

Appeals 2021

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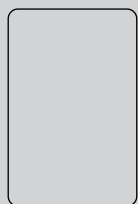
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Appeals 2021

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Lexology Getting The Deal Through is delighted to publish the fifth edition of *Appeals*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Mark A Perry and Perlette Michèle Jura of Gibson, Dunn & Crutcher LLP, for their continued assistance with this volume.



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Portugal

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JURISDICTION

Court system

- 1 | Outline and explain the general structure of your country's court system as it relates to the commercial appellate process.

Portugal's court system is organised in three different levels. There are first instance courts, intermediate appellate courts and the Supreme Court, which is the final appeal court.

In certain circumstances – when a party argues that the way in which the court has interpreted and applied certain legal provisions is in breach of the Constitution – the Constitutional Court will also work as an appeal court.

In terms of intermediate appeal courts, the national territory is divided into five regions: Lisbon (which also covers the territories of the Azores and Madeira Archipelagos), Oporto, Guimarães, Coimbra and Évora, each one with an intermediate appeal court.

The Supreme Court has jurisdiction over the entire national territory.

The threshold for the jurisdictions of the first instance and intermediate appeal courts are €5,000 and €30,000, respectively.

Civil matters

- 2 | Are there appellate courts that hear only civil matters?

The Supreme Court has civil, criminal and social sections.

All the intermediate appeal courts have a civil and a criminal section and will, depending on the level of demand and complexity of the assigned cases, have:

- social (labour) sections;
- family and minors sections;
- commercial sections; and
- intellectual property, competition and regulation sections.

When there are no specialised sections, commercial matters will fall under the jurisdiction of the civil sections.

Therefore, both the Supreme Court and the intermediate appeal courts will hear commercial, civil and criminal matters through the competent sections.

Appeals from administrative tribunals

- 3 | Are appeals from administrative tribunals handled in the same way as appeals from trial courts?

Administrative courts have jurisdiction on matters of public law and taxes, and are organised in three different levels.

However, appeals from decisions on contravention matters by the regulators – namely, the Bank of Portugal, the Portuguese Securities

and Exchange Commission and the Competition and Antitrust Authority – go through the Court of Competition, Regulation and Supervision, which is located in Santarém and has jurisdiction over the entire national territory.

Appeals against decisions of this court go through the Lisbon Court of Appeal.

Representation before appellate courts

- 4 | Is there a separate appellate bar or other requirement for attorneys to be admitted before appellate courts?

There is one bar association in Portugal, the Portuguese Bar Association. Only law graduates that have completed the mandatory two-year internship and passed the bar exam are allowed to enrol in the Portuguese Bar Association and are qualified to practise law.

Qualified lawyers are allowed to practise in all courts (including appellate courts and the Supreme Court) without any limitations. The practice of law by non-qualified lawyers is a criminal offence.

Multiple jurisdictions

- 5 | If separate jurisdictions exist for particular territorial subdivisions or subject matters, explain their main differences as to commercial appeals.

In Portugal, there are two separate jurisdictions: administrative courts and judicial courts. The former have jurisdiction on administrative and tax matters. The latter have jurisdiction on all other subject matters.

Within judicial courts, some subject matters are handled by specific courts or specific sections. The Court of Intellectual Property has nationwide jurisdiction over any matters involving intellectual property law. The Maritime Court has jurisdiction in mainland Portugal over any matters involving maritime law. The Court of Competition, Regulation and Supervision has nationwide jurisdiction over regulatory contravention matters. In larger cities, there are courts or court sections with jurisdiction over insolvency and corporate matters, debt collection and employment disputes.

Appeals from decisions of the Court of Intellectual Property, the Maritime Court and courts or sections specialised in insolvency and corporate matters or debt collection are extremely similar to commercial appeals. However, in insolvency and debt collection proceedings, there is only one level of appeal, besides a few exceptions (namely, conflicting upper court decisions).

