The Dispute Resolution Review

Eighth Edition

Editor
Jonathan Cotton

Law Business Research

The Dispute Resolution Review

The Dispute Resolution Review
Reproduced with permission from Law Business Research Ltd.

This article was first published in The Dispute Resolution Review - Edition 8
(published in February 2016 – editor Jonathan Cotton)

For further information please email
Nick.Barette@lbresearch.com

The Dispute Resolution Review

Eighth Edition

Editor
Jonathan Cotton

Law Business Research Ltd

PUBLISHER
Gideon Roberton

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

SENIOR ACCOUNT MANAGERS
Thomas Lee, Felicity Bown, Joel Woods

ACCOUNT MANAGER
Jessica Parsons

MARKETING ASSISTANT
Rebecca Mogridge

EDITORIAL ASSISTANT
Sophie Arkell

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Caroline Herbert

SUBEDITOR
Anna Andreoli

CHIEF EXECUTIVE OFFICER
Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-909830-83-7

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

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

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE SHIPPING LAW REVIEW

THE ACQUISITION AND LEVERAGED FINANCE REVIEW

THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW

THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW

THE TRANSPORT FINANCE LAW REVIEW

THE SECURITIES LITIGATION REVIEW

THE LENDING AND SECURED FINANCE REVIEW

THE INTERNATIONAL TRADE LAW REVIEW

THE SPORTS LAW REVIEW

www.TheLawReviews.co.uk

ACKNOWLEDGEMENTS

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

ADAMS & ADAMS

ARTHUR COX

ATTIAS & LEVY

AZB & PARTNERS

BAKER & PARTNERS

BONELLIEREDE

BREDIN PRAT

BUFETE HERNÁNDEZ ROMO

CONSULEGIS ABOGADOS

CRAVATH, SWAINE & MOORE LLP

DITTMAR & INDRENIUS

HENGELER MUELLER

HERGÜNER BİLGEN ÖZEKE ATTORNEY PARTNERSHIP

JUN HE LAW OFFICES

KBH KAANUUN

KYRIAKIDES GEORGOPOULOS LAW FIRM

LS HORIZON LIMITED

MANNHEIMER SWARTLING ADVOKATBYRÅ AB

MAPLES AND CALDER

MOHAMMED AL-GHAMDI LAW FIRM IN ASSOCIATION WITH
NORTON ROSE FULBRIGHT US LLP

MOLITOR AVOCATS À LA COUR

MOTIEKA & AUDZEVIČIUS

NIEDERER KRAFT & FREY

OSLER, HOSKIN & HARCOURT LLP

PATRIKIOS PAVLOU & ASSOCIATES LLC

PINHEIRO NETO ADVOGADOS

PIPER ALDERMAN

SCHRECK LAW OFFICES

SHIN & KIM

SLAUGHTER AND MAY

SOFUNDE, OSAKWE, OGUNDIPE & BELGORE

STRELIA

SZECSKAY ATTORNEYS AT LAW

TSMP LAW CORPORATION

ȚUCA ZBÂRCEA & ASOCIAȚII

URÍA MENÉNDEZ

UTEEM CHAMBERS

WOLFF GSTOEHL BRUCKSCHWEIGER ADVOKATURBÜRO

WU & PARTNERS, ATTORNEYS-AT-LAW

YOUNG CONAWAY STARGATT & TAYLOR, LLP

CONTENTS

EDITOR'S PREFACE

The Dispute Resolution Review provides an indispensable overview of the civil court systems of 45 jurisdictions. In a world where commercial disputes frequently cross international boundaries, it is inevitable that clients and practitioners across the globe will need to look for guidance beyond their home jurisdictions. *The Dispute Resolution Review* offers the first helping hand in navigating what can sometimes, at first sight, be an unknown and confusing landscape, but which on closer inspection often deals with familiar problems and adopts similar solutions to the courts closer to home.

This eighth edition follows the pattern of previous editions where leading practitioners in each jurisdiction set out an easily accessible guide to the key aspects of each jurisdiction's dispute resolution rules and practice, and developments over the past 12 months. *The Dispute Resolution Review* is also forward looking and the contributors offer their views on the likely future developments in each jurisdiction.

