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Which country's law applies?

Portugal

1 Sources of the rules in force

The following sources of domestic law are provided for in Articles 1, 3 and 4 of the Portuguese Civil Code:

Laws

Usage

Equity

As for the **sources of international law**, Article 8 of the Portuguese Constitution provides as follows:

The rules and principles of general or common international law form an integral part of Portuguese law.

The rules set out in duly ratified or approved international conventions come into force in domestic law following their official publication and remain so whilst they are internationally binding on the Portuguese State.

The rules established by the competent bodies of the international organisations to which Portugal is party are in force directly in domestic law, provided that such is established in the respective founding treaties.

The provisions of the treaties which govern the European Union and the rules established by its institutions, whilst performing their respective duties, are applicable to domestic law, pursuant to the provisions laid down by the law of the Union, respecting the fundamental principles of a democratic State based on the rule of law.

1.1 National rules

Laws

Laws are an immediate source of domestic law. Article 1(2) of the Portuguese Civil Code deems all general provisions established by competent bodies of the State as laws. Article 112 of the Portuguese Constitution states that laws, decree-laws and regional legislative decrees are legislative acts.

Usage

Usage is legally justifiable as a source of domestic law when both of the following conditions are observed:

it is not contrary to the principles of good faith, and

this is established by law.

Equity

Portuguese courts may settle a dispute in accordance with the principle of equity only under one of the following circumstances:

when the law allows it, or

when the parties agree and the legal relationship is available to them, or

when the parties agreed to equitable remedy in advance.

1.2 Multilateral international conventions

Name and Capacity

Convention Relating to the Deprivation of Civil Rights and Similar Measures of Protection (The Hague, 1905)

Convention on the Law Applicable to Surnames and Forenames (Munich, 1980)

Duties

The Hague Convention on the Law Applicable to Agency (The Hague, 1978)

Debt Securities

Convention for the Settlement of Certain Conflicts of Laws in Connection with Bills of Exchange and Promissory Notes and Protocol (Geneva, 1930)

Convention for the Settlement of Certain Conflicts of Laws in Connection with Cheques and Protocol (Geneva, 1931)

Family, Minors and Maintenance

Convention for the Settlement of the Conflicts of Laws Concerning Marriage (The Hague, 1902)

Convention for the Settlement of the Conflicts of Laws and Jurisdiction Concerning Divorce and Separation (The Hague, 1902)

Convention Relating to Guardianship of Minors (The Hague, 1902)

Convention Relating to the Conflicts of Law with Regard to the Effects of Marriage on the Rights and Duties of the Spouses in their Personal Relationships and with Regard to their Estate (The Hague, 1905)

Convention on the Law Applicable to Maintenance Obligations towards Children (The Hague, 1956)

Convention Concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Minors (The Hague, 1961)

Convention on the Law Applicable to Maintenance Obligations (The Hague, 1973)

Protocol on the Law Applicable to Maintenance Obligations (The Hague, 2007)

Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (The Hague, 1996)

Succession

Convention Concerning the International Administration of the Estates of Deceased Persons (The Hague, 1973)

Civil Procedure

Protocol on Arbitration Clauses (Geneva, 1923)

Convention on the Execution of Foreign Arbitral Awards (Geneva, 1927)

Convention on Civil Procedure (The Hague, 1954)

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

Convention on Recognition and Enforcement of Decisions Relating to Maintenance Obligations in Respect of Children (The Hague, 1958)

Convention on Recognition and Enforcement of Decisions Relating to Maintenance Obligations (The Hague, 1973)

Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels, 1968) as well as the Protocol on its Interpretation by the Court of Justice

The Lugano II Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Council Decision 2009/430/EC of 27/11/2008)

Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (The Hague, 1970)

Transport

Convention Concerning International Carriage by Rail 1980, as amended by the Protocol of 1999

1.3 Principal bilateral conventions

The Rights of Foreigners

The Brasilia Convention on Equality of Rights and Duties between Brazilians and Portuguese Nationals, signed in Brasilia (1971)