Appeals from decisions of courts or sections specialised in employment disputes are very similar to commercial appeals. However, appeal to the relevant intermediate appeal court is always admissible if the dispute relates to the existence and validity of employment contracts, the dismissal or reinstatement of employees, labour accidents and occupational diseases, inter alia.

Appeals from decisions of the regulators (the Bank of Portugal, the Portuguese Securities and Exchange Commission and the Competition

and Antitrust Authority) on contravention matters are very different from commercial appeals. The appeal goes through the Court of Competition, Regulation and Supervision, which will normally hold a trial hearing to reassess evidence already on record and hear new evidence. The decision of the Court of Competition, Regulation and Supervision may be subject to further appeal before the Lisbon Court of Appeal, in accordance with the rules on criminal appeals.

BRINGING AN APPEAL

Deadlines

6 | What are the deadlines for filing an appeal in a commercial matter?

The general deadline for filing an appeal on the merits of a first instance sentence is 30 calendar days.

However, this deadline can be extended for an additional 10 days if the appeal also covers the decision of the first instance court on the facts of the case and implies the reanalysis by the appeal court of audio recordings of witness statements.

The defendant will be granted an equal deadline to present its response to the appeal.

In certain cases, however, the deadline can be reduced to 15 days. This will happen in appeals filed in urgent proceedings (for example, interim measures or requests for interim relief) or against certain interlocutory decisions (decisions on the impediments of the judge, on the suspension of the proceedings, rejection or admission of means of evidence, applying fines, etc).

Except for urgent proceedings, all deadlines will be suspended during judicial holidays, which take place between 22 December and 3 January, between Palm Sunday and Easter Monday, and between 16 July and 31 August.

Finally, when the deadline ends on a day on which the courts are closed (ie, Saturdays, Sundays and bank holidays), its term is transferred to the following working day.

Procedural steps

7 | What are the key steps a litigant must take to commence an appeal?

Despite being addressed to the appeal court, appeals are filed before the trial court.

In its submission, the appellant must indicate the type and effects of the appeal (ie, suspending or not suspending the appealed decision), the way in which it is supposed to be submitted to the appeal court (ie, together with the full records or separately), and must present the written motivation or reasoning in support of the appeal, which will conclude with a brief and synthetic summary of the reasons why the decision should be overruled.

The conclusions are of the utmost importance as they will determine the scope of the appeal and the matters that the appeal court will be called upon to decide. Additionally, the failure to present these conclusions can lead to the dismissal of the appeal altogether.

If the appeal is against legal aspects, the motivation will contain a reference to the legal provisions that the party relies upon and considers that the ruling has breached, the sense in which the provisions the decision relies upon should have been interpreted and applied and, in the case of error in the determination of the applicable legal provisions, those that the first instance court failed to apply and should have been applied.

If the appeal is against matters of fact, the motivation must contain the indication of the specific facts that the appellant considers to have been incorrectly judged, the specific evidence on file that imposed a

different judgment and the decision that should be issued regarding these facts. If these requirements are not met, the appeal on the matters of fact will be summarily dismissed.

Because the hearings are recorded and the Portuguese legal system provides an effective double degree of jurisdiction on the merits or facts of the case, if the party filing an appeal on the facts relies on recorded witness statements, it must indicate precisely the parts of these recordings on which he or she relies, with reference to the recordings provided by the court. It is customary to provide transcripts of the relevant passages as part of or as an attachment to the motivation of the appeal. Once again, if these requirements are not met, the appeal on the matters of fact will be summarily dismissed.

Documentation

8 | How is the documentation for appeals prepared?

In appeals against the final verdict, when the jurisdictional power of the first instance court is terminated, all records will be sent to the appeal court, together with the motivation of the appeal and the response of the counterparty.

