
THE DISPUTE RESOLUTION REVIEW

SIXTH EDITION

EDITOR
JONATHAN COTTON

LAW BUSINESS RESEARCH

THE DISPUTE RESOLUTION REVIEW

Reproduced with permission from Law Business Research Ltd.

This article was first published in The Dispute Resolution Review, 6th edition
(published in February 2014 – editor Jonathan Cotton).

For further information please email
nick.barette@lbresearch.com

THE DISPUTE RESOLUTION REVIEW

Sixth Edition

Editor
JONATHAN COTTON

LAW BUSINESS RESEARCH LTD

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INTERNATIONAL INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

www.TheLawReviews.co.uk

PUBLISHER
Gideon Robertson

BUSINESS DEVELOPMENT MANAGERS
Adam Sargent, Nick Barette

MARKETING MANAGERS
Katherine Jablonowska, Thomas Lee, James Spearing, Felicity Bown

PUBLISHING ASSISTANT
Lucy Brewer

MARKETING ASSISTANT
Chloe Mclauchlan

EDITORIAL ASSISTANT
Eve Ryle-Hodges

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Anna Andreoli

SUBEDITOR
Timothy Beaver

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2014 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients.

Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of February 2014, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-907606-93-9

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ADVOKATFIRMAET BA-HR DA (BA-HR)

ARTHUR COX

ARZINGER

ATTIAS & LEVY

AZB & PARTNERS

BAKER & MCKENZIE SOUTH AFRICA

BIZLINK LAWYERS & CONSULTANTS

BONELLI EREDE PAPPALARDO

BREDIN PRAT

BUFETE HERNÁNDEZ ROMO

CONSULEGIS ABOGADOS

CRAVATH, SWAINE & MOORE LLP

DE BRAUW BLACKSTONE WESTBROEK

DITTMAR & INDRENIUS

FONTES & TARSO RIBEIRO ADVOGADOS

HENGELER MUELLER

HERGÜNER BILGEN ÖZEKE ATTORNEY PARTNERSHIP

JUN HE LAW OFFICES

KBH KAANUUN LTD
LANSKY, GANZGER & PARTNER (LGP)
LLORED A CAMACHO & CO
LOYENS & LOEFF
LUHUT MARIHOT PARULIAN PANGARIBUAN
MANNHEIMER SWARTLING ADVOKATBYRÅ AB
MAPLES AND CALDER
MIYAKE & YAMAZAKI
MOHAMMED AL-GHAMDI LAW FIRM IN ASSOCIATION WITH
FULBRIGHT & JAWORSKI LLP
MOLITOR AVOCATS À LA COUR
MOTIEKA & AUDZEVIČIUS
M/S CHEAH TEH & SU, ADVOCATES & SOLICITORS
NIEDERER KRAFT & FREY
OSLER, HOSKIN & HARCOURT LLP
OXFORD & BEAUMONT SOLICITORS
PATRIKIOS PAVLOU & ASSOCIATES LLC
PINSENT MASONS
PIPER ALDERMAN
PLESNER LAW FIRM
SCHRECK LAW OFFICES
SHALAKANY LAW OFFICE
SLAUGHTER AND MAY
SOFUNDE, OSAKWE, OGUNDIPE & BELGORE

SZECSKAY ATTORNEYS AT LAW

TSMP LAW CORPORATION

ȚUCA ZBÂRCEA & ASOCIAȚII

URÍA MENÉNDEZ

URÍA MENÉNDEZ – PROENÇA DE CARVALHO

UTEEM CHAMBERS

WALKERS

WOLFF GSTOEHL BRUCKSCHWEIGER ADVOKATURBÜRO

YOUNG CONAWAY STARGATT & TAYLOR, LLP

CONTENTS

Editor's Prefacexi
	<i>Jonathan Cotton</i>
Chapter 1	AUSTRALIA..... 1
	<i>Malcolm Quirey and Gordon Grieve</i>
Chapter 2	AUSTRIA..... 34
	<i>Helena Marko, Anna Zeitlinger and Valentin Neuser</i>
Chapter 3	BAHRAIN 51
	<i>Haifa Khunji and Kaashif Basit</i>
Chapter 4	BELGIUM 64
	<i>Geert Bogaert and Stéphanie De Smedt</i>
Chapter 5	BRAZIL..... 87
	<i>Marcus Fontes, Max Fontes and Juliana Huang</i>
Chapter 6	BRITISH VIRGIN ISLANDS 106
	<i>Arabella di Iorio and Ben Mays</i>
Chapter 7	CANADA..... 124
	<i>David Morritt and Eric Morgan</i>
Chapter 8	CAYMAN ISLANDS 139
	<i>Aristos Galatopoulos and Luke Stockdale</i>
Chapter 9	CHINA 152
	<i>Xiao Wei, Zou Weining and Stanley Xing Wan</i>
Chapter 10	COLOMBIA..... 161
	<i>Gustavo Tamayo and Natalia Caroprese</i>

