

*The Foundation of the International Association of Defense Counsel*  
**SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE**

*This document is a resource tool only. The information was compiled in 2014.  
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

# PORTUGAL

## **Responses submitted by:**

*Name: João Nuno Barrocas, Carlos Costa e Silva and João Manuel Silva Pereira*

*Law Firm/Company: Barrocas & Associados – Sociedade de Advogados, R.L.*

*Location: Lisbon, Portugal*

## **1. Would your jurisdiction be described as a common law or civil code jurisdiction?**

Civil Law Jurisdiction

## **2. What method of adjudication is used (adversarial, inquisitorial, other or hybrid)?**

The adjudication method is hybrid. Although it is primarily adversarial, there are a substantial number of situations where the judge has powers to take decisions which do not correspond to the initiative of the parties. The recent reform of the Civil Procedure Code has strengthened the judge's inquisitorial powers.

## **3. What are the qualifications of the adjudicator (judge – elected, appointed; jury; other)?**

Judges in Portugal are appointed by the Supreme Judicial Council (*Conselho Superior da Magistratura*), which is also responsible for the assignment, transfer and promotion of these judges and the exercise of discipline over them as stipulated by law.

Access to the profession is open to Portuguese citizens with full political and civil rights who have graduated in Law in a Portuguese university – or possess an academic qualification deemed equivalent under national law – for at least two years at the start of the competitive admission procedure, who have successfully attended training courses and attachments and who meet the other legal requirements for appointment as public officials.

## **4. Are there any procedures available for specialized courts (i.e. commercial court, employment, environmental)?**

The civil jurisdiction first instance/county courts are divided in accordance with two categories: general jurisdiction and specialized jurisdiction. The specialized jurisdiction courts are the following:

- criminal;
- family;
- juvenile;
- labour;
- commerce;
- maritime; and

*The Foundation of the International Association of Defense Counsel*  
**SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE**

*This document is a resource tool only. The information was compiled in 2014.  
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

## **PORTUGAL**

- enforcement of sanctions;

They hear specific matters, which are typically ones that would fall within the normal definition of those terms. However, the jurisdiction of the courts of commerce is more limited than what may be expected. In fact, commerce courts have only jurisdiction for very specific issues, like insolvency, cases about the validity of corporate resolutions and a few other specific matters. The majority of the commercial activities (namely, commercial contracts) fall within the general jurisdiction of civil courts.

### **5. Is arbitration an option and when? If so, what rules are typically used?**

Yes. For enforcement purposes, arbitration decisions are considered to be equal to those taken by normal courts and are enforceable by them. Unless the parties have renounced their right of appeal or have authorized the arbitrator to reach an impartial and fair judgment, an appeal can be made against arbitration decisions to the Court of Appeal. The present Portuguese arbitration law is very recent, modern (passed on 2011) and essentially follows the UNCITRAL model.

### **6. Will the Courts enforce an arbitration agreement to preclude other forms of litigation?**

If courts find that a valid arbitration clause has been entered into, it shall deny jurisdiction on the matter.

### **7. For Court proceedings, is mediation mandatory, either before or after filing of a claim or complaint?**

No. Mediation is optional.

### **8. What is the process for pre-hearing fact discovery (if any)?**

Whilst with a very specific purpose and scope, the Civil Procedure Code foresees that a preliminary hearing takes place after all the written submissions are exchanged. This hearing's main goal is to define the so-called "themes of evidence" (Temas da Prova), *i.e.* the facts that are going to be submitted to trial and that require evidence to be produced. And no discovery is carried out in that meeting or in any part of the procedures.

As understood in Common Law systems, discovery is not available in Portugal.

A party may request the Court to order the other party or any other person/entity to present a certain document. The party will have to identify the document to the extent possible and explain in which manner it may be relevant to the file. The Court may refuse the request if the documents requested are considered not to be relevant to prove the fact the party requesting them wants to prove.