In appeals against intermediate decisions, which are submitted to the appeal court separately, the appellant must indicate at the end of its motivation which parts of the records it intends to use in support of the appeal. These will then be copied and compiled by the first instance court and sent to the appeal court, together with the motivation of the appeal and the response of the counterparty (that must proceed in the same way), while the records continue with the first instance court.

RIGHT OF APPEAL

Discretion to grant permission to appeal

9 | In commercial matters, may litigants appeal by right or is appellate review discretionary?

Portuguese procedural law grants any party to a dispute the right to appeal against decisions that are detrimental to its interests or claims, as long as the value of the proceeding is above the threshold of the court and the decision itself is detrimental in a value equal to at least half of the applicable threshold.

However, certain categories of rulings are subject to appeal regardless of the value of the proceeding and the value of the detrimental decision. This is the case, for example, for decisions on the international jurisdiction of Portuguese courts, on the material or hierarchical jurisdiction of the court, or on proceedings in which the validity or continuity of lease contracts for permanent residence or commercial purposes are at stake.

Finally, there are also certain decisions – those that are for mere expedience or fall within the discretionary powers of the court – that are not subject to appeal regardless of the value of the underlying proceedings (for instance, the decision to grant or refuse an extension of the term to file the defence or a decision setting the date of a hearing).

Judgments subject to appeal

10 | Can litigants appeal any ruling from a trial court, or are they limited to appealing only final judgments?

Besides final judgments, a broad scope of other intermediate decisions are subject to appeal. Examples of these intermediate or interlocutory decisions can be found in article 644 of the Code of Civil Procedure and include decisions on the impediment of a judge, decisions staying the proceedings, decisions accepting or rejecting a written pleading

or means of evidence and, in general terms, decisions that if only opposed with the appeal against the final verdict would render this opposition absolutely useless.

SECURITY AND INTERLOCUTORY MATTERS

Security to appeal

11 | In a typical commercial dispute, must a litigant post a bond or provide security to appeal a trial court decision?

No. As a general rule, litigants are not required to post bonds or provide any sort of security in order to appeal.

However, in certain circumstances, namely when the appellant argues that the immediate enforcement of the award will cause him or her considerable damage as a means to obtain the suspension of this enforcement while the appeal is pending, he or she will have to post a bond as a condition for this suspension to be granted by the court.

Interlocutory appeals

12 | Are there special provisions for interlocutory appeals?

Yes. Although the appeal procedure is the same for all types of appeals (interlocutory or final), there are a few special provisions for interlocutory appeals.

Examples of these intermediate or interlocutory decisions can be found in article 644 of the Code of Civil Procedure and include decisions on the impediment of a judge, decisions staying the proceedings, decisions accepting or rejecting a written pleading or means of evidence and, in general terms, decisions that if only opposed with the appeal against the final verdict would render this opposition useless. Other decisions subject to interlocutory appeal are decisions:

- on interim measures;
- on the addition and substitution of parties, on third-party interventions, etc; and
- that rule on some (but not all) of the claims or on the liability of some (but not all) of the defendants.

In general terms, the deadline for filing and replying to an interlocutory appeal is shorter (15 days instead of 30 days).

Furthermore, there is only one level of review for interlocutory appeals, which means that the decision taken by the first-level appellate court cannot be appealed to the Supreme Court. There are a few exceptions to this rule. If, for instance, the decision of the first-level appellate court conflicts with decisions taken by other appellate courts, the losing party should be allowed to appeal to the Supreme Court.

Finally, the special provisions described above do not apply to interlocutory appeals on decisions that rule on some (but not all) of the claims or on the liability of some (but not all) of the defendants. Interlocutory appeals against these decisions follow the general procedural framework both in terms of deadline (30 days) and of the possibility of appealing to the Supreme Court.

Injunctions and stays

13 | Are there special rules relating to injunctions or stays, whether entered in the trial court or on appeal?

Generally, injunctions are considered urgent proceedings, which have precedence over other non-urgent matters and run continuously, even during judicial holidays.