Chapter 11	CYPRUS	174
	<i>Eleana Christofi and Katerina Philippidou</i>	
Chapter 12	DENMARK	187
	<i>Peter Schradiesck and Peter Fogh</i>	
Chapter 13	ECUADOR.....	199
	<i>Xavier Castro-Muñoz and Fabrizio Peralta-Díaz</i>	
Chapter 14	EGYPT	209
	<i>Khaled El Shalakany</i>	
Chapter 15	ENGLAND & WALES	214
	<i>Jonathan Cotton and Damian Taylor</i>	
Chapter 16	FINLAND.....	236
	<i>Jussi Lehtinen and Heidi Yildiz</i>	
Chapter 17	FRANCE.....	248
	<i>Tim Portwood</i>	
Chapter 18	GERMANY.....	264
	<i>Henning Bälz and Carsten van de Sande</i>	
Chapter 19	GHANA.....	284
	<i>David A Asiedu and Joseph K Konadu</i>	
Chapter 20	GIBRALTAR.....	297
	<i>Stephen V Catania</i>	
Chapter 21	HONG KONG.....	307
	<i>Mark Hughes</i>	
Chapter 22	HUNGARY.....	332
	<i>Zoltán Balázs Kovács and Dávid Kerpel</i>	

Chapter 23	INDIA.....	347
	<i>Zia Mody and Aditya Vikram Bhat</i>	
Chapter 24	INDONESIA	362
	<i>Luhut M P Pangaribuan</i>	
Chapter 25	IRELAND.....	375
	<i>Andy Lenny, Claire McGrade, Gareth Murphy and Sara Carpendale</i>	
Chapter 26	ISRAEL	390
	<i>Shraga Schreck and Daniella Schoenker-Schreck</i>	
Chapter 27	ITALY.....	416
	<i>Monica Iacoviello, Vittorio Allavena, Paolo Di Giovanni and Tommaso Faelli</i>	
Chapter 28	JAPAN.....	440
	<i>Tatsuki Nakayama</i>	
Chapter 29	JERSEY	454
	<i>David Steenson and Nicholas Mièrè</i>	
Chapter 30	KUWAIT	467
	<i>Kaashif Basit and Basem Al-Muthafer</i>	
Chapter 31	LIECHTENSTEIN.....	479
	<i>Christoph Bruckschweiger</i>	
Chapter 32	LITHUANIA	489
	<i>Ramūnas Audzevičius and Mantas Juozaitis</i>	
Chapter 33	LUXEMBOURG	504
	<i>Michel Molitor</i>	
Chapter 34	MALAYSIA	515
	<i>Tiang Joo Su and Yin Faye Lim</i>	

Chapter 35	MAURITIUS	533
	<i>Muhammad R C Uteem</i>	
Chapter 36	MEXICO	547
	<i>Miguel Angel Hernández-Romo Valencia</i>	
Chapter 37	NETHERLANDS	563
	<i>Ruud Hermans and Margreet Poot</i>	
Chapter 38	NIGERIA	583
	<i>Babajide Ogundipe and Lateef Omoyemi Akangbe</i>	
Chapter 39	NORWAY	598
	<i>Jan B Jansen and Sam E Harris</i>	
Chapter 40	PORTUGAL	613
	<i>Francisco Proença De Carvalho</i>	
Chapter 41	ROMANIA	624
	<i>Levana Zigmund</i>	
Chapter 42	SAUDI ARABIA	636
	<i>Mohammed Al-Ghamdi and Paul J Neufeld</i>	
Chapter 43	SCOTLAND	656
	<i>Jim Cormack and Laura Crilly</i>	
Chapter 44	SINGAPORE	671
	<i>Thio Shen Yi, Karen Teo and Freddie Lim</i>	
Chapter 45	SOUTH AFRICA	684
	<i>Gerhard Rudolph and Nikita Young</i>	
Chapter 46	SPAIN	702
	<i>Esteban Astarloa and Patricia Leandro Vieira da Costa</i>	
Chapter 47	SWEDEN	725
	<i>Jakob Ragnwaldh and Niklas Åstenius</i>	

