THE ASSET TRACING AND RECOVERY REVIEW

NINTH EDITION

Editor
Robert Hunter

THE LAWREVIEWS

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This article was first published in October 2021
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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-759-1

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

ACKNOWLEDGEMENTS

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

AARNA LAW LLP

ALLEN & GLEDHILL LLP

ALLENS

ANTONIA MOTTIRONI

ARCHIPEL

ARENDT & MEDERNACH

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PREFACE

'Fraud' is a word that people find easier to use than to define. Partly for this reason, it is difficult for lawyers to summarise the way in which their particular jurisdictions deal with it. Some of the sources of their laws will be domestic and will have evolved over time. Others will be recent international conventions, where regard must be had to the decisions of other jurisdictions.

But these difficulties aside, the problems that fraud generates pose unique challenges for the legal system of any country. First, there will be forensic issues: to what lengths should the court go to discover what actually happened? Here different jurisdictions place different priorities on what their courts are for. Some treat the court process as an almost sacrosanct search for truth. The courts of my own jurisdiction tend towards this end of the spectrum. Others regard it as a means of resolving disputes efficiently and providing certainty for the litigants. Often courts in this category allow no witness evidence and no procedure for disclosure of documents, regarding both as disproportionately burdensome for any benefit they might provide.

Second, there is the question of whether the court should mark conduct that is 'fraudulent' as particularly abhorrent, in civil proceedings. All will criminalise fraudulent behaviour, but not all will penalise fraudulent conduct by enhancing the victim's compensation or by depriving the fraudsters of arguments that might have been available to them if they had been careless rather than dishonest.

Third, there is the question of innocent parties: to what extent should victims of fraud be given enhanced rights over victims of ordinary commercial default? In some jurisdictions, it is said that victims of fraud part with their assets – at least to some extent – involuntarily while commercial counterparties take risks with their eyes open. Hence, victims of fraud can, in some circumstances, be allowed to retrieve assets from an insolvency before ordinary trade counterparties or general creditors do so.

Lawyers have been mulling over the rights and wrongs of solutions to the problems that fraud presents for centuries. They will never stop doing so. The internationalisation of fraud in the past 40 years or so, however, has meant that they argue about these problems not only with lawyers of their own country, but also with lawyers from other jurisdictions. Rarely nowadays will a fraudster leave the proceeds of fraud in the jurisdiction in which they were stolen. The 1980s and early 1990s saw quite pronounced attempts by fraudsters to 'arbitrage' the various attitudes and priorities of different jurisdictions to retain what they had taken. Perhaps the highest-profile example of this was the use of jurisdictions in which banking secrecy was a priority as a conduit to which the proceeds of fraud would be transmitted. Another well-known strategy was the use of corporate devices and trusts as a means of sheltering assets from those who deserved to retrieve them.

A number of factors have served to make this more difficult. The growth of international conventions for the harmonisation of laws and enforcement of judgments is clearly one factor. Perhaps more notable, however, has been the international impetus to curb money laundering through criminal sanctions. These have, however, been first steps, albeit comparatively successful ones. There is still a huge amount to be done.

I have specialised in fraud litigation – virtually exclusively – since the late 1980s. My chosen area has brought me into contact with talented lawyers all over the world. I remain as fascinated as I was at the outset by the different solutions that different countries have to the problems fraud creates. I am sometimes jealous and sometimes frustrated when I hear of the remedies for fraud that other jurisdictions offer or lack. When I talk to lawyers who enquire about my own jurisdiction, I frequently see them experiencing the same reactions. The comparison is more than a matter of mere academic interest. Every month brings some study by the government or private sector tolling the cost of fraud to the taxpayer or to society in general. My own interest goes beyond ordinary 'balance-sheet' issues. When I deal with fraudsters, particularly habitual or predatory ones, I still retain the same appalled fascination that I experienced when I encountered my first fraudster, and I share none of the sneaking admiration for them that I sometimes see in the media; they are selfish, cruel and immature people who not only steal from their victims, but also humiliate them.

Modern times pose fresh challenges for everyone involved in fraud, from those who commit it to those who suffer from it. As Warren Buffet famously said, 'only when the tide goes out do you discover who has been swimming naked'. The coronavirus pandemic has offered the global economy another opportunity to prove him right. Not only are new frauds being discovered, but the growing recession will challenge the budgets of victims, regulators and criminal enforcement bodies to bring those responsible to justice and to retrieve the proceeds. Remote interpersonal dealings are increasing the distance between business counterparties in a way that the internet did, and the growth of cryptocurrency transactions continues to do.

It is not possible to predict the trajectory of these developments. While it is now a cliché to speak of the 'new normal', nobody can be actually sure what that normal will be. Some even dispute that it is useful to speak of a normal at all. Nassim Taleb has argued that the financial world is more frequently and radically affected by extreme and unpredictable occurrences (which he calls 'Sigma' or 'Black Swan' events) than we acknowledge. According to Taleb, we live in 'extremistan' and not 'mediocristan'. He has suggested that it is part of our makeup to blind ourselves to the influence of what we cannot predict.