Injunctions can be granted ex parte and are, generally, awarded ahead and in support of the main proceedings in which the subject matter is under debate. The decisions of the injunctions are, therefore, provisional and subject to the outcome of the main proceedings.

However, the court may, under certain circumstances – if the evidence on record allows the judge to form a firm conviction on the merits of the case and the injunction is adequate to definitively settle the dispute – invert the terms of the proceedings and exempt the claimant from filing the main proceedings, in which case it will be up to the defendant to react by filing the opposition.

SCOPE AND EFFECT OF APPELLATE PROCEEDINGS

Effect of filing an appeal

14 | If a litigant files an appeal in a commercial dispute, does it stay enforcement of the trial court judgment?

In the Code of Civil Procedure, the general rule for commercial litigation is for appeals not to suspend or stay the enforcement of awards. However, the litigant may secure such a stay if he or she demonstrates that the enforcement would cause him or her considerable damage and offers an adequate security (eg, bank deposit, bank guarantee, in rem security) that covers principal, interest and court fees.

Scope of appeal

15 | On an appeal from a commercial dispute, may the first-level appellate court consider the facts and law anew, or is its power to review limited?

As a rule, the first-level appellate court’s power to review covers both the facts of the case and the applicable law. However, in general terms, the appellate court’s powers are limited to the specific points of law and the findings of fact that are challenged by the appellant in its motivation and, in particular, in the final conclusions.

Further appeals

16 | If a party is dissatisfied with the outcome of the first-level appeal, is further appeal possible?

The thresholds for the jurisdiction of the first instance and intermediate appeal courts are €5,000 and €30,000 respectively, meaning that in commercial disputes between €5,001 and €30,000, there is only one level of appellate review.

In commercial disputes worth more than €30,000, there are two levels of appellate review. The first-level appellate court may re-examine points of law and findings of fact. The second-level appellate court (ie, the Supreme Court) decides only on points of law.

For proceedings above the €30,000 threshold, if the first instance judgment is upheld by the first-level appellate court on broadly similar grounds and without any dissenting opinions, then the appellant is not entitled to appeal to the Supreme Court. Exceptionally, the Supreme Court will accept an appeal in such a case if the appellant is able to demonstrate that:

- the case raises points of law that clearly need to be decided for the correct application of the law;
- the interests at stake are particularly material for the community; or
- the decision of the first-level appellate court conflicts with decisions taken by other appellate courts.

Duration of appellate proceedings

17 | How long do appeals typically take from application to appeal to a final decision?

According to the European Commission’s EU Justice Scoreboard 2020 (the Scoreboard), the average time for a first instance court to rule on a commercial or civil case in Portugal is just over 200 days. Nevertheless, it is not uncommon to see cases in first instance courts last three to

four years, or even longer, particularly with more complex cases or in certain courts known for their high number of pending cases.

According to the Scoreboard, Portugal is among the European countries with the highest number of pending civil and commercial cases per inhabitant, surpassed by Spain, Poland, France, Greece, Romania, Croatia and Italy. Nevertheless, Portuguese scores have improved considerably and consistently each year (down from 3.5 pending first instance cases per 100 inhabitants in 2012 to just under two per 100 inhabitants in 2018).

However, Portugal scores low when it comes to investment in the court system when compared with other European countries, with a mere €60 per inhabitant, compared to over €75 in France and €150 in Germany. The result is a generally slow and somewhat inefficient court system.

The Lisbon Commerce Court is one of the busiest, and therefore slowest, courts in the country, only surpassed by the administrative courts in general, where there is a well-known bottleneck.

When it comes to appeals, the situation is not much better. The average time for an appeal in the intermediate appeal courts to be decided in Portugal varies considerably, depending on the competent appeal court on one hand, and the complexity of the appeal on the other.