Special Agreement between Portugal and Cape Verde Governing the Status of Persons and their Property Regime, concluded in Praia (1976)

Special Agreement between Portugal and Guinea-Bissau to Regulate the Status of Persons and their Property Regime, concluded in Lisbon (1976)

General Agreement on Migration between the Portuguese Republic and the Republic of Guinea-Bissau, signed in Bissau (1979)

Judicial and legal cooperation

Agreement on Legal and Judicial Cooperation between the Portuguese Republic and the Republic of Angola, signed in Luanda (1995)

Convention on Judicial Cooperation Concerning the Protection of Minors between the Government of the Portuguese Republic and the Government of the French Republic, signed in Lisbon (1983)

Agreement on Legal Cooperation between the Portuguese Republic and the Republic of Guinea-Bissau, concluded in Bissau (1988)

Agreement on Legal and Judicial Cooperation between the Portuguese Republic and the People's Republic of Mozambique, signed in Lisbon (1990)

Agreement between the Government of the Portuguese Republic and the Government of the United States of America for the Recovery of Maintenance (2000)

2 Implementation of conflict of law rules

When a conflict-of-law rule refers to a foreign law, this only implies the application of domestic law in that State; it does not mean that the Courts of that State have jurisdiction. The only exception to this is if it runs counter to some precept.

The application of foreign law is limited to the rules of the foreign judicial system which are a part of the regime governing the area of law covered by the conflict-of-law rule (e.g. successions, family, obligations, rights in rem).

2.1 Obligation of the judge to apply conflict of law rules on his own initiative

In Portugal, the Court is not subject to claims of the parties with regard to inquiry, interpretation and application of the rules of law. From this general principle it follows that the national Court applies the conflict-of-law rules on its own initiative.

2.2 Renvoi

In Portugal, there are three key rules when it comes to *renvoi*:

A rule which provides for *renvoi* to the law of another State

A rule which provides for *renvoi* to Portuguese law

A rule which provides for cases in which *renvoi* is not permitted.

Renvoi to the law of another State

In Portugal, the Court may resort to the law of another State.

Renvoi to the law of another State may be made when the Portuguese conflict-of-law rule refers to the law of another State which in turn has a conflict-of-law rule that refers to another body of legislation and Portugal accepts that the latter be applied.

Renvoi ends if:

the foreign law referred to by the Portuguese conflict-of-law rule is personal law **and**

the interested party has their habitual residence in Portugal, or

resides in a country whose conflict-of-law rules deem that the laws of the State of their nationality are applicable.

However, there is always *renvoi* should both of the following conditions be met cumulatively:

the cases involve guardianship, curatorship, property relations between spouses, paternal responsibility, relations between the adopter and the adopted or successions upon death, and

the foreign law specified by the Portuguese conflict-of-law rule refers to the law of the place in which the immovable property is situated and it is deemed competent.

Renvoi to Portuguese law

There is *renvoi* to Portuguese law when the Portuguese conflict-of-law rule refers to the law of another State which in turn has a conflict-of-law rule that refers back again to Portuguese law. In this case, Portuguese law will apply.

However, in matters relating to **personal status**, *renvoi* to Portuguese law is permitted only if the following additional requirement is met:

the interested party has their habitual residence in Portuguese territory, or

the law of the interested party's country of residence deems Portuguese law competent.

Cases in which *renvoi* is not permitted

None of the aforementioned types of *renvoi* are permitted in the following cases:

when the interested parties have specified the applicable foreign law, in cases where this is allowed

when *renvoi* renders invalid or unenforceable a transaction which would be valid if the Portuguese conflict-of-law rule were simply applied (with no *renvoi*)

when *renvoi* results in the illegitimacy of a state which would otherwise be legitimate.

2.3 Change of connecting factor

The connecting factor is a factual or legal circumstance, chosen by the conflict-of-law rule, which serves as a basis for specifying the applicable law.

Depending on the case, it may be, for example, nationality or the place where a transaction took place, where an intellectual work was created, where an entitlement was registered, where assets are located or where the interested party resides.

