PORTUGAL

Global litigation guide

DLA PIPER

About

Welcome to The Global Litigation Guide (the **"Guide"**) which has been prepared by DLA Piper's civil litigation experts around the world for the purpose of presenting key aspects of civil litigation in jurisdictions in which DLA Piper operates.

For each country, the Guide focuses on the following aspects:

- Overview of court system
- Limitation
- Procedural steps and timing
- Disclosure and discovery
- Default judgment
- Appeals
- Interim relief proceedings
- Prejudgment attachments and freezing
- Costs
- Class actions

This global Guide provides practitioners, in-house counsel and clients with a comparative source of reference that covers some of the intricacies of civil litigation in 30 jurisdictions worldwide. DLA Piper has prepared separate guides that deal with matters that are closely related to civil litigation, such as DLA Piper's guide to Legal Professional Privilege and (coming soon) DLA Piper's guide to Third Party Funding. Criminal or administrative litigation (as well as litigation relating to other specialist areas of law that require different procedures such as tax and employment) are outside the scope of the Guide.

The Guide is not a substitute for legal advice. Should you have a civil claim, or if you would like further information, please contact any of the individuals listed in the Guide.

About DLA Piper

DLA Piper is a global law firm with lawyers located in more than 40 countries throughout the Americas, Europe, the Middle East, Africa and Asia Pacific, positioning us to help clients with their legal needs around the world.

For further information visit www.dlapiper.com.

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Portugal

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Overview of court system

Portugal is a civil law jurisdiction. The Portuguese courts operate principally under the Portuguese Civil Code (the Code) and Civil Procedural Code (the Procedural Code), and the primary sources of law are laws and customary rules (as provided for in Article 348 of the Code and based on a social practice with a strong conviction of legality).

The Portuguese civil court system is organized into a three-tier structure:

- Courts of First Instance (District Courts) – for all initial claims irrespective of the claimed amount;
- Courts of Appeal (*Tribunais da Relação*) – in general, an appeal to these courts is admissible if the value of the claim is higher than EUR5,000 and the decision is unfavourable to the appealing party in an amount higher than EUR2,500; and
- The Supreme Court of Justice – an appeal to this court is only admissible under certain circumstances (namely, where the value of the case is higher than EUR30,000 and the decision is unfavourable to the appealing party in an amount which is higher than EUR15,000).

Outside of this system, there is also the Constitutional Court. An appeal can be submitted to the Constitutional Court in specific situations to argue the unconstitutionality of a specific interpretation of a provision of law applied in a particular case.

The Constitutional Court only determines matters directly related to the interpretation and applicability of constitutional provisions. On the other hand, the Supreme Court decides on matters of law in general (but excluding any review of facts deemed proven).

The Portuguese legal system does not employ the rule of precedent. As such, the court will decide each claim before it relying solely on what has been prescribed by law. However, arguments based on case law/jurisprudence can be persuasive and are often used to reinforce legal arguments in written pleadings, along with doctrine.

Courts are not obliged to follow previous court rulings, unless the previous decision is one of the Supreme Court of Justice with standardisation of jurisprudence over a specific legal interpretation, as explained in the *Appeals* section below.

Rules on jurisdiction determine in which Court of First Instance a particular case should be filed. Should a case be appealed, the territorial jurisdiction of the presiding Court of Appeal will depend on the location of the Court of First Instance that issued the decision being appealed.

First Instance Courts are, in general, District Courts, which are divided into:

- Courts with general jurisdiction; and
- Courts with specialised jurisdiction, which may fall into one of the following categories:
  - Central Civil;
  - Local Civil;
  - Central Criminal;
  - Local Criminal;

- Local Petty Criminal;
- Criminal Investigation;
- Family and Minors;
- Labor;
- Commerce; and
- Enforcement.