Chapter 48	SWITZERLAND.....	737
	<i>Peter Honegger, Daniel Eisele, Tamir Livschitz</i>	
Chapter 49	TURKEY.....	755
	<i>H Tolga Danişman</i>	
Chapter 50	UKRAINE.....	774
	<i>Sergiy Shklyar and Markian Malskyy</i>	
Chapter 51	UNITED ARAB EMIRATES.....	785
	<i>D K Singh and Sharon Lakhan</i>	
Chapter 52	UNITED STATES.....	796
	<i>Nina M Dillon and Timothy G Cameron</i>	
Chapter 53	UNITED STATES: DELAWARE.....	812
	<i>Elena C Norman and Lakshmi A Muthu</i>	
Chapter 54	VIETNAM.....	831
	<i>Do Trong Hai</i>	
Appendix 1	ABOUT THE AUTHORS	845
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS....	877

EDITOR'S PREFACE

Building on the previous five editions under the editorship of my partner Richard Clark, I am delighted to have taken on the role of editor from him. *The Dispute Resolution Review* has grown to now cover 54 countries and territories. It is an excellent resource for those, both in-house and in private practice, whose working lives include involvement in disputes in jurisdictions around the world.

The Dispute Resolution Review was first published in 2009 at a time when the global financial crisis was in full swing. Against that background, a feature of some of the prefaces in previous editions has been the effects that the turbulent economic times were having on the world of dispute resolution. Although at the time of writing the worst of the recession that gripped many of the world's economies has passed, challenges and risks remain in many parts of the world.

The significance of recession for disputes lawyers around the world has been mixed. Tougher times tend to generate more and longer-running disputes as businesses scrap for every penny or cent. Business conduct that was entrenched is uncovered and gives rise to major disputes and governmental investigation. As a result of this, dispute resolution lawyers have been busy over the last few years and that seems to be continuing as we now head towards the seventh anniversary of the credit crunch that heralded the global financial crisis. Cases are finally reaching court or settlement in many jurisdictions that have their roots in that crisis or subsequent 'scandals' such as *LIBOR*.

The other effect of tougher times and increased disputes is, rightly, a renewed focus from clients and courts on the speed and cost of resolving those disputes, with the aim of doing things more quickly and for less, particularly in smaller cases. The Jackson Reforms in my home jurisdiction, the United Kingdom, are an example of a system seeking to bring greater rigour and discipline to the process of litigation, with a view to controlling costs. Whether such reforms here and in other countries have the desired effect will have to be assessed in future editions of this valuable publication.

Jonathan Cotton
Slaughter and May
London
February 2014

Chapter 40

PORTUGAL

*Francisco Proença De Carvalho*¹

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

In Portugal the state is the uncontested leader in dispute resolution. In fact, the majority of conflicts are resolved through the legal system, supported by a large network of courts with specific and complex procedural rules. However, with the lack of efficiency of the public system, the importance of arbitration and other alternative dispute resolution methods is increasing.

There are three levels of jurisdiction in Portugal: first and second instance courts and the Supreme Court. Within the first instance there are specialised courts for specific matters, such as civil, criminal, commercial, labour and family courts, and, more recently, competition and intellectual property rights courts. In major urban areas, and for civil and criminal issues, there are different courts depending on the importance of the dispute.

In recent years, particularly in this past year, the state has been actively amending the legal system, not only implementing procedural rules but also improving infrastructure (new courts, new technologies), to respond to the increase in litigation. In spite of these efforts, the main problem of the Portuguese state's dispute resolution is still the length of time proceedings usually take. Through new legislation in force since 1 September 2013, the state is attempting to reduce the length of proceedings.

II THE YEAR IN REVIEW

The past years have been significant for Portugal. A memorandum of understanding on specific economic policy conditionality was entered into between the Portuguese state and the European Commission, the European Central Bank and the IMF (the Troika)

¹ Francisco Proença De Carvalho is a partner at Uría Menéndez – Proença de Carvalho.

on 3 May 2011, and it was agreed that the quarterly disbursement of financial assistance to Portugal would depend on the implementation of a series of structural reforms by the Portuguese government. The judicial system is not an exception, since it is considered one of the main reasons for the country's lack of competitiveness. Thus, in September 2013, the new Civil Procedure Code entered into force, implementing significant changes to Portugal's civil law framework. This law reduced the types of legal processes available, while simultaneously simplifying and expediting proceedings by eliminating red tape. In general, the reorganisation of the Portuguese judicial system is in the process of being implemented, including the legal framework on inventory proceedings and the organisation of the Portuguese judiciary system, which will enter into force during 2014. The two specialised courts on competition and intellectual property rights, which were created in 2012, are fully operational and are receiving an increasing number of pleadings.

