Securing assets during a claim in EU countries

Portugal

1 What are the different types of measures?

Interim and precautionary measures are intended for the protection of certain legal situations, and may include: (a) interim measures within the scope of the legal framework for accompanied adults provided for by Law No 49/2018 of 14 August 2018; (b) provisional curatorship of an absentee's assets (Article 1021 of the Code of Civil Procedure); (c) appointment of a curator *ad litem* (Article 17 of the Code of Civil Procedure); or (d) measures necessary to protect assets comprising an estate in abeyance (Article 938 of the Code of Civil Procedure).

The purpose of interim proceedings (e.g. those provided for under Articles 362 et seq. of the Code of Civil Procedure) is to minimise the risk of a late decision and to ensure the effectiveness of the final judgment (Article 2 of the Code of Civil Procedure).

Interim proceedings seek to secure the practical outcome of the action, to avoid serious damage or to anticipate the enforcement of the right, while striking a balance, as far as possible, between the interests of speed and legal certainty.

Portuguese civil procedural law provides for two types of interim proceeding:

(a) ordinary interim proceedings (*procedimento cautelar comum*) (Articles 362 to 376 of the Code of Civil Procedure);

(b) specific interim proceedings (*procedimentos cautelares especificados*) (Articles 377 to 409 of the Code of Civil Procedure).

Examples include:

(a) provisional restitution of possession (Article 377 of the Code of Civil Procedure);

(b) suspension of company resolutions (Article 380 of the Code of Civil Procedure);

(c) provisional maintenance (Article 384 of the Code of Civil Procedure);

(d) award of provisional damages (Article 388 of the Code of the Code of Civil Procedure);

(e) seizure (Article 391 of the Code of Civil Procedure);

(f) injunction prohibiting new works (Article 397 of the Code of Civil Procedure);

(g) inventory (Article 403 of the Code of Civil Procedure).

2 What are the conditions under which such measures may be issued?

Where someone demonstrates a justified fear that another person may cause serious and irreparable harm to their rights, they can request the appropriate precautionary or anticipatory measure to secure the effectiveness of the right at risk (Article 362(1) of the Code of Civil Procedure).

Recourse to the ordinary precautionary measure, being as it is a supplementary remedy, is also dependent on a lack of a specific precautionary measure that is appropriate to the facts of the case (Article 362(3) of the Code of Civil Procedure).

Thus, the **precautionary measures not elsewhere specified** referred to in Article 362 of the Code of Civil Procedure have the following legal preconditions:

(a) the apparent existence of a right;

(b) the well-founded fear that another person may cause serious and irreparable harm to their right (*periculum in mora, or danger in delay*);

(c) the practical suitability of the precautionary or anticipatory measure to ensure the effectiveness of the right at risk;

(d) the measure to be obtained must not be covered by other precautionary procedures.

For the court to order precautionary measures, it is sufficient for it to find that there is a prima facie case that the right asserted exists and a justified fear that the time naturally taken to reach a final resolution of the dispute may cause harm that is irreparable or difficult to compensate. The judge must be sufficiently convinced that the outcome of the main case will be favourable to the applicant, as precautionary measures entail clear interference with the defendant's legal situation (Article 368(1) of the Code of Civil Procedure).

2.1 The procedure

Except for the injunction prohibiting new works, for which it is possible to take prior outofcourt action followed by an application for confirmation by the court (Article 397(2) and (3) of the Code of Civil Procedure), all other proceedings are based on an initial application to the court in which the applicant provides summary proof of the right at risk and justifies the fear of injury. In this application, the list of witnesses is submitted and other evidence requested, with a limit of five witnesses, in accordance with Article 365 of the Code of Civil Procedure.

As regards territorial jurisdiction, Article 78 of the Code of Civil Procedure states that:

(a) applications for the seizure and inventorying of assets may be filed with the court where the related action is to be brought, or in the place where the assets are located or, if there are assets in a number of districts, in one of them (Article 78(1)(a) of the Code of Civil Procedure);

(b) for an injunction prohibiting new works, the court of the place where the work is to be done has jurisdiction (Article 78(1)(b) of the Code of Civil Procedure);

(c) for the other interim proceedings, the court with jurisdiction is the court before which the related action is to be brought (Article 78(1)(c) of the Code of Civil Procedure).

Representation by a lawyer is mandatory where the value of the measure exceeds € 5 000.00 or where appeals are admissible, under Articles 58 and 1090 of the Code of Civil Procedure in conjunction with Article 44(1) of the Law on the Organisation of the Judicial System.

