidation, and enforcement of the mortgaged asset;
- (ii) amounts owed to employees that work at the mortgaged property;
- (iii) property taxes (Property Purchase Tax (**IMT**) and Immovable Property Tax (**IMI**)) due to the State and Tax Authorities in relation to the mortgaged property; and
- (iv) mortgaged credit.

The ranking of creditors in insolvency proceedings differs and is as follows:

- (i) debts of the insolvent estate (i.e., court costs, payment to insolvency administrator, expenses with management, and liquidation of insolvency assets), which will be paid firstly with any income of the insolvent estate and, secondly, pro rata with proceeds of sale of all the assets of the insolvent estate (subject in any case to a maximum of 10% of proceeds of secured assets);
- (ii) amounts owed to employees that work at the mortgaged property;
- (iii) IMT and IMI due to the State and Tax Authorities in relation to the mortgaged property which became due during the period of twelve months prior to commencement of the insolvency proceeding; and
- (iv) mortgaged credit.

Other taxes due to the State and Tax Authorities (i.e., income tax or VAT), or contributions due to the Social Security, are ranked below the mortgaged credit.

(f) Sale of Seized Assets

The enforcement agent, under the supervision of the judge, determines the type of sale. This can be a judicial sale, auction sale, or private sale.

(g) Forms of Payment (If Debtor Does Not Pay Voluntarily)

Credit-Bidding: the lender may accept receipt of the mortgaged asset by set-off against its credit (any remaining credit becomes unsecured).

Consignment of Income (*consignação de rendimentos*): if requested by the lender, the court may allocate to the lender income generated by the mortgaged asset (i.e., rental income).

Sale Proceeds: the court awards to the lender the proceeds that are generated by the sale of the mortgaged asset (any remaining credit becomes unsecured).

(h) General Timing

The time frame is approximately eighteen months, assuming there is no opposition by the debtor, no appeal against the court decision, no bankruptcy of the debtor, existence of seizable assets and market conditions for sale of the seized assets; but subject to the complexity of the case and work volume of the relevant court.

(i) Preservation/Conservation of Asset

In the context of enforcement proceedings, the mortgaged asset shall remain the property of and in the administration of the debtor/owner. If actions/omissions of the owner threaten the conservation and preservation of its value, the creditor may potentially file an injunction with the court to impose preservation actions.

In the context of insolvency proceedings, the insolvency administrator (designated by the insolvency court) shall be responsible for administration of the insolvent estate and must ensure the preservation and conservation of the assets of the insolvent estate.

(j) Lease/Rental Agreements

In the case of shopping centres: (i) the shop lease agreements remain in force and effect during enforcement, (ii) the transfer of the mortgaged property to a third party does not lead to termination of the lease agreements, (iii) shop owners do not have special rights in the context of the enforcement proceedings, and (iv) lease agreements typically do not foresee exit/termination upon transfer/change of control of the property.



The lease agreements should, however, be reviewed to ensure there are no unusual clauses.

(k) Moratorium/Standstill

Under Portuguese law there are two types of special recovery proceedings that may establish a standstill period: (i) PER (*Processo Especial de Revitalização*); (ii) RERE (*Regime Extrajudicial de Recuperação de Empresas*); and PEVE (*Processo Extraordinário de Viabilização de Empresas*).

The enforcement proceedings are suspended if the debtor submits itself to a PER or a PEVE. Within the course of a RERE, and unless otherwise agreed between the debtor and its creditors, the enforcement proceedings for payment of claims initiated against the debtor and/or its respective guarantors concerning guaranteed operations are extinguished only if they were initiated by one of the creditors who have adhered to the RERE. Should the debtor be declared insolvent, the enforcement proceedings will also be suspended.

Extra-Judicial Enforcement of the Pledge

In a situation where security has been created in the form of a pledge, the parties may agree that the lender may enforce the pledge over the pledged assets without recourse to a court enforcement proceeding.

If the parties have elected the extra-judicial enforcement of the pledge, the lender may sell the pledged assets through a private sale, provided that:

- (i) the pledged assets are sold at their fair market value. In this context, it is advisable that the lender obtain a credible valuation of the pledged assets prior to the sale; and
- (ii) the lender may not acquire the pledged assets for itself.

Enforcement of Unsecured Debt

Under Portuguese law, unsecured credits may be enforced, but creditors must have an enforceable title to request an enforcement proceeding.

To be enforceable, documents signed by the debtor must be authenticated by a notary or a duly authorised entity in order to be valid as the basis for enforcement proceedings. *Private documents* signed by the debtor that create or recognise pecuniary obligations are not enforceable titles.

If the document in question does not meet the conditions for it to count as an enforceable title, depending on the document on which the process is based, creditors might be able to present a special debt recovery action, or a declarative action requesting the recognition of their credit.

If the debtor does not: (i) oppose the payment procedure, or (ii) pay within fifteen days, the creditor will have an enforceable title. If the debtor opposes the procedure, the payment procedure will proceed according to declarative action rules.

In the event of the declaration of insolvency of the debtor, unsecured creditors may not enforce their rights outside of the insolvency proceeding.

Enforcement of Foreign Judgments

Any final judgment obtained in a competent jurisdiction in respect of any sums payable would be enforced by the courts of Portugal under the conditions set forth in the Recast Brussels Regulation or, if and when such convention is not applicable, would be enforced by the courts of Portugal without re-examination of the merits of the case provided that:

- (i) there are no doubts about the authenticity or substance of the document in which the judgment is given, and the judgment is final and conclusive;
- (ii) any conditions imposed by the law of the country in which it was given, which are conditions to its enforcement in the Portuguese courts, have been complied with;
- (iii) it was issued by a foreign court, the jurisdiction of which had been used justifiably and does not pertain to matters subject to the exclusive competence of the Portuguese courts;
- (iv) the exception of *lis pendens* or *res judicata* cannot be raised based on a case before a Portuguese court, unless the action was brought first before the foreign court;
- (v) the defendant was duly served for the action in accordance with the law of the country in which the judgment was issued, and that the principles of the right to a fair trial (*princípio do contraditório*) and equal treatment of the parties have been complied with; or
- (vi) it does not contravene the principles of Portuguese international public order.

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