Taleb may be right. For my part, I rather think that he is. But amid all the unpredictability, there are nevertheless some certainties. Society depends upon trust, and there will always be some people who abuse it. So some people will always commit fraud. Globalisation has ensured that major fraud will usually have an international element. Fraud lawyers will therefore have to be internationally minded.

Perhaps the growing international and technical complexity of fraud will continue to outstrip the ability of any one person to understand or remedy it. One of the heartening things about the legal profession over the past 25 years or so, however, is the growth of an international community of lawyers specialising in fraud and asset tracing work who share knowledge and experience with each other about the events in their fields. This book continues to be a useful contribution to that community.

No book sufficiently brief to be useful could ever contain all the laws of any one jurisdiction relating to fraud. The challenge, unfortunately, for a contributor to a book like

this lies as much in what to exclude as in what to say. This review contains contributions from eminent practitioners the world over, who have, on the basis of their experience, set out what they regard as critical within their own jurisdictions. Each chapter is similarly structured for ease of reference with similar headings to enable the reader to compare remedies with those in other jurisdictions, and each contributor has been subject to a strict word limit. Despite there being a huge amount more that each would have been perfectly justified in including, I still believe this book to be an enormous achievement.

Once again, we have some of the foremost experts in the area from an impressive array of jurisdictions contributing. I have often thought that true expertise was not in explaining a mass of details but in summarising them in a meaningful and useful way. That is exactly the skill that a work like this requires and I believe that this edition will continue the high standard of the previous six. I have come across a number of the authors in practice, and they are unquestionably the leaders in their fields. I hope that other readers will find the work as useful and impressive as I do.

Robert Hunter
Robert Hunter Consultants
August 2021

Chapter 19

PORTUGAL

Fernando Aguilar de Carvalho and Nair Maurício Cordas[1]

I OVERVIEW

Portuguese law provides fraud victims with several criminal law and civil law remedies, both for recovering assets lost through fraudulent actions and for obtaining compensation for damage as a result thereof.

On one hand, every person who suffers losses as a result of fraudulent actions is free to take action under civil law, for example, to assert claims for recovery or damages before the civil courts, regardless of any criminal proceedings in fraud cases.

While there are remedies available to ensure that a claimant's rights are secured (e.g., provisional restitution of possession and attachment of the debtor's assets), Portuguese civil law does not provide for specific legislation related to asset tracing and recovery, including the taking of evidence to support the respective claims arising specifically out of fraud or dishonesty. Hence, in civil proceedings, victims must rely on general actions provided for under Portuguese civil liability law and privately trace any assets or proceeds of fraud.

On other hand, under Portuguese law, a victim can appear as a party to criminal proceedings, not only to exercise a criminal action, but also for the purposes of seeking compensation for damages, through standing as civil party. In fact, as a general rule, asset recovery claims as a result of criminal offences must be filed within the relevant criminal proceedings.

In most cases, bringing asset recovery claims within criminal proceedings will prove to be more advantageous, given the powers and resources of the public prosecutor. For instance, to secure the future payment of compensation for damage and prevent dissipation of the defendant's assets, the examining magistrate can order the defendant to provide bail and that the defendant's assets be seized. In addition, the public prosecutor (with the support of the police and tax authorities) and the examining magistrate can enable use of a wide array of procedures to obtain evidence, such as wiretaps, the interception of correspondence and searches, which are not available to parties in civil proceedings.

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II LEGAL RIGHTS AND REMEDIES

i Civil and criminal remedies

Civil remedies

Portuguese law does not provide for a specific civil asset recovery action for victims of fraudulent actions. Hence, remedies in civil asset recovery actions are usually brought under the general tort liability rules and principles, pursuant to which an injured party can claim damages from an offender who has engaged in intentional or negligent unlawful conduct where a causal link can be established between the conduct and the damage.[2] Claimants can also bring actions directly against directors for their fraudulent actions in carrying out their duties.[3]

It is also important to note that, under Portuguese law, a company can also be held liable for the damage caused by fraudulent actions of its director and employees in carrying out their duties.[4]

Claims may also be brought under the general contractual liability framework when the cause of action arises out of an underlying contractual relationship.[5] Where there is concurrent tort and contractual liability, the majority of case law and legal scholars argue that a claimant is entitled to choose the applicable legal framework and should, therefore, weigh up the pros and cons of each regime.

As a general rule, asset recovery claims must meet the following requirements:

a unlawful conduct (either by act or omission);
b being guilty of either wilful or negligent misconduct (except in cases of strict liability);
c a causal link between the conduct and the relevant damage claimed by the claimant; and
d damage suffered (either actual losses or a loss of profit).

The burden of proof lies with the claimant.

Generally speaking, in tort and contractual claims, if a claimant's claim proves to be successful, the defendant is obliged to place the victim in the position he or she would have been in were it not for the circumstances giving rise to the liability, or if such restoration is not possible or not sufficient, the defendant is obliged to compensate the claimant with money. Under Portuguese law, punitive damages cannot be awarded.