Collectively, the chapters illustrate the continually evolving legal landscape, responsive to both global and local developments. For instance, over the past year the EU has adopted a new regulation on jurisdiction which fortifies the freedom of parties of any nationality to choose to litigate in their preferred forum and grants Member State courts discretion to stay proceedings in favour of proceedings already on foot in non-Member State courts. At the other end of the spectrum, 2015 saw the Supreme Court in the United Kingdom clarify the law on penalty clauses 101 years after the seminal House of Lords' case on this issue (see the review of *ParkingEye Ltd v. Beavis* and *Cavendish Square Holding BV v. El Makdessi* [2015] UKSC 67 at page 181). But even seemingly local decisions such as this have a broad audience and can have far-reaching consequences in global commerce. It is always a pleasure – and instructive for my own practice – to observe the different ways in which jurisdictions across the globe tackle common problems – sometimes through concerted action under an umbrella international organisation and sometimes individually by adopting very different, but often equally effective, local solutions.

Over the lifetime of this review the world has plunged into deep recession and seen green shoots of recovery emerge as some economies begin to prosper again, albeit

uncertainly. One notable development over the course of 2015 has been the sharp and sustained fall in the oil price (along with commodities more generally). This has had, and will continue to have, far-reaching economic and geo-political effects which may take some time to manifest themselves fully. As many practitioners will recognise from previous global shocks, these pressures typically manifest themselves in an increased number of disputes; whether that is joint venture partners choosing to fight over the diminishing pot of profits, customers seeking to exit what have become hugely expensive long-term contracts, struggling states renegotiating or exiting their contracts (or simply expropriating commercial assets) or insolvency-related disputes as once-rich parties struggle to meet their obligations. The current economic climate and short to medium term outlook suggests that dispute resolution lawyers operating in at least the energy and commodities sectors will continue to be busy and tasked with resolving challenging multi-jurisdictional disputes for years to come.

Finally, I would like to express my gratitude to all of the contributors from all of the jurisdictions represented in *The Dispute Resolution Review*. Their biographies start at page 747 and highlight the wealth of experience and learning from which we are fortunate enough to benefit. I would also like to thank the whole team at Law Business Research who have excelled in managing a project of this size and scope, in getting it delivered on time and in adding a professional look and finish to the contributions.

Jonathan Cotton
Slaughter and May
London
February 2016

Chapter 32

PORTUGAL

Francisco Proença de Carvalho and Tatiana Lisboa Padrão[1]

I INTRODUCTION TO THE 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 significantly.

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, family, competition and intellectual property rights courts. During 2015 the overhaul of the Portuguese judicial system, which began in September 2014,[2] was completed. Nevertheless, the legal community is still becoming accustomed to the changes introduced.

Bearing in mind that the main problem of dispute resolution in Portugal is still the length of time proceedings usually take, in recent years the state has actively amended the legal system – not only implementing procedural rules but also improving infrastructure (new courts, new technologies) and modifying judicial structure to respond to the increase in litigation and to improve the effectiveness and the degree of specialisation of the courts and judges. In fact, during 2015, no major judicial reform was carried out; instead, it was a year of stabilisation and adaptation to the new legislation in force since 1 September 2013 and 1 September 2014. This legislation has not proved to be as effective in reducing the length of proceedings as expected.

1 Francisco Proença de Carvalho is a partner and Tatiana Lisboa Padrão is a junior associate at Uría Menéndez – Proença de Carvalho.

2 Law No. 62/2013 of 26 August and Decree Law No. 49/2014 of 27 March.

II THE YEAR IN REVIEW

Given that the Portuguese judicial system was considered to be one of the main reasons for the country's lack of competitiveness, important reforms entered into force as a consequence of the memorandum of understanding on specific economic policy entered into between the Portuguese state and the European Commission, the European Central Bank and the IMF (or the Troika) in 2011. Thus, in September 2013, the new Civil Procedure Code entered into force, implementing significant changes to Portugal's civil law framework. Additionally, the reorganisation of the Portuguese judicial system was implemented in September 2014 upon the entry into force of a new law for such purposes.

By contrast with the three previous years, and given that Portugal held parliamentary elections in October 2015, the past year has been the end of the legislative term for the previous government. For this reason, no significant reforms were carried out. Moreover, the legal community was demanding time to adapt itself to the considerable changes made to the Portuguese judicial system during 2013 and 2014.

2015 was essentially year of stabilisation and a year in which to test all the amendments made since 2012. Nevertheless, some regulatory ordinances were published in order to guarantee that all the preceding modifications could be fully operational.

As a result of the economic crisis, the rise in lawsuits and insolvency proceedings of a heightened level of complexity and value has continued, although this trend has slowed to some degree during the course of 2015. 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, which this year proved to be successful. In particular, the Special Recovery Procedure seeks to provide borrowers with some leeway in negotiating recovery plans with their creditors in the event of imminent insolvency. The SIREVE (extrajudicial system of company rehabilitation) came into force on 3 August 2012 and was amended in February 2015.