A judge order to submit other documents must be respected, otherwise the defaulting party may suffer financial penalties and/or the judge may evaluate such default negatively when deciding on the facts. The court may also order any measures it deems appropriate in order to obtain the document.

In principle, however, everyone (either a party or not to a case) has the duty to cooperate with the Court, so that the truth

*The Foundation of the International Association of Defense Counsel*  
**SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE**

*This document is a resource tool only. The information was compiled in 2014.  
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

## **PORTUGAL**

is discovered. There are exceptions to that rule, particularly when professional privilege or secrecy may be invoked.

*(a) Are there provisions for mandatory document disclosures?*

No. The parties are not obliged to disclose any documents. However, the parties must submit with their statements all the documentary evidence they rely in. A party is also entitled to ask the court to order the other party to submit other documents. A judge's order to submit other documents must be respected, otherwise the defaulting party may suffer financial penalties and/or the judge may evaluate such default negatively when deciding on the facts.

*(b) Is there provision for oral examinations of the parties or others?*

There is no pre hearing oral discovery.

*(c) Are there limits on the length of oral examinations?*

N/A

*(d) Are witness statements or summaries to be provided before the hearing?*

The party's position in the case is already sustained in the written submissions. With the exception of high representatives from the government and other high officials, written statements are not admitted, unless there is a grave difficulty (particularly in case of disease) in obtaining the witness's statement in Court.

### **9. What is the process for pre-hearing expert disclosure (if any)?**

Expertises may only be conducted by experts appointed by the court at its initiative or at the request of any party. The parties or the judge may request or order an expertise. When ordered by the court, normally there will be only one expert. However, the parties may request an expertise to be carried out by 3 (three) experts, in which case each party will appoint one expert and the Court a third one, unless the parties agree on the 3 (three) experts.

The experts will prepare a joint report where they will answer the queries raised. Those queries are limited to themes of evidence (*Temas da Prova*). Later on – normally during the trial hearing – they can be summoned to court in order to provide explanations on the report.

Any evidence given by a person or entity with a certain degree of expertise but who is not appointed in the terms referred above will be deemed as documentary or witness evidence. In case of “expert witnesses”, there is no pre-hearing disclosure procedure.

*(a) Are expert reports or written summaries required to be exchanged?*

Not specifically. As noted above, an “expert” report submitted by a party is deemed as documentary evidence and, as such, it is always notified to the counter-party.

*The Foundation of the International Association of Defense Counsel*  
**SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE**

*This document is a resource tool only. The information was compiled in 2014.  
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

## **PORTUGAL**

(b) *Are the parties entitled to conduct a pre-hearing oral examination of opposing experts?*

No.

(c) *Are there provisions requiring experts to meet and narrow issues before the hearing?*

No. See above.

**10. Are there other notable discovery rules?**

No.

**11. Is there a prehearing conference (for trial management, settlement or other purposes)? Who conducts it? How long before the hearing?**

Yes. It is called “Audiência Prévia”, it is conducted by the judge and usually it takes place several months before the hearing.

**12. Can a prehearing motion for judgment be brought? If so, what is the threshold test for judgment?**

No. Such mechanism is very non-typical of systems such as the Portuguese one. If one party maintains that a case is “straight-forward”, such must be alleged in the initial statements. If the judge agrees with such party, he/she can produce a summary judgment.

**13. Is there a process for obtaining pre-hearing rulings with respect to evidence admissibility including admissibility of expert testimony? What is the process and when does it occur?**

Any evidence requested by a party must be admitted by the judge. Normally, such judgment on the admissibility happens at a pre-hearing conference called “Audiência Prévia”. However, if the request for evidence is made at a later stage, the judge will decide at that moment or later, but not after the start of the final hearing.

**14. What is the standard for admissibility of expert evidence?**

The parties or the judge may request or order an expertise. When ordered by the court, normally there will be only one expert. However, the parties may request an expertise to be carried out by 3 (three) experts, in which case each party will appoint one expert and the Court a third one, unless the parties agree on the 3 (three) experts.