Typical remedies in civil asset recovery actions for victims of fraud are:

a restitution of specific assets (against whoever is currently in possession of said assets), when possible;
b payment of damages; and
c restitution of benefits that another person unjustifiably obtained in connection with the fraud, based on unjustified enrichment.

Civil proceedings usually last, at the first instance court, between 18 to 24 months, and between six to 12 months before the court of appeals. Notwithstanding, it is not unusual for complex fraud litigation proceedings to take significantly longer.

2 Article 483 of the Portuguese Civil Code.
3 Article 72 of the Portuguese Commercial Companies Code.
4 Article 500 of the Portuguese Civil Code.
5 Article 798 of the Portuguese Civil Code.

Criminal remedies

As general rule, asset recovery claims based on criminal offences must be filed within criminal proceedings through standing as civil party save for, namely, if:

a charges are not brought within eight months of the opening of a criminal inquiry, or if the inquiry does not progress during such a period;

b the criminal proceedings are closed with no charge, or are temporarily suspended or closed for other reasons;

c the bringing of criminal proceedings is dependent on the filing of a criminal complaint or private prosecution;

d if there is no known damage at the time charges are brought, or its full extent is not known; or

e if a court decision does not rule on the damages claim due to the risk of it delaying the criminal proceedings.[6]

In these circumstances, civil actions may progress in parallel with criminal proceedings that concern the same subject matter.

All in all, the remedies mentioned above also apply to asset recovery claims filed within criminal proceedings, that is:

a restitution of particular assets, when possible;

b damages; or

c restitution of benefits that another person unjustifiably obtained in connection with the fraud, based on unjustified enrichment.

As mentioned above, in most cases, bringing an asset recovery claim within criminal proceedings will prove to be the most effective route to trace and recover assets. In such circumstances, a claimant will be able to benefit from the actions and powers of the public prosecutor and police resources with regard to, for instance, the taking of evidence, such as:

a wiretaps;

b the interception of correspondence;

c searches;

d witness evidence;

e the tracing of tainted funds; or

f the suspension of suspicious transactions directly or indirectly related to the possible commission of a criminal offence (through the financial intelligence unit of the police).

Benefiting from the above may not be admissible or easy to obtain in civil proceedings.

In asset recovery claims based on criminal offences filed within criminal proceedings, the claimant's burden of proof as to the fraudulent actions will be facilitated substantially. Indeed, in criminal proceedings, the burden of proof lies with the public prosecutor, which will evidently benefit the claimant.

Moreover, the claimant will also be able to request the court to grant attachment orders against the defendant's assets to prevent their dissipation, and will be entitled to be satisfied with precedence on such assets in cases of conviction and confiscation (which is compulsory when fraudulent actions fall under the statute of money laundering). In this context, it should

6 Article 72 of the Portuguese Criminal Procedure Code.

be noted that, as a general rule, an asset belonging to a person extraneous to the crime (e.g., a bona fide third party) cannot be subject to confiscation. Notwithstanding, confiscation will be ordered where that third party knows of its origin, or has conspired through his or her conduct in making the undertaking of the crime easier or has taken advantage of the crime. Recent Portuguese case law has taken the strict position that only people with no direct or indirect (e.g., due to lack of vigilance) negligent link to the undertaking of an offence may be considered extraneous to a criminal offence.[7] Hence, for instance, assets held by close relatives of a defendant may be subject to confiscation, as has been the case in several high profile cases recently.

Portuguese law provides for a special form of confiscation in relation to assets resulting from one of a list of crimes, including, inter alia:

a passive or active corruption;
a money laundering;
b drug trafficking;
c embezzlement; or
d the peddling of influence.

In such circumstances, in the event of conviction, and for the purposes of a confiscation order, the difference between the value of the defendant's assets and that which is congruent with his or her lawful income is held to be an advantage arising from criminal activity.

Finally, regardless of whether a claimant has requested appointment as a civil party within criminal proceedings, he or she may claim title over the assets, as a bona fide third party, subject to confiscation before the court with jurisdiction to execute it. If a dispute arises about the title over an asset, the court must refer the case to the competent civil court to determine the legitimate title.

ii Defences to fraud claims

As a general rule, defendants may contest a claimant's fraud claims by arguing that one or more of the elements of the crime, or one or more conditions for civil liability (fault or breach of contract, damage, causality, etc.) are not met.

The most common specific defences to fraud claims are the expiration of the statute of limitations and title over the relevant assets.