Although a new legal framework on inventory proceedings entered into force on 2 September 2013,[3] the measures are still not fully operational.

Despite the fact that 2015 was not a year of major reforms, some amendments were made to the Portuguese Civil Code. In particular, with the introduction of the legal framework regarding the adoption process for children, modifications were made regarding the maintenance allowance for children of full age and regarding parental responsibilities.

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.

3 Law No. 23/2013 of 5 March.

Despite the foregoing, the Civil Procedure Code establishes that all witnesses must be offered with the submission of the complaint.

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 Civil Procedure Code in force, 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 required by the claimant bearing in mind said other 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.

Said enforcement 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[4] or certified by the same and cheques).

It may take from one to three years in ordinary declaratory proceedings for a final court decision to be 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, a claimant may request that the court issue an adequate preliminary injunction; this may take from three to six months in Portugal.

Please note that any of the mentioned 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.

In 2014, a pre-enforcement out-of-court proceeding[5] was introduced, allowing the claimant to verify whether the defendant has any attachable assets before filing a petition. In 2015, Regulatory Ordinance No. 349/2015, published on 13 October, provided the regulation regarding the IT platform related to the above-mentioned pre-enforcement out-of-court proceeding.

4 Before the new Civil Procedure Code entered into force (on 1 September 2013), private documents signed by the debtor were considered to be an enforceable title. Under the new provisions of the Civil Procedure Code, this was deemed no longer to be the case. On 23 September 2015, the Constitutional Court held that it was unconstitutional for such provisions to operate retroactively regarding said private documents. Thus, private documents signed before 1 September 2013 still constitute an enforceable title (Judgment No. 340/2015).

5 Law No. 32/2014 of 30 May and Ministerial Order No. 233/2014 of 14 November.

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, but in certain cases, such as 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 groups of related claims. This is based on the Portuguese Constitution and on specific regulations that grant all citizens, individually or through relevant organisations, the right to initiate class actions, within the terms established therein. It includes the rights of injured 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, *inter alia*, during interrogation, trial and appeal. As regards the representation of victims, certain acts must also be carried out together with the assistance of lawyers, such as 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 a defendant's domicile is outside 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 on 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 of 13 November,[6] in which

6 As amended by Council Regulation No. 17/2013, 13 May.

the particular formalities are set out, especially concerning the obligation to serve notice through the 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 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 sends procedural documents directly to the persons who are in the territory of another Member State, by mail.[7] In certain cases, however (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 party to 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 EU, Council Regulation No. 44/2001, 22 December 2000[8] 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 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;

7 Article 5.

8 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, Council Regulation No. 280/2009, 6 April and Regulation No. 416/2016, 12 May.

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 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 the parties, lawyers or any persons 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 or divorce proceedings) or may lead to the ineffectiveness of the decision to be issued by the court, as, for instance, in interim application 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 interest a central issue, promoting the prevention or prohibition of any conduct that may create such conflict for a lawyer or firm.

The regime seeks both to protect and promote the dignity and independence of the lawyer in their 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 99 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 moving towards the exclusion of Chinese walls or 'firewalls' as valid mechanisms to overcome limitations imposed upon law firms, but 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 on this matter, 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[9] and 2006/70.

Portugal transposed the aforementioned Directives in Law No. 25/2008 of 5 July[10] into Portuguese law. From this date, financial institutions and a large number of service

9 As Amended by Directive No. 2007/64/EC, 13 November, Directive No. 2008/20/EC, 11 March, Directive No. 2009/110/EC, 16 September, Directive 2010/78/EU, 24 November.

10 Amended by Rectifying No. 41/2008, 4 August, Decree No. 317/2009, 30 October, Law No. 46/2011, 24 June, Decree No. 242/2012, 7 November, Decree No. 18/2013, 6 February, Decree No. 157/2014, 24 October, Law 62/2015, 24 June and Law 118/2015, 31 August.

providers, such as notaries and civil servants, are bound, *inter alia*, 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.