As a result of the economic crisis, the rise in lawsuits and insolvency proceedings of heightened complexity and value has continued. Therefore, the Insolvency Law was amended (and came into force on 20 May 2012) in order to introduce fast-track court approval procedures for restructuring plans. In particular, the Special Revitalisation Procedure seeks to provide borrowers with some leeway in negotiating a recovery plan with their creditors in case of imminent insolvency. The Special Revitalisation Procedure is now fully operational and the number of procedures is increasing.

Important amendments were made to the legal framework on justices of the peace in order to increase their jurisdiction for disputes involving amounts of up to €15,000.

Regarding the urban rehabilitation (which entered into force on 13 September 2012), the 'urban over-the-counter parcel service' was created to ensure the special dumping procedure.

III COURT PROCEDURE

i Overview of court procedure

Both civil and criminal proceedings include different stages. Generally, proceedings are initiated by the parties submitting pleadings, followed by a stage in which evidence is provided. Subsequently, the trial takes place and the court issues its decision. Finally, the parties can appeal said judgment, provided that certain conditions are met.

Despite the above, the new Civil Procedure Code establishes that all witnesses must be offered with the submission of the pleadings.

ii Proceedings and time frames

There are two kinds of civil proceedings: declarative and enforcement. Through the former, the court's decision has *res judicata* effect. According to the new Civil Procedure Code, the court may decide on issues raised by the parties as well as on instrumental, complementary or notorious facts that may not have been raised by the parties – and sentence the defendant to the extent requested by the claimant plus said non-essential facts.

Enforcement proceedings may serve three purposes:

- a* the payment of an amount;

- b* the delivery of a certain object; or
- c* forcing the counterparty to carry out a certain action. These proceedings are filed based on a previous court decision or on certain documents established at law (for instance, some contracts, mortgages or deeds, provided that the documents are signed before a notary public or certified by the same, and cheques).

Ordinary declaratory proceedings in Portugal may take from one to three years until a final court decision is issued, while enforcement proceedings may take from one to two years.

To avoid damages resulting from the delay in court decisions and to assure the effectiveness of the final decision, claimants may request the court to issue an adequate preliminary injunction. Preliminary injunctions in Portugal may take from three to six months.

Please note that any of the referred time frames are indicative, as such proceedings may be longer or shorter, depending on the workload of the court (before which the claim is filed) and the particular circumstances of the case, as well as the arguments put forward.

Unlike in civil proceedings, in which the parties play a major role (although courts play an increasingly important role under the new Civil Procedure Code), in criminal proceedings the court has total control of the case and the duty to seek the truth. In this respect, the court may order the execution of any proceedings to uncover the truth.

Generally, ordinary criminal proceedings in Portugal take two years. However, in certain cases, like white-collar crimes, proceedings may take longer. As for civil proceedings, the term provided here is also indicative.

iii Class actions

Class actions are allowed under Portuguese law using a specific procedure to deal with a group of related claims. This procedure is based on the Portuguese Constitution and on specific regulations, which grant all citizens, individually or through organisations created for the defence of relevant interests, the right to initiate a class action, in the cases and within the terms established therein. It includes the right of an injured party or parties to request compensation to:

- a* promote the prevention, termination or judicial persecution of infringements against public health, consumer rights, quality of life and the preservation of the environment and cultural heritage; and
- b* guarantee the defence of state property, the property of the autonomous regions or of the local authorities (e.g., municipalities).

Class or group proceedings can be brought by individuals, associations and foundations created for the defence of relevant interests (regardless of their direct interest in the case), and local authorities regarding the interests of their residents, within their respective area.

iv Representation in proceedings

In civil proceedings, parties must be represented by a lawyer whenever the economic value exceeds €5,000 or when the proceedings are taking place before higher courts.

In criminal proceedings, individuals considered formal suspects must be assisted and represented by a lawyer at several stages. Therefore, the assistance of lawyers is mandatory, among other things, during interrogation, trial and appeal. As regards the representation of victims, certain acts must also be carried out together with the assistance of lawyers as, for instance, filing personal claims or appeals. Conversely, witnesses may also be assisted by lawyers, but only to ensure that they know their rights.

v Service out of the jurisdiction

Pursuant to the Civil Procedure Code, when the defendant's domicile is outside the Portuguese jurisdiction, the initial summons or other notices requesting attendance to court will be served by mail, by means of a registered letter with acknowledgement of receipt, unless international treaties or conventions set out otherwise.