The Portuguese judicial system places at least two limitations on changes of connecting factor:

Fraudulent evasion of the law – a change of connecting factor arising from a situation of fact or of law created by the interested parties to avoid the application of a law which would otherwise be applicable is deemed irrelevant.

Age of majority reached according to the preceding personal law is not affected by a change in personal law.

If it is impossible to determine the connecting factor on which specification of the applicable law depends, the law otherwise applicable is used.

2.4 Exceptions to the normal application of conflict rules

Violation of public policy

The provisions of foreign law specified by the conflict-of-law rule do not apply if they violate the fundamental principles of the Portuguese State's international public policy. In this case, other provisions of foreign law which are deemed more appropriate or, in the alternative, the rules of Portuguese domestic law apply.

International Conventions and EU legislation

Where international conventions **that are** binding on the Portuguese State or EU legislation provide for rules on applicable law that differ from those provided for in national conflict-of-law rules, those national rules do not apply.

2.5 Proof of foreign law

Whoever invokes foreign law has the burden of proving its existence and content. However, the Court must seek on its own initiative to acquire knowledge of the foreign law. The foreign law is interpreted within the system to which it belongs and in accordance with the rules of interpretation established therein.

In order to obtain information on the foreign law on civil and commercial matters, reference may be made to the two conventions Portugal is a party to:

The European Convention on Information of Foreign Law (London, 1968)

The Convention on Information on Legal Matters with Respect to the Law in Force and its Application (Brasilia, 1972)

Should it not be possible to ascertain the content of the foreign law, the law that is otherwise applicable is used.

3 Conflict of law rules

3.1 Contractual obligations and legal acts

Regime provided for in EU legislation

In the Member States of the European Union (except Denmark), the law applicable to contractual obligations is determined according to Regulation (EC) No 593/2008 of 17 June 2008 (Rome I), which overrides the national conflict-of-law rules indicated below insofar as they provide differently.

Denmark is the only EU Member State to which Regulation (EC) No 593/2008 of 17 June 2008 does not apply. It continues to be covered by the Rome Convention of 1980 on the law applicable to contractual obligations. In Denmark, the law applicable to contractual obligations is determined according to the Rome Convention of 1980, which overrides the national conflict-of-law rules indicated below, insofar as they provide differently.

Regime provided for in the national conflict-of-law rules

Matters relating to the confirmation, interpretation and completion of a declaration of intent and to lack of will or defects of will are governed: by the law applicable to the substance of the transaction.

The value of a behaviour as a declaration of intent and the value of silence as a means of declaration are governed:

by the law of the common habitual residence of the declarant and of the recipient of the declaration, or, failing that, respectively:

by the law of the place where the behaviour took place or where the proposal was received.

The form of the declaration of intent is governed:

by the law applicable to the substance of the transaction, or

by the law in force in the place where the declaration is made, or

by the law of the State referred to by the conflict-of-law rule in force in the place where the declaration is made.

NB:

Alternatives 2) and 3) are admissible only if the law governing the substance of the transaction does not provide for the declaration to be null or unenforceable in the event of non-compliance with a certain form even if the transaction is concluded abroad.

The law applicable to legal representation is:

the law governing the legal relationship from which the representative power arises.

The law applicable to representation of legal persons by their statutory bodies is:

the relevant personal law.

Voluntary representation is governed as follows:

The law of the State where the representative powers are exercised governs the existence, extension, amendment, effects and extinction of the representative powers.

The personal law of the represented person applies if the representative exercises its powers in a country other than the one indicated by the represented person and if such is known by the third party with whom it enters into a contract.

The law of the place of the representative's registered office applies if the said representative exercises the representation professionally and such is known by the contracting third party.

The law of the place where the immovable property is situated applies when the representation relates to the disposition or administration of that property.

Limitation periods and forfeiture are governed:

by the law applicable to the right to which one or the other relates.

The obligations arising from legal transactions and the substance of the transaction are governed:

I. by the law which the contracting parties chose or had in mind, provided that one of the following conditions is met:

its applicability corresponds to a serious interest of the declarants, or

it is connected with one of the aspects of the transaction which fall under the scope of private international law.