Limitation periods for fraud claims depend on the nature or type of civil liability. If a fraud claim is based on tort liability, the right to compensation generally expires after three years, counted from the date on which the claimant becomes aware of his or her right to compensation, irrespective of whether he or she has knowledge of the persons liable or the full extent of the damage incurred (which is usually the date on which a claimant becomes aware that the requirements for civil liability have been met)[8] and, in any event, no later than

7 Law No. 5/2002, of 11 January.
8 Article 498 Section 1 of the Portuguese Civil Code.

20 years from the date of the misconduct.[9] Specific professionals or acts of misconduct may by subject to special rules on limitation periods. This is the case, for instance, with directors' professional liability (subject to a five-year time limitation).[10]

In cases where the misconduct is considered a crime, the limitation period will be extended to that of the crime in question. In such cases, the Portuguese Supreme Court has considered that pending criminal proceedings are a continued cause of interruption of the limitation period, which will only start running again once the proceedings are closed.[11]

In the case of liability for breach of contract, the general limitation period applies, meaning that any claim to compensation becomes time-barred 20 years after the occurrence of the contractual breach.[12]

Claims for damages based on expired rights become time-barred.

On the other hand, defendants faced with claims for restitution of embezzled or stolen objects may also invoke title over the assets as a defence, which may be the case when, for instance, he or she has acquired as a bona fide third party (i.e., without knowledge that the asset did not belong to the person disposing of it).

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

Civil proceedings

Under the Portuguese Civil Procedure Code, a claimant may request the judge to adopt any preliminary measures deemed necessary and proportionate to secure his or her rights. Although they are usually instrumental to bringing an asset recovery action, preliminary measures may also be requested after the asset recovery action has been filed.

For this purpose, the claimant will have to provide prima facie evidence of the existence of the right that the requested preliminary measure intends to secure (*fumus boni juris*), and a serious and concrete risk that the delay could compromise the satisfaction of the asset recovery in the main proceedings (*periculum in mora*).

In the context of asset recovery claims, the most common preliminary measures requested are the provisional restitution of the possession of certain assets and the attachment of assets, that is, the judicial apprehension of the debtor's assets (e.g., bank accounts, real estate, shares, credits over a third party).[13]

9 The running of the limitation period may be interrupted or suspended. The Portuguese Civil Code provides for several causes of interruption or suspension. For instance, the limitation period is interrupted by the judicial notification of a writ of summons, or of any other act that, directly or indirectly, expresses a claimant's intention to enforce his or her right to compensation. Interruption of the limitation period renders the time already elapsed without effect and restarts the applicable limitation period (Article 326 Section 1 Portuguese Civil Code). The new limitation period does not begin to run until a final decision is issued on the claims submitted to the court (*res judicata*), putting an end to the legal proceedings (Article 327 Section 1 Portuguese Civil Code).

10 Article 174 of the Portuguese Commercial Companies Code.

11 See ruling issued by the Portuguese Supreme Court on 22 May 2013, case No. 2024/05.2TBAGD.C1.C1, www.dgsi.pt.

12 Article 309 of the Portuguese Civil Code.

13 The way in which the attachment is made depends on the nature of the assets. For instance, attachment of real estate is registered at the competent land registry office as a charge in favour of the claimant, whereas the attachment of personal assets is done by seizing the assets and placing them in the custody of an

As a general rule, preliminary measures are only issued *ex parte* if the defendant's prior knowledge could endanger the effectiveness of the measure. This is always the case when the claimant request for the attachment of the debtor's assets or the preliminary restitution of assets.[14] In such circumstance, the defendant is entitled to subsequently challenge said order, after which the same will be confirmed, amended or revoked.

Criminal proceedings

The Portuguese Criminal Procedure Code provides for two types of provisional measures with a view to securing assets and proceeds: economic security and preventive seizure (analogous with the preliminary measure of attachment provided under civil law).

Both measures are aimed at guaranteeing:

a payment of the financial penalty, the costs of the proceedings and any other debt to the state related to a crime;

b the loss of instruments, products and advantages of a crime, or the payment of the value thereof; and

c payment of damages or other civil obligations as a result of the crime.

Economic security may be provided by any form of patrimonial guarantee (e.g., deposit, pledge, mortgage or bank guarantee).

The judge can only order such provisional measures at the request of the public prosecutor or the injured party. Preventive seizures ordered in criminal proceedings are immediately revoked if the defendant posts economic security.

In addition, pursuant to the Criminal Procedure Code, all instruments, products or advantages related to the practice of a criminal act are apprehended by the Portuguese Asset Recovery Office (PARO), a specialised asset recovery agency that is part of the national judicial police that operates under orders from the Public Prosecutor's Office.[15] The PARO's mandate is to identify, trace and seize property or proceeds related to criminal activities (both domestically and internationally) and to cooperate with asset recovery offices of other countries. The PARO may access several databases to gather intelligence, including:

a the national tax database;

b the customs database;

c the social security database;

d the insurance and pension database;

e the Securities and Exchange Commission;

f the Bank of Portugal;

g the civil aviation service; and

h the maritime authority.

The PARO also operates as the country's asset recovery office for purposes of EU Council Decision 2007/845/JHA.

enforcement agent appointed by the court on behalf of the claimant. Moreover, the attachment of rights is performed by means of a notification to the third-party debtor, which must place the credit at the disposal of the enforcement agent.