iii Data protection

The processing of personal data in Portugal is governed by Law No. 67/98 of 26 October (the Data Protection Act), which requires that for the lawful and fair processing of personal data, the data controller (which is the entity deciding on the data processing purposes and means) must meet the following requirements:

a providing notification of existing personal data files to the Portuguese Data Protection Authority;

b providing information to the data subjects about the processing of their personal data (including regarding transfers and the sharing of information with any third party);

c as a general rule, obtaining the prior consent of the data subjects for any processing activity;

d when the recipient is not located in the EU or EEA (or in a country whose regulations do not afford an equivalent or adequate level of protection to that identified by the EU Commission or the Portuguese Data Protection Authority), obtaining the prior authorisation of the Data Protection Authority, unless a legal exemption applies;

e adopting specific security measures to protect personal data from unlawful disclosure or undue access;

f granting the data subjects a right to access all data relating to them and to rectify and cancel data that does not comply with the data protection principles, in particular, when data is incomplete or inaccurate or excessive in relation to the legitimate purpose of its processing; and

g granting the data subjects a right to object to certain processing activities that do not require their consent or that are carried out for direct marketing purposes.

These general rules also apply to the activities of law firms that involve the processing, access or transfer of personal data.

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, *inter alia*, 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, *inter alia*, 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 not permissible to break privilege to investigate minor offences.

Although Portuguese law widely respects this privilege, in recent years 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.

There are, however, 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 a relevant document is held by a third party (e.g., a parent company), a party may request that the court 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 other 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 asked 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 of or back-up of deleted documents.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

The greatest criticism of the Portuguese legal system is still the length of time that proceedings take. According to the latest data from the Portuguese National Institute of Statistics, the average duration of a civil action at trial is 37 months. Furthermore, during the past decade, the annual number of actions filed before court has risen dramatically.

In light of the foregoing, 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,[11] replacing the former Portuguese Arbitration Act.[12]

The 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 four years since its entry into force, it is legitimate to state that the law has increased flexibility in Portuguese arbitration and facilitated the increasing number of arbitral agreements included in contracts.

Thus, among its most important innovations, the Arbitration Law:

a contains a major change in the arbitrability analysis;

b 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;

c regulates the most important aspects of the application of interim measures, closely following the Model Law;

d includes the regulation of multiparty arbitration and third-party intervention; and

e 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. Law No. 74/2013 of 3 September created the Sports Arbitration Court, which became operative in October 2015.

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 aforementioned requirements as to the value of the action are met. Thus, parties should always seek adequate guarantees to secure 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.

11 Law No. 63/2011 of 14 December.

12 Law No. 31/86 of 29 August 1986.

iii Mediation

Law 29/2013 of 19 April establishes general principles applicable to mediation in Portugal, as well as measures on civil and commercial mediation, mediators and public mediation regimes. The law filled a lacuna 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 as follows:

a the settlement's object must be able to be 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 Portuguese public policy; 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 and rights 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, which is governed by Law No. 78/2001 of 13 July 2001 (as amended by Law 54/2013 of 31 July, which broadened 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 concerning small claims (up to €15,000). Under the new legal framework on justices of the peace, legal persons may now resort to mediation (except in class actions), and preliminary injunctions are now available.

Between 2001 and 2014, approximately 82,500 claims were heard (with a success rate around 95 per cent). Justices of the peace must have a law degree, but need have no further legal education.

The Portuguese Supreme Court has held that the jurisdiction of the justices of the peace is concurrent with that of the courts.[13] While justices of the peace are proving useful in simple disputes, however, strong suspicion still remains about the quality of the decisions on the merits.

VII OUTLOOK AND CONCLUSIONS

The demanded changes to the judicial system, which are now complete, have been an important part of the structural reforms required by the Troika as they are fundamental to making the Portuguese economy more attractive and secure for investment. This year draws to a close with the beginning of a new legislative period, and therefore it has not been a year of new reforms. The measures implemented in the previous years were tested during 2015 and this has highlighted that much more needs to be done regarding the length of time that proceedings take in Portugal. Thus, we expect that in the medium term additional reforms will be implemented in this regard.

As Portugal has a new government, it is reasonable to foresee a modification regarding the Portuguese legislative policy, and that therefore some reforms may take place in the coming years.

Finally, we can look forward to analysing the performance of the Mediation Law and observing whether mediation becomes, in practice, a true dispute resolution alternative.

13 Decision No. 11/2007 of 24 May 2007.

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.

Mr 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.

TATIANA LISBOA PADRÃO

Uría Menéndez – Proença de Carvalho

Tatiana Lisboa Padrão joined Uría Menéndez – Proença de Carvalho in September 2011 as a trainee lawyer. She is now an associate in the litigation and arbitration department of the Lisbon office, where she focuses her practice on litigation and insolvency and restructuring. She has a master's degree in law and management.

URÍA MENÉNDEZ
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