There is no reliable official data regarding the average time for appeals in Portugal. For example, according to the Scoreboard, the average time to resolve an appeal would be around 100 days in the intermediate appeal courts (second instance) and 50 days in the Supreme Court (third instance), which is not in line with our experience (other than for appeals that are dismissed summarily on procedural grounds or that deal with very simple questions). In our experience, the average time for an appeal in a complex commercial case, involving both matters of fact and law, is between 10 and 18 months.

SUBMISSIONS AND EVIDENCE

Submissions process

18 | What is the briefing and argument process like in a typical commercial appeal?

In commercial appeals, the appellant must file a written motivation or reasoning in support of the appeal, setting out all the reasons why the decision should be overruled. The statement of appeal is filed in the same court that issued the decision and must be served on the respondent by the appellant. The respondent is entitled to file a statement of reply setting out all the reasons why the decision should be upheld.

The parties are not allowed to submit documents with their statement of grounds, except under exceptional circumstances (documents that the party was unable to present during the discussion of the case before the first instance court).

The parties may, however, submit legal opinions together with their submissions.

In principle, the parties are not allowed to file any further briefs in support of their arguments.

New evidence

19 | Are appeals limited to the evidentiary record that was before the trial court, or can new evidence be introduced on appeal?

As a rule, parties are not allowed to introduce new evidence on appeal.

Exceptionally, a party may introduce new documents, provided that it demonstrates that it was unable to obtain or retrieve them beforehand.

New evidence of wrongdoing

20 | If litigants uncover new evidence of wrongdoing that they believe altered the outcome of a trial court judgment, can they introduce this evidence on appeal?

Generally, the parties are limited to the evidence that is in the record.

The only additional evidence that can be submitted during appeals to the intermediate appeal courts is documentary evidence, provided that the party demonstrates that it was unable to obtain or retrieve the additional evidence beforehand.

The appellate process for commercial arbitration does not contemplate additional witness evidence.

It is also possible, in very exceptional circumstances, to file an appeal of revision against a definitive ruling, if subsequent evidence of wrongdoing is uncovered (for instance, if the evidence produced during the proceedings and upon which the ruling was issued is found to be false).

Such an appeal must be filed before the court that issued the decision under revision within five years of the decision and, in any case, within 60 days of the date upon which the party became aware of the new relevant facts.

New legal arguments

21 | May parties raise new legal arguments on appeal?

No. Parties are limited to raising the arguments that were made before the first instance court.

COSTS, SETTLEMENT AND FUNDING

Costs

22 | What are the rules regarding attorneys' fees and costs on appeal?

The losing party has a duty to reimburse the attorneys' fees and costs incurred by the winning party up to 50 per cent of the aggregate court fees paid by both parties. Court fees on appeal are calculated on an ad valorem basis.

Settlement of first instance judgment after appeal lodged

23 | Can parties enter into a settlement agreement to vacate the trial court judgment after an appeal has been taken?

Yes. The parties can enter into a settlement agreement to vacate the trial judgment after filing an appeal.

Limits on settlement after commencement of appeal

24 | Are there any limits on settlement once an appeal has been taken?

No. The fact of filing an appeal does not affect or limit the parties' right to enter into a settlement agreement.

Third-party funding

25 | May third parties fund appeals?

There is no regulation on third-party funding of litigation or appeals in Portugal. It follows that there is also nothing prohibiting this funding. Until recently there were no known cases of third-party funding in commercial litigation. The first cases of third-party funding in Portugal became publicly known in 2020 and relate to class actions filed by a recently incorporated consumer association in follow-on litigation for breach of competition rules against a local brewery and a credit card

company. It is expected that third-party funding will become increasingly more common in the near future in Portugal, which may lead to regulation on the matter.

Disclosure of litigation funding

26 | If litigation funding is permitted in an appeal, must funding sources be disclosed to the court or other parties to the litigation?

There are no specific rules governing third-party litigation funding in Portugal. Therefore, there is no mandatory disclosure.