14 Articles 391 and 377, respectively, of the Portuguese Civil Procedure Code.

15 Law No. 45/2011 of June 24 (as amended by Law No. 2/2020, of 31 March) on the Establishment of an Asset Recovery Office.

ii Obtaining evidence

Civil proceedings

In Portuguese civil proceedings, the taking of evidence is mostly carried out within a trial, and is conducted by the court mainly at the request of the parties, with a notable exception being the production of documents, which generally have to be provided by the parties with the pleadings.

Unlike the common law system, Portuguese law does not provide for a disclosure or discovery phase. Further, Portugal lodged a reservation to the Hague Convention with regard to the taking of evidence in civil and commercial matters, declaring that it will not execute letters of request issued for the purpose of obtaining pretrial discovery of documents as practiced in common law countries. Notwithstanding, parties may request that the court orders that certain specific categories of documents in the possession of a counterparty or third party are produced to prove facts alleged in the proceedings, which the court may do if it deems them relevant to the dispute.

With regard to interim relief for obtaining information, the Civil Procedure Code provides that, upon the request of a party, a court can order pretrial testimony and expert evidence or inspection of a place (even, under certain circumstances, prior to the filing of a lawsuit) in the event that there is a serious risk that another party's testimony, or the verification of certain facts by means of expertise or inspection during trial, will be either impossible or extremely difficult.

In addition, Portuguese law provides for an obligation to provide information, and to present things and documents whenever the holder of a right has a well-founded doubt about their existence or their content and someone else is in a position to provide the necessary information.[16] In the circumstance where wrongdoers or third parties do not comply with such obligation, a claimant may file civil proceedings requesting that the same be ordered to provide the relevant information, things or documents. In this context and to the extent that a claimant is able to demonstrate that there is a serious risk that the production of a document subsequent to a court order within such proceedings will be extremely difficult (for instance, due to a risk of destruction), a claimant may ask the court to issue a preliminary measure ordering the obliged party to provide such a document.

The court's decision has to be based on the evidence submitted by the parties. As a general rule, the court can freely assess any evidence at its discretion, but it has to provide the reasons for the assessment made in coming to its decision. Exceptions are made with regard to authentic documents such as public deeds or extracts from the commercial or land registry offices.

Criminal proceedings

As previously mentioned, the burden of proof lies with the public prosecutor in Portuguese criminal proceedings. The public prosecutor has to prove, beyond a reasonable doubt, a defendant's guilt in relation to certain criminal offences, or that specific assets are the proceeds of a criminal offence, and therefore must be confiscated.

In criminal proceedings concerning organised crime or financial and economic crime, such as influence peddling, corruption or money laundering, the public prosecutor has powers to lift bank secrecy and to issue a reasoned order to banks and other financial institutions,

16 Articles 573 to 576 of the Portuguese Civil Code.

which must comply in sending any requested information within the allocated time frame. In these cases, video and audio surveillance are permissible when deemed necessary for an investigation of the relevant crimes.

The court shall order, *ex officio* or upon request, the production of all means of evidence that it deems necessary for the discovery of the truth and for a good decision in a case.

Under the Criminal Procedure Code, evidence is only valid, and can only form the court's conviction, in cases where it is produced or examined before the court at a hearing. An exception is made to evidence contained in procedural acts whose expression, reading or visualisation at a hearing are deemed admissible.

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

The Portuguese Criminal Code does not provide for specific provisions on fraud affecting banks. Hence, the general criminal provisions are apply to said sector.

Under Portuguese law, anyone who converts or transfers funds, or intervenes or aids in such operations, to conceal their unlawful origin, from predicate offences, such as tax evasion, bribery and corruption, influence peddling, drug trafficking or other crimes, may be punished with imprisonment for up to 12 years.[17]

Law No. 83/2017, of 18 August 2017, as amended, contains measures for combating money laundering and terrorism financing, partially transposing Directives 2015/849/EU of the European Parliament and of the Council of 20 May 2015, and 2016/2258/EU of the Council of 6 of December 2016.[18]

Pursuant to that Law, financial institutions and non-financial institutions such as casinos, betting and lottery prize-paying entities, entities that engage in any real estate activity, auditors, certified accountants, tax consultants, lawyers and notaries, are bound to not participate in suspicious or criminal activities related to money laundering. In addition, they must report such activities to the public prosecutor or the Unit of Financial Information.

In particular, Law No. 83/2017, of 18 August 2017 imposes on the relevant entities certain anti-money laundering obligations, most notably;

a customer due diligence obligations, such as identifying and verifying customers' identities and beneficial owners, obtaining information regarding the purpose and intended nature of business relationships, and conducting risk assessments;

b record-keeping obligations; and

c reporting obligations.

In addition, participants in money laundering offences are subject to compulsory confiscation of the relevant proceeds of such criminal offence, including proceeds that have been converted into other assets in the event of conviction.