In addition to District Courts, there are also Courts of Extended Territorial Jurisdiction, which have jurisdiction over more than one district or over areas specifically referred to by law. These courts deal with specific matters, regardless of the applicable form of procedure. In particular, the Courts of Extended Territorial Jurisdiction are:

- The Intellectual Property Court;
- The Competition, Regulatory and Supervisory Court;
- The Maritime Court;
- The Court of Penalties Enforcement; and
- The Central Court of Criminal Instruction.

According to Article 133 of the Procedural Code, Portuguese is the mandatory language of the courts, and all judicial documents and oral hearings must be in Portuguese. If there are documents or testimonies in another language, an official translator must be appointed by the court.

Limitation

The general limitation period for civil claims in Portugal is 20 years from the date that the claimant's right to bring the claim becomes enforceable (i.e. the moment when the claimant knew or ought to have known – whichever is the earlier – the circumstances giving rise to such right and the identity of the defendant). There are, however, exceptions providing for shorter limitation periods, notably the following:

- Five years for statutory or agreed interest, namely within financial agreements, and other specific situations;
- Three years for non-contractual liability;
- Two years for lawyers' fees and other payment of services claims, amongst other things; and
- Six months for claims from establishments providing accommodation services against consumers, amongst other things.

The most common trigger for a limitation period to start is the event that constitutes the grounds for the claim, but a later date can be triggered if the perpetrator or details and/or consequences of the event only become known at a later date.

Given the number of potential scenarios, the limitation period for each claim must be analyzed on an individual, case-by-case basis.

Procedural steps and timing

Proceedings are commenced by submitting an initial statement of claim to the court, usually through the e-justice platform (*Citius*). Under Article 552 of the Code, the claim must:

- Identify the parties and the court before which the claim is filed;
- State the factual and legal grounds of the claim and the legal consequences; and
- Provide a specific indication of the evidence that the claimant intends to offer or request in the proceedings and, in particular, list the documents which the claimant exhibits to the statement of claim.

The Court serves the claim on the defendant by post. The deadline to submit a defense varies from ten days in fast-track cases to 60 days when the defendant resides abroad.

The defense must set out all the grounds for the Court to dismiss the claim, including any that could lead to summary dismissal. Grounds for summary dismissal include:

- Expiry of the relevant limitation period;
- Lack of jurisdiction;
- Lack of legal standing;
- *Res judicata* (which prevents a party from re-litigating a claim or defense (or issue) already litigated); and/or
- *Lis pendens* (pending lawsuit regarding the same matter).

Once the defense has been submitted, the next stages include:

- A preliminary hearing;
- Expert reports and other actions relating to the production of evidence by the parties; and
- A trial hearing.

The average length of first instance proceedings may range from 18 to 24 months. For appeals in the Courts of Appeal, the average length may range from six to 12 months and for the Supreme Court of Justice from another 6 to 12 months. However, proceedings can be shorter or last much longer, especially when the facts are disputed and must be established by the court, or if other issues arise.

When the Court of First Instance issues its final decision, the deadline for the losing party to file an appeal is 30 days from notification of such decision, reduced to 15 days in cases specified by law, such as an appeal within a proceeding which is deemed to be urgent (amongst other things).

The appeal must be filed by means of an application addressed to the Court of First Instance that issued the decision being appealed and must also indicate the type, effect, and method of lodging the appeal. The application to file the appeal must contain the appellant's briefs stating the specific grounds of appeal and respective conclusions. If all these formal requirements are fulfilled, the Court of First Instance will admit the appeal and refer it to the competent Court of Appeal.

Once the Court of Appeal has granted its decision, and if an appeal to the Supreme Court of Justice is legally permissible, the same time limits shall be observed.

Legal representation for civil proceedings is mandatory in cases where:

- An ordinary appeal is admissible due to the claim's value;
- An appeal is always admissible, regardless of the amount; and
- Appeals are initially filed in higher courts.