II. Should the parties not determine the law, the applicable law is as follows:

the law of the habitual residence of the declarant, in the case of a unilateral transaction;

the law of the common habitual residence of the parties, in the case of a contract.

III. In the case of a contract in which the parties have not determined the law and they do not have a common habitual residence, a distinction must be made between two situations:

gratuitous contracts, for which the applicable law is the law of the habitual residence of the contracting party who granted the benefit;

onerous contracts, for which the applicable law is the law of the place where they were concluded.

The law applicable to the management of business is:

the law of the place where the manager's main activity takes place.

The law applicable to unjust enrichment is:

the law on which the transfer of assets in favour of the enriched party was based.

3.2 Non-contractual obligations

Regime provided for in EU legislation

In the Member States of the European Union (except Denmark), the law applicable to noncontractual obligations is determined according to Regulation (EC) No 864/2007 of 11 July 2007, which overrides the national conflict-of-law rules indicated below insofar as they provide differently.

Regime provided for in the national conflict-of-law rules

I. The law applicable to extra-contractual liability based on a wrongful act or on risk is as follows:

- a) the law of the State where the main harmful activity took place, or
- b) in the case of an omission, the law of the place where the person responsible should have acted.

II. If the perpetrator is not deemed responsible under the law where the harmful activity occurred or, in the case of an omission, the law of the place where the person should have acted, the applicable law is the law of the State where the harmful effect occurred, provided that two requirements are met cumulatively:

- a) the law of the State where the harmful effect produced its effect deems the perpetrator responsible, and
- b) the perpetrator should have foreseen the damage caused in that State as a consequence of their action or omission.

III. The aforementioned rules in I and II do not apply under the following circumstances:

- a) if the perpetrator and the injured party have the same nationality or the same habitual residence and are occasionally abroad, the applicable law is that of their nationality or of their common habitual residence, as appropriate;
- b) this is the case without prejudice to the provisions of the Local State which must apply to all persons equally.

3.3 The personal status, its aspects relating to the civil status (name, domicile, capacity)

The concept of personal law

Individuals:

The personal law is that of the individual's nationality.

In the case of stateless persons, the personal law of the stateless person is that of the place where they reside. However, should the stateless person be a minor or deprived person, the personal law is that of their legal domicile.

Legal persons:

The personal law of legal persons is that of the State where its main registered office and real seat of administration is situated.

The personal law of individuals governs:

marital status;

capacity;

the beginning and the end of personality;

the rights of personality - existence, protection and restrictions (with the proviso that the foreigner or stateless person enjoys no legal protection whatsoever that is not recognised under Portuguese law);

age of majority (with the proviso that a change of personal law does not affect the majority reached under the previous personal law);

guardianship and similar institutions aimed at protecting incapable persons.

The personal law of legal persons governs:

the capacity of the legal person;

incorporation, operation and competence of its bodies;

ways of acquiring and losing membership and the rights and duties pertaining thereto;

third party liability of the legal person, its respective bodies and members;

transformation, dissolution and termination of the legal person.

Transfer and merger of legal persons:

The transfer from one State to another of the registered office of a legal person does not extinguish its personality if the laws of both registered offices agree on this.

the merger of legal persons coming under different personal laws is assessed under both laws.

International legal persons:

The personal law is determined in the convention that created them or in the articles of association.

If this is not the case, the applicable law is the law of the country where the main registered office is located.

3.4 Establishment of parent-child relationship, including adoption

3.4.1 Establishment of parent-child relationship

The law applicable to the establishment of a parent-child relationship is as follows:

The personal law of the parent at the time the relationship was established.

The common national law of both parents or, failing this, the law of the common habitual residence of the spouses or, failing this, the personal law of the child, if it is the child of a married woman and the establishment of the parent-child relationship relates to the father.

The relationships between parents and children are governed:

by the common national law of the parents or, failing this,

by the law of the common habitual residence of the parents or, should the parents reside in different States,

by the personal law of the child.