17 Article 368-A of the Portuguese Criminal Code.

18 Law No. 83/2017, of 18 August 2017 repealed Law No. 25/2008, of June 5, which previously set out measures on prevention and law enforcement to combat money laundering and terrorist financing, transposing to the Portuguese jurisdiction Directives 2005/60/EC of the European Parliament and of the Council (of 26 October 2005) and 2006/70/EC of the Commission (of 1 August 2006) on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

ii Insolvency

The Criminal Code provides for several insolvency-related crimes as follows:

a fraudulent insolvency: for example, the destruction, damage or dispersion of assets, the artificial inflation of losses or the artificial reduction of profits, which acts are punishable with imprisonment for a period of up to five years or with a fine of up to 600 days;[19]

b frustration of credits: for example, the destruction or dispersion of assets in order to avoid paying a specific creditor, which acts are punishable with imprisonment for a period of up to three years or with a fine if the creditor's rights are not satisfied in full within the enforcement proceedings;

c negligent insolvency: for example, if the perpetrator's reckless conduct led to the insolvency situation, which is punishable with imprisonment for a period up to one year or a fine of up to 120 days; or

d benefiting certain creditors: for example, the payment of undue debts in order to benefit some creditors over others, which is punishable with a period of imprisonment of up to two years or a fine of up to 240 days, if the insolvency is recognised judicially.

Under Portuguese insolvency law, an insolvency may be classified as either culpable or fortuitous when the situation was created or aggravated as a result of the conduct (with *dolus* or with gross negligence) of the debtor or its directors in the three years preceding the commencement of the insolvency proceedings. In the event of an insolvency being judged to be culpable, directors may be subject to liability towards the creditors of the company up to the amount of their unpaid claims.

Moreover, the Portuguese Insolvency and Company Recovery Code provides for specific means for the recovery of assets, which allow for the insolvency administrator to claw back acts detrimental to the debtor's best interests that were performed in the two years before insolvency proceedings were initiated. Detrimental acts include any such acts that reduce, frustrate, obstruct, endanger or delay the satisfaction of creditors.[20]

iii Arbitration

Under Portuguese law, parties may only opt for arbitration if a dispute submitted to an arbitral tribunal concerns patrimonial interests.

Notwithstanding, provided that the dispute concerns patrimonial interests, nothing prevents an arbitral tribunal from deciding on claims arising out of tortious liability. Accordingly, depending on the circumstances of the case, and provided that the dispute is covered by an arbitration agreement, an arbitral tribunal in Portugal may adjudicate disputes involving claims for liability in tort or contract that result from fraud or the dishonest behaviour of a certain party.

Moreover, although pursuant to Portuguese law arbitral tribunals may issue interim measures, given tribunals' lack of enforcement powers, parties tend to request such measures from the Portuguese state courts, which can issue preliminary measures in aid of arbitration proceedings.

19 The amount of the fine applicable per day is determined by the court, in an amount of between €5 and €500.

20 Article 120 et seq. of the Portuguese Insolvency and Company Recovery Code.

iv Fraud's effect on evidentiary rules and legal privilege

As a general rule, fraud allegations and related procedures for asset tracing and recovery do not modify evidentiary rules or conditions.

The scope of protection of legal privilege granted under Portuguese law differs according to a professional's particular practice. As a general rule, public prosecutors do not have the power to seize or request the production of documents that are subject to legal professional privilege, such as correspondence between a suspect and his or her lawyer, save for where such documents are deemed to be elements of a criminal offence.

Moreover, while lawyers benefit from broad and strict protection, the employees and directors of financial institutions do not. In particular, as mentioned above, in criminal proceedings related to organised crime and economic and financial criminality, the public prosecutor has powers to lift bank secrecy and to issue reasoned orders to banks and other financial institutions.

At trial, legal privilege is not an absolute right: in most cases it may be lifted, although the procedure to do so is complex.[21]

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

In fraud claims encompassing cross-border elements, Portuguese courts determine the applicable substantive law based on Portuguese and European conflict of law rules.

If a claim is based on tort law, the Rome II Regulation shall apply.[22] Accordingly, if the parties have not chosen the applicable law,[23] the general rule is that the law of the country where the damage occurs, irrespective of where the event giving rise to the damage occurred and of where the indirect consequences of that event occurred, shall apply.[24]

For contractual liability claims, the applicable law will be determined on the basis of the Rome II Regulation,[25] pursuant to which, if the parties have not chosen the applicable law, the same will depend on the type of contract at stake.[26] Some exceptions do apply, however, as well as specific rules for all contracts that the Rome II Regulation does not expressly deal with.

Given the universal scope of application of the European conflict of law rules, Portuguese courts only seldom apply the conflict of law rules set forth in the Portuguese Civil Code that, in any case, provide for comparable criteria.

21 Pursuant to Article 135 of the Portuguese Criminal Procedure Code, only superior courts may decide whether privilege should be lifted and thus consequently force the disclosure of protected facts. The superior court's decision must always be taken according to the principle of the prevailing interest, which binds the court to, inter alia, considering the gravity of a criminal offence and the interests pursued through the corresponding criminal procedure. This procedure is also applicable to civil proceedings.