Disclosure and discovery

There is no obligation to provide full discovery under Portuguese law. This means that the parties are not obliged to share relevant documents unless an order to this effect is issued by a judge. Such orders can only be made when one party specifically requests a document to be disclosed by the adverse party and the judge deems such disclosure necessary. Requests which reference an excessively broad class of documents or information on a certain matter, or that will lead to non-specific searches will not be granted by the court.

The requesting party must indicate the facts it intends to prove with the documents requested. The disclosure request will only be granted by the court if the requesting party is unable to obtain the documents by other means or would have substantial difficulty in doing so. The court may also order the parties to disclose documents or other evidence of its own volition. Evidence can not be obtained ex parte.

In Portugal, the general rule is that each party shall allege and prove the facts on which the claim or the defense is based. Any facts not objected to by the opposing party will be deemed to be admitted and therefore proved. Therefore, only disputed facts will be subject to further evidence.

Generally, all evidence should be provided by the parties with their written pleadings. After the pleadings have been filed, the appropriate time to submit documents and other evidence, or to change the evidence previously submitted, is at the preliminary hearing.

The parties can amend their list of witnesses until 20 days before the trial hearing. If a party chooses to do so, the opposing party will have five days to do likewise.

Under Portuguese law, all individuals are under a duty to cooperate with the court in discovering the truth. This includes the duty to provide whatever documents or information are requested by the Court. However, certain documents such as privileged communication between lawyers or other documents containing professional secrecy are excluded from disclosure, unless the court grants a specific order, which only occurs when there is no other means of proving a fact which is essential to discover the underlying truth).

Default judgment

If the defendant does not appear before the court on the date set in the writ of summons or otherwise specified by the judge, the claimant will be awarded a judgment in default unless the court verifies that the claim was not properly served, or it appears prima facie to lack any legal basis.

Even in the case of a default judgment, the claimant is required to prove his case, and the court will always analyze whether the claim is founded or not before rendering a default judgment.

A defendant met with a default judgment has the option to appeal to the Court of Appeal within 30 days calculated from the notification of the default judgment decision.

Appeals

In the Portuguese jurisdiction, there are ordinary and extraordinary appeals. Ordinary appeals must be filed before the decision becomes *res judicata* (which means final and binding) – in general within 15 or 30 days of the notification of the final decision to the parties, depending if it is an urgent proceeding (such as an interim relief proceeding) or an ordinary proceeding (although other specific timeframes might be applied). Extraordinary appeals can, in some circumstances be filed outside those timeframes (see below).

In general, claims brought before the Court of First Instance may only be appealed to the Court of Appeal if the value of the claim is higher than EUR5,000 and the decision is unfavourable to the appealing party in an amount higher than EUR2,500. The Court of Appeal decides on matters of fact and law.

As for the decisions of the Court of Appeal, an appeal to the Supreme Court of Justice is only admissible under certain circumstances (namely, where the value of the case is higher than EUR30,000 and the decision is unfavourable to the appealing party in an amount which is higher than EUR15,000). However, if the first instance judgment is upheld by the first-level appellate court on broadly similar grounds and without any dissenting options, the matter cannot be appealed to the Supreme Court of Justice. The Supreme Court of Justice only decides questions of law.

For decisions on interim relief proceedings (described below), there is generally only one level of appeal, which means that the decision granted by the first-level appellate court cannot be appealed to the Supreme Court.

For appeals in the Courts of Appeal, the average length may range from six to 12 months and for the Supreme Court of Justice from another six to 12 months. However, proceedings can be shorter or last much longer, especially when the facts are disputed and must be established by the court, or if other issues arise.

When the Court of First Instance issues its final decision, the deadline for the losing party to file an appeal is 30 days from notification of such decision, reduced to 15 days in cases prescribed by law, such as an appeal within a proceeding which is deemed to be urgent (amongst other things).

The appeal must be filed by means of an application addressed to the Court of First Instance that issued the decision being appealed and must also indicate the type, effect, and method of lodging the appeal. The application to file the appeal must contain the appellant's briefs stating the specific grounds of appeal and respective conclusions. If all these formal requirements are fulfilled, the Court of First Instance will admit the appeal and refer it to the competent Court of Appeal.