3.4.2 Adoption

The law applicable to adoption, the relationships between the adopter and the adopted, and the relationships between the adopted and their biological family is as follows:

the personal law of the adopter, or

if the adopters are married or if the adopted is the child of one of them, the common national law of the adopters or, failing this,

the law of the common habitual residence of the adopters or, failing this,

the law of the country with which the family life of the adopters is most closely connected.

Situations under which adoption is not permitted:

Adoption is not permitted if the competent law which governs the relationships between the adopted and their biological parents does not recognise or does not allow adoption in those circumstances.

Situations under which consent is required for adoption or assuming a parent-child relationship:

When the personal law of the adopted requires their consent.

When the law which governs the relationship between the interested party and a third party with whom they have a legal family or guardian relationship, requires consent from the third party.

3.5 Marriage, unmarried/cohabiting couples, partnerships, divorce, judicial separation, maintenance obligations

3.5.1 Marriage

The personal law of each of the betrothed applies:

to their capacity to wed;
to their capacity to sign a prenuptial agreement;
to the rules concerning absence of consent or vitiated consent of the contracting parties.

The law applicable to the forms of marriage is as follows:

The law of the State in which the marriage is celebrated;

The national law of either of the spouses if they are both foreigners who wed in Portugal before the respective consular or diplomatic officials, and if that law affords equal competence to Portuguese consular and diplomatic officials;

The diplomatic or consular officials of the Portuguese State or Catholic ministers may officiate the marriage of two Portuguese nationals or of one Portuguese national and a foreigner abroad;

In either of the situations mentioned in the last indent, the marriage must be preceded by publication of notices organised by the competent body, unless this has been waived;

A canonical marriage, officiated abroad, of two Portuguese nationals or of one Portuguese national and a foreigner, is deemed a Catholic marriage and is transcribed in Portugal based on the parish records, regardless of the legal form of the marriage.

The law applicable to the relationships between spouses and to changes to the matrimonial property regime is as follows:

the common national law or, failing this,

the law of the common habitual residence or, failing this,

the law of the country with which the family life is most closely connected.

3.5.2 Unmarried/Cohabiting couples and partnerships

There are no national conflict-of-law rules that specifically provide for unmarried/cohabiting couples and partnerships.

Under domestic law, cohabitation is governed by Law No 7/2001 of 11 May 2001 (last amended by Law No 23/2010 of 30 August 2010).

Portuguese law defines cohabitation as the legal situation of a couple who, regardless of their gender, have been living together as if they were married for more than two years.

In the absence of conflict-of-law rules specifically providing for cohabitation, the conflict-of-law rules relating to the relationships between spouses and to changes to the matrimonial property regime may be applied by analogy. However, this interpretation is subject to fluctuations in national case-law.

3.5.3 Divorce and judicial separation

Regime provided for in EU legislation

In fifteen Member States of the European Union (Austria, Belgium, Bulgaria, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain), the law applicable to divorce and judicial separation is determined by Council Regulation (EU) No 1259/2010 of 20 December 2010, which overrides the national conflict-of-law rules indicated below, insofar as they provide differently:

Regime provided for in the national conflict-of-law rules

The law applicable to divorce and judicial separation of persons and assets is:

the common national law or, failing this,

the law of the common habitual residence or, failing this,

the law of the country with which the family life is most closely connected.

Change in the law applicable to constancy of marriage:

In this case, only a fact that was relevant at the time it was established can be used as a basis for divorce or separation.

3.5.4 Maintenance obligations

Regime provided for in the Hague Protocol of 2007

In the Member States of the European Union (with the exception of Denmark and the United Kingdom), the law applicable to maintenance obligations arising from family relationships, parent-child relationships, marriage or affinity, including maintenance obligations owed to children whose parents are not married, is determined in accordance with the Hague Protocol on the law applicable to maintenance obligations of 23 November 2007, which overrides the national conflict-of-law rules indicated below, insofar as they provide differently.