The experts will prepare a joint report where they will answer the queries raised. Those queries are limited to themes of

*The Foundation of the International Association of Defense Counsel*  
**SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE**

*This document is a resource tool only. The information was compiled in 2014.  
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

## **PORTUGAL**

evidence (*Temas da Prova*). Later on – normally during the trial hearing – they can be summoned to court in order to provide explanations on the report.

**15. Does the Court have the power to appoint its own experts? Under what circumstances and what type?**

See answer to 14 above.

**16. Does your jurisdiction protect privilege? If so, what privileges are protected from disclosure (attorney client / legal advice; documents prepared in anticipation of litigation; settlement discussions; other)?**

Yes. Professional privilege or secrecy applies, particularly, to lawyers, priests, journalists, doctors or members of credit institutions.

**17. If privilege is not protected, are there other protections from disclosure (i.e. privacy) that could prevent disclosure of otherwise privileged information, and what is the basis for those protections?**

N/A

**18. Who determines privilege disputes, or disputes with respect to other forms of protection described in 17 above?**

N/A

**19. Briefly describe the trial process?**

(a) *Are there opening submissions, in what form and of what length?*

No. There are a few numbers of very exceptional proceedings, normally confined to only written statements where a limited right to respond to pending issues might be given to a party at the beginning of the hearing.

(b) *What is the order of presentation of witnesses?*

The first ones to be heard are the ones presented by the Claimant and then the ones presented by the Defendant.

*The Foundation of the International Association of Defense Counsel*  
**SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE**

*This document is a resource tool only. The information was compiled in 2014.  
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

## **PORTUGAL**

(c) *Who conducts examination and in what order?*

The parties' lawyers/barristers under the judge's supervision. The party that presents the witness shall indicate the facts to which the witness will answer and shall be first to pose questions. The judge is also allowed to ask questions. At the end of the testimony, the other party's lawyer shall be entitled to put any questions to the witness, provided that they are in connection with the answers previously given.

(d) *What is the process for closing submissions?*

After the evidence has been taken, the facts of the matter are debated. In these debates the lawyers/barristers seek to establish the facts which should be considered as proven by the Court and those which, in their opinion, have not been demonstrated. The first lawyer/barrister to do so is the one representing the Claimant and the Defendant's will have the right to do so afterwards.

### **20. Please identify any other notable trial procedures.**

A person (either a company or an individual) who is a party in a lawsuit is prevented from witnessing. The representatives of a company (Directors) are considered as being parties in the case and therefore are prevented from standing as witnesses. However, the parties or those who are considered as being equivalent to parties (Directors) may be called by the other party to give testimony (Depoimento de Parte). In such case, only confessions ("unfavorable facts") will be considered by the Court. The party is not, however, prevented from being presented in Court until the end of the trial hearing in order to produce enlightenments regarding facts stated by witnesses.

The new Civil Procedure Code of 2013 now allows the parties also to make statements in their favor at the end of the hearing. Such statements may influence the judge's decision but have a lower value than witnesses' testimonies.

### **21. Who bears the burden of proof of liability? Causation? Damages? What is the standard of proof for each?**

In theory, each party must prove enough elements to establish that the facts have occurred. In case of doubt, *i.e.* if the evidence given is not of full evidentiary force or if the counter-proof offered is of equivalent strength, the judge shall decide against the party who bears the burden of proof.

The obligation to indemnify only arises in relation to damages that would probably not have occurred, had the illegal conduct not taken place. According to legal doctrine, the theory of adequate causality applies. As so, causation is established if the occurrence of the damage was objectively and reasonably predictable at the time of the act or fact and taking into account the circumstances known by the person committing it.

### **22. What heads of damage are recoverable (compensatory, pre-judgment interest, punitive damages, other)?**

Damages are awarded to compensate the actual loss suffered (courts do not impose punitive damages), in order to ensure the injured party's return to the position he occupied before he was affected by a wrongful conduct (including both the

*The Foundation of the International Association of Defense Counsel*  
**SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE**

*This document is a resource tool only. The information was compiled in 2014.  
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

## **PORTUGAL**

actual loss or injury and, if applicable, loss of profits).