22 Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.

23 Article 14 of the Rome II Regulation.

24 Article 4(1) of the Rome II Regulation.

25 Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

26 For instance, the law of the country of residence of the seller will apply to a sales contract.

Moreover, pursuant to the Recast Brussels I Regulation,[27] Portuguese courts will have jurisdiction over tort claims if Portugal is the place where the harmful event occurred (i.e., either the place where the damage occurred, or the place of the event that gives rise to (and is at the origin of) that damage).[28] For contractual claims, the Portuguese court's jurisdiction will depend on the nature of the contract and whether Portugal is the place where the relevant obligation was performed (or had to be performed).[29] In either scenario, a claimant can always sue in Belgium if a defendant is domiciled in Belgium. Subject to certain restrictions, parties may also agree on a choice of forum clause.

If the Recast Brussels I Regulation is not applicable, the international jurisdiction of the Portuguese courts is determined by the following:

a under the Portuguese territorial jurisdiction rules (e.g., *forum rei sitae*, when a defendant is resident in Portugal), a lawsuit may be filed in the Portuguese courts;

b the facts determining the cause of action took place in Portugal; and

c the rights of the plaintiff can only become effective under a lawsuit filed in the Portuguese courts or when bringing a legal action in a foreign country may present the plaintiff with difficulties and, at the same time, there is a relevant connection between the lawsuit and the Portuguese jurisdiction.

ii Collection of evidence in support of proceedings abroad

Judicial cooperation in matters of collection of evidence in Portugal is governed by EU Regulations and international conventions.

On one hand, within the EU, the gathering of evidence in civil and commercial matters is facilitated by Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, which provides for direct communication between EU Member State courts through the use of standard forms. Pursuant to the Regulation, EU courts can request another Member State's courts to gather evidence in its home jurisdiction and, under certain conditions, the direct taking of evidence by the requesting court can take place (e.g., if videoconferencing is available for the examination of witnesses).

In cross-border cases outside of the EU, the most relevant international convention is the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, to which Portugal is a party and the main terms and conditions of which are similar to those set out in the Regulation.

Moreover, under Portuguese law, letters rogatory of foreign authorities will be analysed by the public prosecutor prior to execution for public interest reasons. If granted, the competent court will be responsible for ensuring compliance with the letters rogatory unless the execution of a letter rogatory does not require the intervention of the Portuguese court.

iii Seizure of assets or proceeds of fraud in support of the victim of fraud

Requests for assistance by foreign judicial authorities are sent to the Portuguese judicial authorities through diplomatic channels unless any international conventions provide otherwise.

27 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

28 Article 7.2 of the Recast Brussels I Regulation.

29 Article 7.1 of the Recast Brussels I Regulation.

In the case of assistance concerning provisional measures, foreign authorities can request assistance from the Portuguese authorities for the seizure of assets that seem to be the proceeds of a criminal offence, and of any asset whose value is equivalent to the proceeds of that offence, with a view to confiscating them in the future. Such a request can be refused if, inter alia, the facts underlying it do not constitute an offence under Portuguese law or if the referred-to assets cannot be confiscated under Portuguese law.

Within the EU, applications for the seizure of assets and any subsequent enforcement will be decided by the public prosecutor that has territorial jurisdiction. Following the regularity of an application being examined, the application will immediately be enforced by the PARO; however, the PARO may refuse to enforce a freezing order in some circumstances or to defer an order in other situations.[30]

If the public prosecutor decides to defer enforcement, he or she must inform the judicial authority of the issuing state of his or her reasons for such deferral and, if possible, the foreseeable duration of such deferral.

iv Enforcement of judgments granted abroad in relation to fraud claims

Civil proceedings

The enforcement of foreign civil judgments rendered in another EU Member State falls under the Recast Brussels I Regulation, pursuant to which a judgment issued in another Member State and enforceable in that Member State may also be enforceable in Portugal if, upon the filing of a judicial application by an interested party, the court recognises the enforceability of the judgment. An application of enforceability is filed before the competent superior court.

If no convention or EU regulation applies, the enforcement of foreign civil court judgments will be subject to the Civil Procedure Code. Pursuant to the applicable provisions, the enforcement of foreign civil judicial judgments is generally possible following a prior confirmation procedure before the Portuguese court. Confirmation will be granted if:

a there are no well-grounded doubts about the authenticity of submitted documents or the fairness of a decision;

b the decision is final according to the law of the country in which the judgment was rendered;

c the object of the decision does not fall within the exclusive international jurisdiction of the Portuguese courts, and the jurisdiction of a foreign court has not been determined fraudulently;

d no other proceedings are pending between the same parties that are 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 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 his or her case fairly; and

g the acknowledgement of the decision is not patently incompatible with the public policy of Portugal.

30 Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders.

Criminal proceedings

The enforcement of foreign judgments in criminal matters is governed by the Portuguese Law on International Judicial Cooperation in Criminal Matters[31] and the Criminal Procedure Code.