Other notices will be served to the lawyer appointed by the party. Service of judicial and extrajudicial documents in civil and commercial matters within the European Union are governed by Council Regulation No. 1393/2007, 13 November, in which the particular formalities are set out, especially concerning the obligation to serve notices through public authorities of the addressed state and to comply with certain rules of the relevant jurisdiction.

In criminal proceedings, notices for parties whose domicile is outside the Portuguese jurisdiction will be served according to the rules set out in international treaties and conventions. Portugal is a party to the Convention on Mutual Assistance in Criminal Matters between Member States of the European Union of 29 May 2000. Pursuant to this Convention, as general rule, each Member State will send procedural documents directly to the persons who are in the territory of another Member State, by mail (Article 5). However, in certain cases (e.g., if the procedural law of the state requires proof of service of the document on the addressee, other than the proof that an ordinary letter can provide), the documents will be sent through the competent authorities of the requested Member State. Portugal is also a member of the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, and other codes of practice. Pursuant to this Convention, documents will be served by means of letters rogatory sent to the competent entities of the state concerned.

vi Enforcement of foreign judgments

Within the European Union, Council Regulation No. 44/2001, 22 December 2000² sets out the conditions under which a judgment (concerning civil and commercial matters) issued in a Member State can be enforceable in another.

Therefore, pursuant to this Regulation, a judgment issued in a Member State and enforceable in that Member State may be enforceable in Portugal when, upon application

2 As amended by Council Regulation No. 1496/2002, 21 August, Council Regulation No. 1937/2004, 9 November, Council Regulation No. 2245/2004, 27 December, Council Regulation No. 1791/2006, 20 November, Council Regulation No. 1103/2008, 22 October and Council Regulation No. 280/2009, 6 April.

by the interested party, it has been declared enforceable. The application of enforceability is filed in the competent superior court.

Without prejudice to international conventions and treaties in force (for instance, the Lugano Convention), under Portuguese law, it is generally possible to enforce foreign court civil judgments provided that these are subject to a prior confirmation procedure before a Portuguese court. Said conformation will be granted whenever:

- a* there are no well-grounded doubts concerning either the authenticity of the submitted documents or the judiciousness of the decision;
- b* the decision is final according to the law of the country where the judgment was rendered;
- c* the object of the decision does not fall within the exclusive international jurisdiction of Portuguese courts and the jurisdiction of the foreign court has not been determined fraudulently;
- d* there are no other proceedings between the same parties, based on the same facts and having the same purpose, and no ruling on the same case has been issued by a Portuguese court;
- e* the defendant was duly notified of all the proceedings according to the law of the country where the judgment was rendered;
- f* the foreign court proceedings complied with the procedural law requirements and each party received an adequate opportunity to present their case fairly; and
- g* the acknowledgement of the decision is not patently incompatible with the international public policy of the Portuguese state.

vii Assistance to foreign courts

Portuguese courts can provide assistance to foreign courts when it is required by means of letters rogatory, unless the execution of the requested proceedings violates Portuguese public policy, the letter rogatory is not duly legalised, the execution of the requested proceedings compromises national sovereignty or security, or the execution of the requested proceeding leads to the execution of a foreign court decision subject to confirmation of the Portuguese courts.

viii Access to court files

The Civil Procedure Code sets out, as a general rule, that court files may be accessed by parties, lawyers or anyone with a relevant interest in the proceedings. However, the examination of court records is more restricted when the disclosure of information may cause damage to a person's dignity or privacy, is contrary to public values (e.g., adoption and divorce proceedings) or may lead to the ineffectiveness of the decision to be issued by the court, as for instance in interim applications proceedings.

In addition, the Criminal Procedure Code sets out, as a general rule, the possibility of parties and lawyers accessing court records. Nevertheless, the examination of court records at the investigation stage always requires the public prosecutor's or the judge's authorisation. Third parties who have relevant interests in the proceedings may also request authorisation to access court files, unless the proceedings are confidential, which occurs whenever the public prosecutor or judge forbids the parties and respective

lawyers from accessing such records during the investigation stage when disclosure could interfere with the investigation or cause damage to any of the parties.

ix Litigation funding

In Portugal, disinterested third parties cannot fund litigation.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

The current legal system considers conflicts of interests as a central issue, establishing the prevention and prohibition of any conduct that may create a conflict of interests for the lawyer or firm.

The regime seeks both to protect and promote the dignity and independence of the lawyer in his or her role as a true participant in the administration of justice and to ensure the relationship of trust that must be established between a lawyer and client.