In principle, if the Defendant has committed an offence, interest is awarded from the moment such offence has been committed until the indemnity is paid.

**23. If punitive damages are available, what is the threshold for recovery, and range of awards?**

N/A

**24. Are there time limits for bringing claims? Responding to claims? Please describe.**

Yes. Time limits for bringing court actions vary according to the case. The general time limit for contractual claims is 20 years and for tort claims, 3 years. Please note however, that our substantive law contains a great number of exceptions fixing specific time bars for specific types of claims.

The general time-limit for a party to respond to a claim is 30 days.

**25. What are the requirements to establish jurisdiction over a foreign defendant in your court? Can a foreign defendant request that the court decline jurisdiction on the basis that there is a more convenient forum?**

Council Regulation (EC) No 44/2001 of 22 December 2000 (on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) and the Lugano Convention are applicable in Portugal to determine jurisdiction. If none are applicable, the Civil Procedure Code applies. In general, it confers on the Portuguese Courts jurisdiction for international matters when: (i) the defendant is domiciled in Portugal, unless the action relates to real estate assets situated abroad. If the defendant is a company, it is considered to have domicile in Portugal when its headquarters are in Portugal or when there is a subsidiary or representative in Portugal; or (ii) the fact(s) on which the action is based occurred in the Portuguese territory; or (iii) the right claimed cannot be effectively enforced unless the action is brought before the Portuguese courts.

A Portuguese Court will only decline jurisdiction on the basis that it is incompetent to judge the case.

**26. Are there procedures for a defendant to bring other potentially responsible parties into the proceeding? Briefly describe.**

Yes. The Defendant may bring other potentially responsible parties into the proceeding upon its first written submission, stating the facts in which he grounds their potential responsibility.

*The Foundation of the International Association of Defense Counsel*  
**SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE**

*This document is a resource tool only. The information was compiled in 2014.  
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

## **PORTUGAL**

**27. Are legal costs recoverable by either party? If so, under what circumstances, and how is the amount calculated? (i.e. is it a loser pays costs system).**

The parties bear the legal costs, but, once the sentence becomes *res judicata*, the winning party is entitled to recover them from the losing party. In relation to lawyers' fees, they are recoverable, but with a fixed amount which actually corresponds to the same amount that the party paid as court fees. If both parties had partial success, the costs are split according to the percentage of victory/defeat.

**28. Are contingency fees allowed?**

Contingency fees are not permitted. The Bar Association's Code of Conduct (*Estatuto da Ordem dos Advogados*) establishes a principle of moderation in setting fees, taking into account the amount of time involved, the complexity of the case, the importance of the advice provided and the financial means of the client. Lawyers' fees are usually charged on an hourly rate.

**29. Is third party funding of claims permitted? Under what circumstances?**

Our law does not specifically address the issue of third party funding, but it does not also exclude such possibility. Third party funding may occur, provided that third party funders obtain their client's rights using the traditional legal mechanisms (e.g. subrogation, assignment and others). Such subrogation or assignment will be valid if not forbidden by any specific rule and the normal consequences of such operation will be applied to the funder.

**30. Are class or multi-party actions allowed? Under what circumstances? For what types of claims?**

The law provides for the so-called "*acção popular*", also known as "*Acção para a Tutela de Interesses Difusos*" (Action for the Protection of Diffuse Interests). It confers on any person the right to claim the discontinuation or the prevention of infractions against, *inter alia*, public health, consumers' rights, quality of life, environment or the public domain. Such right also includes the one to obtain compensation for the damages they have suffered as a result of the violation of said interests.

However, it has not the same nature as the class actions of the Anglo-American legal systems, as it only comprises any private interests that may not be split in individual terms.

Joint actions are also possible under the Civil Procedure Code, particularly when participation of all parties is necessary to preserve the usefulness of the decision or when different claims have the same grounds or are interconnected.