JUDGMENTS, RELIEF AND NON-PARTIES

Decisions

27 | Must appellate courts in your country write decisions explaining their rulings? Can the courts designate the precedential effect of their decisions?

Appellate courts in Portugal are required to motivate their rulings. Indeed, the lack of motivation is cause for the nullity of an award.

Under Portuguese law, court decisions do not have precedential effect, except for the decisions rendered by the plenary of the Civil Sections of the Supreme Court for the specific purpose of resolving conflicting interpretations of the law.

However, this does not mean that the appellate court cannot refer to previous decisions on the same subject matter to motivate its decision. This will normally happen when the court considers that the underlying matter has been judged repeatedly in the same manner, in which case it can refer specifically to and draw from these precedents.

Non-parties

28 | Will the appellate courts in your country consider submissions from non-parties?

No. As a general rule, appeals must be filed by the party that is faced with an adverse decision that exceeds the thresholds of the court's jurisdiction.

However, there are exceptions to this rule, allowing third parties that are directly and effectively harmed by judgments to appeal against them.

For instance, when a judgment has been issued as a result of collusion between the claimant and defendant to obtain what would otherwise be an illegal result, any third party may appeal the judgment.

Relief

29 | What are the ordinary forms of relief that can be rendered by an appellate court in a civil dispute?

There are no specific limitations as to the relief that can be rendered by an appellate court. Apart from exceptional situations where the court has the power to investigate matters without having to rely on the parties' impulse, the general rule is that the courts will be limited to the specific questions raised and relief requested by the parties in their written submissions.

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UPDATE AND TRENDS

Current developments

30 | Are there any current developments or emerging trends that should be noted?

The inefficiency of the Portuguese legal system as a whole – including the appeal courts – is well known to practitioners and investors alike.

The Directorate-General for Justice Policy stopped releasing statistics on the number of appeals in civil and commercial matters in 2019. However, between 2013 and 2018, the trend was for the number of appeals to increase more than the number of decisions and, consequently, for the number of pending appeals to increase (which it did, by around 30 per cent, in that time period).

Although practitioners, politicians and investors agree that the inefficiency of the court system impairs investment and growth, it does not seem very likely that the reforms and investment needed to turn the situation around will be implemented in the near future. The outbreak of covid-19 and the disruption it has caused to the progress of non-urgent cases, together with the economic recession that is expected to follow, will in all likelihood have a negative impact on the efficiency of the court system. The number of pending court cases is expected to increase owing to delays and an influx of litigation, including bankruptcies and judicial enforcement proceedings.

For these reasons, alternative means of dispute resolution (ie, arbitration) continue to be favoured, particularly for complex, high-value transactions.

Coronavirus

31 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Like many other European governments, other than enacting special health and cleanliness rules for court hearings, the main concern of the Portuguese government in relation to judicial proceedings in civil and commercial matters has been to adjust procedural deadlines in line with lockdown measures.

The general trend in Portugal has been to suspend procedural deadlines (except for urgent proceedings) when there is a lockdown in place and to resume them when the lockdown is lifted. Consequently, the procedural deadlines in non-urgent proceedings were first suspended between 9 March and 2 June 2020. These deadlines were suspended for a second time between 22 January and 6 April 2021. In relation to appeals, the situation has been somewhat different. Although the first suspension of deadlines extended to appeals, the second did not and appeals have been following their ordinary course.

The first suspension of non-urgent cases led to the cancellation and adjournment of over 64,000 hearings, generating a backlog of pending cases that is yet to be fully handled. The second suspension is expected to have a similarly negative impact.

The Resilience and Recovery Plan that the government presented on 16 February 2021 includes a €267 million investment in the National Strategy for Digital Transition for the Judiciary, in line with the recommendations of the European Commission. It is not yet clear how this amount will be invested, but it is expected to improve the Portuguese courts' digital infrastructure and capacity, which should improve efficiency.

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