Pursuant to the relevant provisions, final and enforceable foreign criminal judgments may be enforced in Portugal, after they are reviewed and confirmed according to the provisions of the Code of Criminal Procedure,[32] provided that the following requirements are met:

a a sentence imposing a criminal penalty must have been rendered for an offence in respect of which the foreign state has jurisdiction;

b if sentence was pronounced during a trial in the absence of the sentenced person, the sentenced person must have been given the legal possibility of requesting a new trial or introducing an appeal;

c the enforcement of the sentence must not run counter to the fundamental principles of the Portuguese legal system;

d the facts involved must not be the subject of criminal proceedings in Portugal;

e the facts involved must amount to a criminal offence under Portuguese law;

f the sentenced person must be a Portuguese national, or otherwise must have his or her habitual residence in Portugal;

g the enforcement of the sentence in Portugal must be justified in terms of a better chance of either the rehabilitation of the sentenced person or compensation for damage caused by the offence;

h the sentencing state must have provided guarantees that, once the sentence has been enforced in Portugal, it shall consider the criminal liability of the person concerned to be extinguished;

i the term to be served under the sentence must not be less than one year or, in cases of a pecuniary sanction, it should correspond at least to the equivalent of 30 units of account in a criminal procedure; or

j where the sentence involves deprivation of liberty, the sentenced person must give his or her consent to the enforceability in Portugal of said foreign criminal sentence.

A foreign judgement may also be enforced in Portugal if the person concerned is already serving a prison sentence in Portugal for any offence other than the offence for which the foreign judgment was passed.

v Fraud as a defence to enforcement of judgments granted abroad

Fraud is not available as an autonomous defence to prevent the enforcement of a judgment granted abroad under the applicable instruments. However, Portuguese courts may consider that a judgment tainted with fraud contravenes Portuguese concepts of public policy; thus, fraud may be a defence to the enforcement of judgments granted abroad if brought under the umbrella of public policy, both with regard to civil claims (under the Recast Brussels I Regulation and the Civil Procedure Code) and criminal claims (under the Law on International Judicial Cooperation in Criminal Matters).

31 Law No. 144/99, of 31 August.

32 Article 234 et seq. of the Portuguese Criminal Procedure Code.

VI CURRENT DEVELOPMENTS

In the past few years, Portugal has witnessed several high-profile criminal investigations involving high-ranking politicians, including a former prime minister, former members of the government and former members of Parliament, bankers and directors of listed companies, and members of the judiciary, mostly in cases of fraud, corruption, tax fraud and money laundering. Criminal and civil proceedings are currently pending in relation to these investigations, the development of which will have a significant impact on the shaping of future legislation dealing not only with fraud related activities, but also with asset tracing and recovery mechanisms.

In this context, the Portuguese government has already approved the national anti-corruption strategy for 2020–2024, whereby several legislative amendments are envisaged, most notably, the approval of a general regime for the prevention of corruption, which is intended to convert soft law instruments, such as risk management and prevention plans, codes of conduct and ethics and whistle-blowing channels, into law, with the application of administrative offence penalties to non-compliant public and private sector entities.[33] Likewise, there is currently heated debate among legislators, judges and scholars surrounding the potential criminalisation of unlawful or unjustified enrichment in such a manner not deemed unconstitutional, as previous proposals were deemed to be.

Moreover, times of crisis generally create favourable conditions for fraud, and the covid-19 crisis has been no exception. In addition to specific covid-19 related frauds (such as those regarding vaccines and the sale of personal protective equipment), we have seen an increase in cyber frauds. Indeed, in the first semester of 2020 alone, 1,377 complaints were made in this regard, which represents an increase of 34 per cent when compared with the previous year.[34] Thus, a surge in litigation is expected in the coming years as new cases come to light.

On the other hand, in the wake of the financial crisis, the country witnessed multiple-billion euro insolvencies and bailouts, particularly in the banking and finance sector, which have drained public resources and affected many small retail investors. This has also resulted in widespread litigation, both criminal and civil, as affected parties file for damages.

Similarly, the non-performing loan (NPL) market has been very active, with banks offloading multimillion euro NPL packages from their balance sheets at sometimes hard discounts. Some of these deals are now under scrutiny and the immediate result has been a surge in criminal investigations against some of the largest debtors of the banking sector, on suspicion of embezzlement, fraud, tax fraud and money laundering, among other criminal offences.

We expect that the current covid-19 pandemic and its economic impact will continue to result in further scrutiny and investigations into past dealings, reinforcing public awareness and debate surrounding economic criminality.

33 Resolution of the Council of Ministers No. 37/2021, of 6 April 2021.

34 According to the website Portal da Queixa: https://portaldaqueixa.com/news/portal-da-queixa-regista-16-casos-de-fraude-por-dia-saiba-quais-sao-as-burlas-mais-comuns.

Appendix 1

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ISBN 978-1-83862-759-1