*The Foundation of the International Association of Defense Counsel*  
**SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE**

*This document is a resource tool only. The information was compiled in 2014.  
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

## **PORTUGAL**

**31. Can claims be commenced by a consumers association or other representative organization? Under what circumstances?**

Yes. Please see answer to **30** above.

**32. On average, how long does it take to get to trial/final hearing, and what factors can affect that?**

It is not possible to establish an average period for that particular phase of proceedings. According to official statistics, the average duration of a case in a Civil County Court in Portugal is 16 months. However, this figure comprises all kinds of lawsuits in civil law regardless of the way they were sentenced or settled.

**33. Is an appeal process available (distinguish between final and interlocutory/procedural orders as needed)? Who hears the appeal? How are they appointed? What are their qualifications?**

Yes. After a judgment is given, there are two degrees of appeal to higher courts, called *Tribunal da Relação* (Court of Appeals) and *Supremo Tribunal de Justiça* (Supreme Court). If the value of the claim is lower than 30.000,00 Euros, in principle there shall be only one grade of appeal to the *Tribunal da Relação* (Court of Appeals). If the claim is lower than 5.000,00 Euros, in principle no appeal will be admissible.

Interlocutory/procedural orders are also appealable under specific circumstances.

**34. Are hearing rooms available for electronic trials or appeals (i.e. where documents and transcripts are presented on computer monitors; witnesses can testify by video conference)?**

Whilst the law does not provide for the presentation of documents or transcripts in computer monitors (as all documents must be physically filed in court and/or sent electronically to be printed by the Court Clerks), witnesses that live elsewhere (but within the Portuguese territory) can be heard through video-conference. Additionally, witnesses living abroad may testify in a Portuguese Consulate through video-conference.

**35. What is the practice regarding the use of graphics, computer animation, power point and the like, in trials? In appeals?**

The law allows it but they are very rarely used.

*The Foundation of the International Association of Defense Counsel*  
**SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE**

*This document is a resource tool only. The information was compiled in 2014.  
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

## **PORTUGAL**

**36. Will the lawyer at trial be the same as the one responsible for pre-trial procedures? Is there a solicitor / barrister distinction?**

There is no solicitor/barrister distinction in Portugal. As so, usually the lawyer at trial will be the same as the one responsible for pre-trial procedures.

**37. What are the contributory negligence laws in your jurisdiction? Is there a comparative fault assessment, joint and several or proportionate liability among tortfeasors? Does a plaintiff's negligence reduce or eliminate liability of defendants named in the litigation?**

Our law defines negligence as the breach of duties of care *vis-a-vis* what would be a normal behavior of the so-called *bonus pater familiae*. Our law foresees that the plaintiff's negligence may reduce or eliminate the defendant's liability.

**38. Is service of a complaint issued outside your country permitted in your country by "informal" means, or must the Hague Convention be followed?**

The Hague Convention must be followed. Additionally, Council Regulation (EC) No. 1393/2007 of 13 November (on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters) is also applicable.

**39. Do your laws prohibit export of relevant documents from your jurisdiction for the purposes of litigation outside your jurisdiction? (Consider privacy rules)**

No. Unless, of course, the documents are deemed classified for State reasons.

**40. Please point out any litigation Best Practices employed by Courts in your jurisdiction but not yet referenced in the survey.**

N/A

**41. Are there any significant areas in which you believe the playing field between plaintiff and defendant is not level that you think need to be addressed?**

No.

*The Foundation of the International Association of Defense Counsel*  
**SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE**

---

*This document is a resource tool only. The information was compiled in 2014.  
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

## **PORTUGAL**

**42. Are there legislative efforts under way that address any of the litigation practices in your country?**

Not presently. In the past decade, Portugal has carried substantial efforts to improve litigation practices. Legal reforms were conducted practically in all civil litigation sectors, such as the core of court procedure rules, appeals and enforcement.