Once the Court of Appeal has granted its decision, and if an appeal to the Supreme Court of Justice is legally permissible, the same time limits shall be observed.

Legal representation for civil proceedings is mandatory in cases where:

- An ordinary appeal is admissible due to the claim's value;
- An appeal is always admissible, regardless of the amount; and
- Appeals are initially filed in higher courts.

There are two types of extraordinary appeals: the revision appeal and the appeal for the standardization of jurisprudence. The revision appeal may be filed in exceptional cases in which it can be shown that the original decision was, for example, based on forged evidence. The appeal for the standardization of jurisprudence is submitted in order to obtain a homogenous interpretation and application of a specific Portuguese law provision. It is the Supreme Court's duty to ensure that judicial decisions upon similar matters do not differ substantially from each other, to ensure a uniform application of the law.

Under certain circumstances, the parties can also appeal to the Constitutional Court when all ordinary appeals have been exhausted and when the case concerns issues of a constitutional nature.

As a general rule, an appeal does not suspend the effect of the original judgment. However, when the appeal is filed, the appealing party may request the original judgment to be suspended, on the grounds that immediate enforcement of the judgment would cause substantial damage – in which case the appealing party must provide security by means of a monetary deposit, bank guarantee or security bond. The Court can then decide how to proceed.

Interim relief proceedings

Portuguese law provides for, and clearly defines, different kinds of interim measures. They include:

- Provisional measures, which are intended to maintain an existing situation unaltered and avoid prejudicial mutations; and
- Conservatory measures, which are intended to anticipate the decision that the Court will issue in the principal case, to ascertain the applicant's threatened rights.

The Court can issue an interim measure only if the applicant provides evidence that:

- there is strong prima facie case that the right it claims exists (*fumus boni iuris*);
- the respondent has breached such right or is on the verge of doing so;
- such breach is likely to cause irreparable harm, or harm which is not easily remediable;
- there is urgency (*periculum in mora*); and
- the relief sought is proportionate to the detriment of the respondent.

In addition to the general interim relief proceedings, the Civil Code prescribes the following specific interim measures:

- Provisional reversion of possession;
- Suspension of company resolutions;
- Temporary alimony;
- Arbitration of provisional compensation;
- Seizure;

- Embargo on new work; and/or
- Enrolment.

In some cases, the Court may provisionally decide on interim relief requests without holding any hearing and therefore without involving the respondent, i.e. ex parte. In such cases, the courts would re-establish the necessary dialogue (and due process) with both parties in a second phase after the interim measure is rendered. In this second phase, a hearing will be scheduled within 15 days after the order whereby the interim measure is issued. If the respondent files a response, the interim measure will be decided within two months, although in practice, it may take much longer).

All interim relief proceedings are dependent on the respective main proceedings, in which a final decision regarding the initial issues will be made. Following procedural reforms in 2013, it is possible to request the "reversal of the litigation" ("*inversão do contencioso*"), which means that the main issues can be decided within the interim relief proceedings and, if granted, the claimant would not have to file the main action.

The procedural timings vary depending on the measure requested and on the specificities of each case, but ranges from approximately two to 18 months. However, where the proceedings are ex parte (only admissible for cases of embargo on new work), the judge may take just a couple of days to order the relief.

A party can appeal the order granted pursuant to an interim relief application within 15 days of the communication or service of the order granted. Just as for general appeals, an appeal of an interim relief order does not have suspensory effect unless ordered by the court.

When there is a judicial seizure of assets, an enforcement agent (suggested by the applicant and appointed by the court) provides for the sale of the assets and the net price is deposited in a credit institution and held to the order of the enforcement agent, who must communicate it to the court within five days of the sale. Should the auction not realise the required amount, there are specific rules for the following sale attempts for different kinds of assets. For example, if an auction of immovable assets fails, an attempt must be made to sell them through private bids to be submitted in writing to the enforcement agent.