The main sources of law regarding conflicts of interests for lawyers are the Regulations of the Portuguese Bar Association (the Regulations), the regulations of law firms and the Criminal Code. These sources are complemented by the opinions and decisions of the Portuguese Bar Association. Finally, the provision of legal services in Portugal by lawyers from the European Economic Area is also subject to the Code of Conduct for Lawyers in the European Union, as approved by the Council of the Bars and Law Societies of Europe.

The Portuguese Bar Association is primarily responsible for ensuring compliance with and enforcement of the law, having disciplinary power over its members. However, the decisions of the Bar Association can be appealed before the administrative courts, under Article 6 of the Regulations. Furthermore, the courts are responsible for the enforcement of the law in any proceedings other than disciplinary proceedings.

The Criminal Code establishes, in Article 370.2, that certain abuses of conflicts of interest by lawyers are criminal offences. Thus, a lawyer who acts in a situation where the interests of his or her clients are conflicting, with the intention of benefiting or damaging either, will be penalised with up to three years of imprisonment or with a fine.

The Regulations establish the duties with which lawyers are obliged to comply in their relationships with clients. Article 94 deals specifically with possible causes of conflicts of interest, establishing several duties upon lawyers to prevent them.

The lawyer's wilful or negligent violation of the foregoing rules may give rise to disciplinary liability, which is independent of any eventual civil or criminal liability.

It is particularly worth noting that Portuguese law is evolving towards the exclusion of Chinese walls or 'firewalls' as valid mechanisms to overcome limitations imposed upon law firms. However, the practical application of the law has yet to be fleshed out by case law, opinions or decisions of the Portuguese Bar Association. While further new legislation is unlikely, we can expect decisions that will detail what is expected of lawyers.

ii Money laundering, proceeds of crime and funds related to terrorism

The European Parliament and the Council decided to create special rules to prevent and punish money laundering within EU territory. For that purpose, the relevant EU bodies passed two important directives: Directives Nos. 2005/60 and 2006/70.

Portugal transposed the aforementioned Directives in Law No. 25/2008, 5 July, recently amended by Decree Law No. 18/2013, 6 February. From this date, financial institutions and a large number of service providers, such as notaries and civil servants, are bound, among other things, not to participate in any suspicious or criminal activities relating to money laundering and to report such activities to the public prosecutor and the Unit of Financial Information.

Obviously, confidentiality issues arise when legislators decide to extend such obligations to service providers such as lawyers bound by the rules of secrecy. To avoid conflicts, Portuguese law sets out that the disclosure of facts under the obligations of the Regulations must be made directly to the President of the Portuguese Bar Association, who must, under the terms established by law, report such facts to the public prosecutor.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

The Portuguese legal system acknowledges that some professions of social importance cannot exist without confidentiality, as people only feel comfortable disclosing personal or troubling facts when they are certain that those facts will remain secret.

In light of the above, lawyers, priests, doctors, journalists, chartered accountants, civil servants, public officials and corporate bodies of financial institutions, among others, have, in broad terms and under the terms established by law, the right not to testify in court or not to comply with orders issued by any private or public entities to disclose or provide information or documentation, whenever said disclosure regards facts or documents relating to the professional activity.

In some cases, this prerogative also entails special protection against searches and seizure. For instance, searches inside law firms must be conducted by a judge, unlike in most other cases where the presence of the district attorney suffices. Evidence obtained in criminal matters pursuant to illegal searches or seizures will be considered null and illegitimate in court.

Notwithstanding this, the scope of protection granted under Portuguese law differs according to the professional's particular practice. Priests and lawyers, for instance, benefit from a broader and stricter protection, while employees and corporate bodies of financial institutions do not. In fact, while financial secrecy can easily be waived with the consent of the interested client, the disclosure of facts by lawyers always depends on the intervention of the Portuguese Bar Association.

However, privilege is not an absolute right and, in most cases, excluding religious matters, it is possible to break it, albeit through a complex procedure. The key rule on this issue is found in Article 135 of the Portuguese Criminal Procedure Code, which stipulates that only superior courts may decide whether privilege should be broken and thus consequently force the disclosure of protected facts.

The existence of said rule does not jeopardise the general protection granted to professional privilege in Portugal as the superior court's decision must always be taken according to the principle of the most important prevailing interest, which binds the court to, among other things, consider the seriousness of the crime and the interests pursued in the criminal procedure.

The application of this principle has driven courts to decide that, for instance, it is inadmissible to break privilege to investigate minor offences.

Although Portuguese law widely respects this privilege, there have been some troubling recent court decisions, limiting the scope of the privileged protection of lawyers.