Regime provided for in the national conflict rules

The applicable law, as appropriate, is the law indicated above:

under the heading "*Establishment of parent-child relationship, including adoption*" insofar as it concerns the *relationships between parents and children*, and the *relationships between adopters and the adopted*;

under the heading "*Marriage, unmarried/cohabiting couples, partnerships, divorce, judicial separation and maintenance obligations*" insofar as it concerns the *relationships between spouses*.

In cases where maintenance is owed based on other family relationships:

The applicable law is the personal law of the respective parties.

In cases where maintenance is owed based on legal transactions:

The applicable law is the law indicated above under the heading "*Contractual obligations and legal acts*", in particular the reference to *the obligations arising from legal transactions and the substance of the transaction*.

In cases where maintenance is owed based on a succession or testamentary disposition:

The applicable law is the law indicated below under the heading "*Wills and successions*".

3.6 Matrimonial property regimes

The law applicable to prenuptial agreements (substance and effects) and to the matrimonial property regime (statutory or laid down by agreement) is as follows:

the national law of the couple at the time they wed or, if they do not have the same nationality,

the law of the common habitual residence of the couple at the time they wed, or, failing this,

the law of the first matrimonial residence or,

any of the previous regimes, if a foreign law is applicable, one of the betrothed habitually resides in Portugal and such is agreed to without prejudice to third party rights prior to the agreement.

As regards changes to the matrimonial property regime, see the reference to *the relationships between spouses and changes to the matrimonial property regime* in point 3.5.1 above – "*Marriage*".

3.7 Wills and successions

Regime provided for in EU legislation

In the Member States of the European Union (with the exception of Denmark, Ireland and the United Kingdom), the law applicable to successions is determined according to Regulation (EU) No 650/2012 of 4 July 2012, which overrides the national conflict-of-law rules indicated below, insofar as they provide differently.

Regime provided for in the national conflict-of-law rules

The personal law of the testator at the time of death applies:

to succession upon death

to the powers of the administrator of the inheritance and of the executor of the will.

The law of the testator at the time of the declaration applies:

to the capacity to carry out, change or revoke a disposition upon death;

to the special form required by virtue of the age of the person carrying out the disposition;

to the interpretation of the clauses and provisions upon death unless reference is made to another law;

to the absence of consent and vitiated consent;

to the admissibility of joint wills;

to the admissibility of agreements as to succession without prejudice to the regime indicated above under the heading "*Matrimonial property regimes*".

NB:

In the event of a change of personal law after disposition of property upon death has been carried out, the person carrying out the disposition may still revoke said disposition pursuant to the preceding personal law.

Regarding the form of the dispositions of property upon death, and revocation of or change to the disposition, the following may be applied as an alternative:

the law where the act was carried out; or

the personal law of the deceased at the time of the declaration; or

the personal law of the deceased at the time of death; or

the law to which the local conflict-of-law rule refers.

Limitations to this regime:

Compliance with the form required by the personal law of the deceased at the time of the declaration must be respected if non-compliance results in the invalidity or unenforceability of the declaration, even if it is made abroad.

3.8 Real property

The law applicable to possession, ownership and other rights in rem is:

the law of the State in whose territory the property is situated.

The law applicable to the establishment and transfer of rights in rem over property in transit is:

the law of the country of destination.

The law applicable to the establishment and transfer of rights in rem over means of transport subject to registration is:

the law of the country where registration was carried out.

The law applicable to the capacity to establish rights in rem over immovable property or to dispose of it is:

the law of the place where the property is situated, provided that said law so determines or, if it does not,

the respective personal law.

The law applicable to copyright is:

the law of the place where the work was first published or, if it has not been published,

the personal law of the author, without prejudice to the provisions in special legislation.

The law applicable to industrial property is:

the law of the country in which it was created.

3.9 Insolvency

There are no national conflict-of-law rules that specifically provide for the law applicable to insolvency.

In the Member States of the European Union, the law applicable to insolvency is determined in accordance with Council Regulation (EC) No 1346/2000 of 29 May 2000.

Final Note

The information contained in this factsheet is of a general nature, is not exhaustive and does not bind the Contact Point, nor the European Judicial Network in Civil and Commercial Matters, nor the Courts or any other recipients. Applicable legislation must always be consulted.

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