Prejudgment attachments and freezing orders

In Portugal, prejudgment attachments and freezing orders are procedurally deemed to be interim relief proceedings. In fact, some interim measures, such as seizures (also mentioned in the Interim relief proceedings section), have the same effect as a prejudgment attachment or freezing order, and prevent a defendant from dealing with the assets seized.

For a seizure to be granted, the applicant will need to prove the same requirements as all other interim measures, namely the *fumus boni iuris* and the *periculum in mora*.

A seizure request is filed before the Court where the assets are based and can be granted either before or during the hearing of a merits case between the creditor and the debtor. The court will only authorize the apprehension of property (either movable or immoveable assets) valued to the amount needed to cover and ensure the applicant's credit.

Once a seizure order is issued by the court, the seized assets stay under the control of the court through an appointed depositary, who will be liable for any damages caused to the seized assets and/or the debtor during that time. A seizure cannot be requested ex parte.

If the decision on the merits is favourable to the applicant, the creditor will have the right to proceed with a forced auction sale of the assets seized. The provisions related to the enforcement sale apply, in particular in what concerns the auction sale (discussed under the Interim relief proceedings section).

Costs

In all proceedings and without prejudice to the following paragraphs, the parties initially bear their own costs, including all legal expenses.

As a general rule, the losing party shall bear not only its own court costs but also the court costs (judicial fees) incurred by the successful party during the proceedings, as well as 50% of all costs incurred by both parties as compensation.

If the losing party has commenced or continued civil proceedings in gross negligence or bad faith, the successful party can claim damages caused by the counterparty's behaviour.

Court fees vary depending on the amount in dispute and the stage of the proceedings (i.e. first instance, appeal or appeal to the Supreme Court of Justice). In ordinary proceedings for disputes with a value up to EUR275,000 and for the Courts of First Instance, the fees range from approximately EUR102 to EUR1,632. On appeals to both the Court of Appeal and the Supreme Court of Justice, the initial judicial fee is EUR816).

If the value of the claim is higher than EUR275,000, the amount in excess of that figure will be taxed at the end of the proceeding, for each stage. For example, in a EUR4.25 million claim, the initial judicial fee would be EUR1,632 in the Court of First Instance and the balance of the claim value (from EUR275,000 to EUR4.25 million) would be taxed at the end of the proceeding as follows:

First Instance Court fees:

- Initial judicial fee: EUR1,632
- Remaining judicial fee: EUR48,654
- Total: about EUR50,286.00

Second Instance Court fees (in case of appeal):

- Initial judicial fee: EUR816
- Remaining judicial fee: EUR24,327
- Total: about EUR25,143.00

Third Instance Court fees (in case of appeal to the Supreme Court of Justice, only admissible in certain circumstances):

- Initial judicial fee: EUR816
- Remaining judicial fee: EUR24,327
- Total: about EUR25,143.00

At the end of the proceedings, both parties will have to pay the remaining judicial fee unless the court agrees to waive it, which often happens when the dispute is resolved before the final hearing, e.g. through a settlement agreement.

Class actions

Portuguese law allows collective actions to protect certain collective interests, such as public health or consumer rights. There is also a procedure that allows individual claimants to join their claims in a single proceeding.

All citizens are entitled to bring class actions, by themselves or through associations or foundations incorporated to defend the relevant interests. For example, the main associations for consumer protection actions are *Deco* and *Ius Omnibus*.

Class actions are based on an opt-out mechanism. This means that if the Court decides to certify a matter to be treated as a class action, those prospective claimants who do not wish to participate in the mass lawsuit must take positive steps to remove themselves from the class action on receiving notice of it - i.e., they must "*opt-out*" by giving notice to the Court that they decline to participate. Once a specified period of time has passed, all individuals who have not opted-out are considered to be part of the class action and the Court can hear their claims, even if they do not engage with the proceedings.

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