Finally, under Portuguese law, the scope of rights and duties granted to Portuguese lawyers applies to any foreign lawyers as long as they comply with the Portuguese Bar Association procedures. Under these conditions, foreign lawyers are also subject to the rules of privilege.

ii Production of documents

When a party intends to gain access to a document held by the other party, it may request the court to order the production of said document within a particular term. If the order is ignored, the court may consider the party's refusal for probative value and impose the reversal of the burden of proof.

However, there are some documents that parties do not have to produce in litigation, such as correspondence between the lawyer and the counterparty or between the parties' lawyers themselves. Furthermore, in relation to the latter, this cannot be considered evidence by the courts. In relation to correspondence between the lawyer and the counterparty, they are also considered to be privileged and protected professional secrets. In such cases the party can claim a lawful excuse. The court may only deny the lawful excuse if it decides that the document is indispensable for the statement of facts and if the importance of the case is higher than the protection of professional secrecy. This statutory regime is also applicable to state secrets and to civil servants.

When the relevant document is held by a third party (e.g., a parent company), a party may request the court to order such third party to produce it.

Foreign deeds have the same legal value as those executed in Portugal, provided that some legal conditions are duly complied with. We note that the public official's signature of the official deed has to be recognised by a Portuguese diplomatic or consular agent in the respective state and this signature has to be certified with the respective consular seal. In addition, in judicial acts, documents must be written in Portuguese. Therefore, when the document required is stored overseas it must be translated and duly certified.

The rules applicable to electronic documents are substantially the same as those applicable to any other document. In all cases, the law sets out several restrictions in the production of documents in relation to general correspondence, letters or any type of mail, which are protected by law, based on the principles of protection of privacy. Furthermore, the Portuguese Constitution expressly forbids any intrusion in correspondence from the authorities. In conclusion, if a party is notified to produce correspondence in court that is not related to the case in question, it can claim this legal protection. There is, however,

an exception in the Portuguese Constitution and in the Criminal Procedure Code related to authorised police searches.

If a party is notified to produce electronic documents that are no longer accessible, such party can argue that it is unable to do so. Nevertheless, in criminal proceedings the judges may order a search of the home or other premises of the defendant and in such cases evidence may be found through the reconstruction or the back-ups of deleted documents.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

The greatest criticism of the Portuguese legal system is the length of time proceedings take. According to the latest data from the Portuguese National Institute of Statistics, the average duration of a civil action at trial is 29 months. Furthermore, during the past decade, the annual number of actions filed before court has increased dramatically.

In light of the above, both the civil society and the government have been encouraging the promotion of ADR, namely arbitration, mediation, conciliation and resolution by justices of the peace. In 2001, the government created the Cabinet for Alternative Dispute Resolution (GRAL), a department of the Ministry of Justice exclusively dedicated to ADR.

ii Arbitration

In recent years, arbitration has been flourishing in Portugal. Parties have progressively added arbitral agreements to contracts and there is a general sense that Portugal may become a privileged forum for arbitrations between companies based in Portuguese-speaking countries such as Brazil, Angola and Mozambique.

On 15 March 2012, a new Law on Arbitration entered into force, replacing the former Portuguese Arbitration Act (Law No. 31/86 of 29 August 1986).

The new Arbitration Law is rather innovative, drawing inspiration from the 2006 version of the UNCITRAL Model Law, introduces provisions intended to grant more flexibility with regard to the formal validity of an arbitration agreement, making it simpler to comply with the written form requirement.

After almost two years since its entrance into force, it is reasonable to state that the law increased flexibility in Portuguese arbitration and facilitated the increasing number of arbitral agreements included in contracts.

Thus, among the most important innovations, the new Arbitration Law: contains a major change in the arbitrability analysis; expressly foresees that independence and impartiality are not only required for the appointment of arbitrators, but that the arbitrators must comply with those requirements throughout the proceedings; regulates the most important aspects of the application of interim measures, closely following the Model Law; includes the regulation of multiparty arbitrations and third-party intervention; and foresees that an award will not be subject to appeal, unless otherwise expressly established by the parties in the arbitration agreement (without prejudice to the applicable procedures to set aside the award, which cannot be waived in advance).

The leading arbitral centre is the Arbitration Centre of the Portuguese Commercial Association.

As regards foreign arbitration, Portugal is party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. However, and although Portuguese jurisprudence is arbitration-friendly, narrowly interpreting the grounds for refusal of recognition or enforcement of foreign arbitral awards, the interested party may also appeal against the decision of the first instance court that recognises or declares the foreign arbitral award enforceable before the Supreme Court, provided that the above-mentioned requirements as to the value of the action are met. Thus, parties should always seek adequate guarantees to secure the fulfilment of the contracts they enter into, or to secure compensation for the breach of such contracts.