2.2 The main conditions

When assessing the criteria for ordering a precautionary measure, the court must always examine whether the fear invoked is wellfounded and how serious and difficult it will be to compensate for the potential harm. It will also assess whether the precautionary or anticipatory measure is appropriate in the specific case at issue, with a view to safeguarding the right alleged to be at risk. It must establish that there is a risk associated with any delay.

It will also examine whether the proceedings are actually or potentially dependent on an action brought or to be brought in respect of the right protected by the measure.

In this type of proceeding, it is for the court to obtain prima facie evidence (i.e. less rigorous evidence than in the main action) that there is a real likelihood that the right to be safeguarded exists and that the fear of its being harmed is sufficiently justified.

All interim proceedings are regarded as urgent, taking priority over any other nonurgent judicial work (Article 363(1) of the Code of Civil Procedure), and must be decided at first instance within two months at most or, if the defendant does not have to be summoned, within 15 days (Article 363(2) of the Code of Civil Procedure).

3 Object and nature of such measures?

3.1 What types of assets can be subject to such measures?

Rights and movable and immovable property not totally or partially excluded by law may be subject to precautionary measures.

3.2 What are the effects of such measures?

Since they are ordered by the courts, precautionary measures are binding on all public and private entities and take precedence over measures adopted by any other authority (Article 205(2) of the Constitution of the Portuguese Republic). Any person who infringes the precautionary measure ordered will incur the penalty for the offence of aggravated failure to comply with an official order (*desobediência qualificada*), notwithstanding any enforcement measures (Article 375 of the Code of Civil Procedure).

3.3 What is the validity of such measures?

Without affecting the possibility of the applicant's being relieved of the responsibility for bringing the main action, Article 373 of the Code of Civil Procedure stipulates that the interim proceedings end and any measure ordered expires:

(a) if the applicant does not bring the action on which the measure depends within 30 days of the date on which they were notified that the decision ordering the measure became final (Article 373(1)(a) of the Code of Civil Procedure);

(b) if, after the action has been brought, proceedings have been stopped for more than 30 days by the applicant's negligence (Article 373(1)(b) of the Code of Civil Procedure);

(c) if the action is dismissed by a final decision (Article 373(1)(c) of the Code of Civil Procedure);

(d) if the action is dismissed on procedural grounds and the applicant does not bring a new action in time to take advantage of the effects of the previous action (Article 373(1)(d) of the Code of Civil Procedure);

(e) if the right which the applicant seeks to safeguard has lapsed (Article 373(1)(e) of the Code of Civil Procedure).

4 Is there a possibility of appeal against the measure?

Yes. Ordinary appeals are admissible when the value of the measures exceeds the limit of the court before which the decision is appealed and the contested decision is unfavourable to the appellant by more than half of this amount (Article 629(1) of the Code of Civil Procedure). Appeals may also always be brought against decisions relating to the value of precautionary measures on the grounds that the value exceeds the limit of the court which took the contested decision (Article 629(3)(b) of the Code of Civil Procedure) and against preliminary rejections of initial applications for precautionary measures (Article 629(3)(c) of the Code of Civil Procedure).

Decisions ordering reversal of the responsibility for bringing the action are only appealable in conjunction with appeals against decisions on the requested measure; decisions to reject the reversal are final and unappealable (Article 370(1) of the Code of Civil Procedure).

No appeal may be brought before the Supreme Court of Justice (*Supremo Tribunal de Justiça*) against decisions ordering precautionary measures, including those ordering the reversal of responsibility for bringing an action, without prejudice to cases in which an appeal is always admissible (Article 370(2) of the Code of Civil Procedure).

An interim order may be challenged by:

any party to the proceedings who loses the case (Article 631(1) of the Code of Civil Procedure);

anyone who is not a party to the proceedings but suffers direct and real harm as a result thereof (Article 631(2) of the Code of Civil Procedure).

The court with jurisdiction to hear the appeal is the court of appeal in the judicial district in which the court which handed down the contested decision is located.

The time limit for lodging an appeal is 15 days from notification of the decision (Article 638(1) of the Code of Civil Procedure). If the appeal also concerns the reappraisal of recorded evidence, the time limit increases by 10 days (Article 638(7) of the Code of Civil Procedure).

An appeal brought against an order which rejects outright or does not order the measure has suspensive effect (Article 647(3)(d) of the Code of Civil Procedure). In other cases it has a purely devolutive effect.

Applicable legislation

Law No 41/2013 of 26 June 2013 – Code of Civil Procedure

Law No 62/2013 of 26 August 2013 – Law on the Organisation of the Judicial System

Related links

Further information may be obtained from the following websites:

Justice Portal

Directorate-General for Justice Policy

CITIUS Portal

Legal Document Database

Official Gazette of Portugal

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