Tax arbitration is becoming increasingly common and some decisions have already been handed down.

iii Mediation

Law 29/2013 of 19 April establishing general principles applicable to mediations in Portugal as well as measures on civil and commercial mediation, mediators and public mediation regimes, was recently promulgated. The law filled a legal gap where there was previously no specific law or act governing mediation and conciliation.

The law introduced important provisions establishing that any dispute regarding property issues or any rights that may be the object of transactions by the parties may be submitted to mediation.

Another important provision establishes that private mediation settlement agreements are, under specific circumstances, enforceable directly, without the need to obtain homologation from a court or the obligation to execute extrajudicial settlements in mediation centres supervised by the Ministry of Justice.

The specific circumstances are the following:

- a* the settlement's object must be capable of being mediated and not subject to a mandatory court decision;
- b* parties must have capacity to execute the settlement;
- c* the settlement must have been reached through mediation and according to law;
- d* the content of the settlement must not violate the public policy of the Portuguese state; and
- e* the settlement must be reached with the intervention of a mediator included on the Ministry of Justice's public list of mediators.

The Mediation Law also includes provisions on the training, duties, rights and legal impediments of mediators, as well as the rules applicable to public mediation frameworks.

Despite the Mediation Law, in Portugal, mediation and conciliation, settlement agreements are traditionally negotiated between the parties' attorneys, in the majority of the cases, during pending lawsuits. Parties are usually very reluctant to use mediation and conciliation.

iv Other forms of alternative dispute resolution

Besides arbitration, mediation and conciliation, the most popular form of ADR is conducted by a justice of the peace, who is governed by Law No. 78/2001 of 13 July 2001 (as recently amended by Law 54/2013, 31 July, which widened the scope and jurisdiction of justices of the peace) and numerous centres have been created under the supervision of a special commission, justices of the peace are only available to settle disputes among individuals and have jurisdiction on civil matters purporting to small claims (up to €15,000). Under the new legal framework on justices of the peace, legal persons may now resort to mediation (excluding for class actions) and preliminary injunctions are now available.

Between 2001 and 2012, approximately 60,000 claims were heard (with a success rate of 95 per cent). Justices of the peace must have a law degree, but need not have further legal education.

The Portuguese Supreme Court held that the jurisdiction of the justices of the peace is concurrent with that of the courts (Decision No. 11/2007 of 24 May 2007).

Justices of the peace are proving to be useful in simple disputes, but there is still strong suspicion about the quality of the decisions on the merits.

VII OUTLOOK AND CONCLUSIONS

The bailout of Portugal has awakened the country to the need to undertake deep structural reforms of its economy. Changes to the judicial system, which have started, are an important part of that change, as they are fundamental for making the Portuguese economy more attractive and secure for investments. This year comes to end with a comprehensive reform of the Civil Procedure Code, a significant amendment to the Criminal Procedure Code and a new legal framework on mediation. Thus, we expect 2014 to be a year of balance and analysis of the implemented reforms.

In 2014 we can also expect the implementation of the adopted changes to Portugal's judiciary map.

Lastly, we can look forward to analysing the performance of the Mediation Law and observing whether or not mediation becomes, in practice, a true dispute resolution alternative.

Evidently, the effective implementation of all these changes demands a strong commitment from those who work in the system, including lawyers and judges.

Appendix 1

ABOUT THE AUTHORS

FRANCISCO PROENÇA DE CARVALHO

Uría Menéndez – Proença de Carvalho

Francisco Proença de Carvalho joined Uría Menéndez – Proença de Carvalho in April 2010 following the merger of the firm Proença de Carvalho & Associados with Uría Menéndez. He is now a partner in the litigation and arbitration department of the Lisbon office.

Before that, he was a partner at Proença de Carvalho & Associados, a prestigious litigation and business law boutique in the Portuguese market.

He focuses his practice on litigation, covering all areas of professional litigation and arbitration practice. He also has experience in mergers and acquisitions matters.

He has a postgraduate degree in law and business.

Francisco Proença de Carvalho is a regular speaker at seminars and conferences on themes related to his field of expertise, and also is a frequent presence in the media as an opinion-maker in economic and legal issues.

URÍA MENÉNDEZ – PROENÇA DE CARVALHO

Edifício Rodrigo Uría
Rua Duque de Palmela 23
1250-097 Lisbon
Portugal
Tel: +351 21 030 86 00
Fax: +351 21 030 86 01
lisboa@uria.com
www.uria.com