

**COMPARATIVE STUDY OF "RESIDUAL JURISDICTION"
IN CIVIL AND COMMERCIAL DISPUTES IN THE EU
NATIONAL REPORT FOR:**

PORTUGAL

PREPARED BY:

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(A) General Structure of National Jurisdictional Rules for Cross-Border Disputes

1. Main legal Sources

Apart from the Brussels I Regulation and Brussels/Lugano Conventions, the main legal sources of the rules on jurisdiction in Portugal in civil and commercial matters are bilateral and multilateral treaties and statutes mentioned below. The main treaties on jurisdiction in civil and commercial matters are the Brussels/Lugano Conventions. However, there are other conventions that contain some jurisdictional rules.

Regarding the matters referred to in the Brussels I Regulation, these are the internal jurisdictional rules in civil and commercial matters:

- articles 61, 65, 65-A and 99 of the Portuguese Civil Procedure Code (hereinafter referred to as "PCPC"), establish the general criteria that define Portuguese jurisdiction in civil matters and other residual matters including commercial matters;
- articles 49, 497, no. 3, 1094 to 1102 of PCPC regarding the recognition and enforcement of foreign judgments;
- articles 10 and 11 of the Portuguese Labour Procedure Code (hereinafter referred to as "PLPC"), which define the criteria that determine Portuguese jurisdiction regarding employment matters;
- article 19, paragraph g), article 21, paragraph h) and article 28 of the Decree-law no. 446/85 of 25 October (revised by the Decree-law no. 220/95 of 31 August and Decree-law no. 249/99 of 7 July) regarding the regime of the General Contractual Clauses (hereinafter referred to as the "Regime of the General Contractual Clauses" or briefly as "RGCC");
- article 7 of the Law no. 35/86 of 4 September, article 20 of the Decree-law no. 349/86 of 17 October, article 30 of Decree-law no. 352/86 of 21 October, article 16 of Decree-law no. 431/86 of 30 December, article 47 of Decree-law no. 191/87 of 29 April and article 15 of Decree-law no. 203/98 of 10 September, all relate to Maritime Commercial Law.

Please see **Annex I A** and **Annex I B** related to specific internal jurisdictional rules.

2. Specific Rules (or Not) for Transnational Disputes

The main jurisdictional statute rules are specific to transnational disputes.

However, article 65 A, no. 1, b) of PCPC, that stipulates the criterion of coincidence, determines that the Portuguese courts have jurisdiction to judge a case according to Portuguese rules relating to internal territorial jurisdiction (articles 73 to 89 of PCPC).

Also article 10 of PLPC establishes the criterion of coincidence which determines that the Portuguese courts have jurisdiction to judge cases relating to employment matters, according to Portuguese rules on internal territorial jurisdiction (articles 13 to 18 of PLPC).

Therefore, there are some rules that are derived from those applied in internal disputes.

For further information, please see paragraphs 11 and 13, b) below.

3. Specific Rules (or Not) for Article 4(1) Jurisdiction

In the Portuguese Statute Law, there is not a set of rules designed to govern exclusively the jurisdiction of courts pursuant to article 4 (1) of the Brussels I Regulation. Thus, for cross-border cases the traditional rules of jurisdiction regarding transnational disputes are applied.

4. Influence of EU Law

In Portugal, the application and interpretation by the courts of the national jurisdictional rules are not mandatorily influenced by the Brussels I Regulation and/or by the case law of the European Court of Justice.

It is important to clarify that in Portugal the courts are not obliged to comply or follow the decisions of other courts in similar cases, even of the superior courts, with exception of decisions of unification of judgments rendered by the Supreme Court of Justice.

The interpretation of internal jurisdictional rules is defined by articles 8 and 9 of the Portuguese Civil Code (hereinafter referred to as "PCC"), while the interpretation of the international jurisdictional rules follows the rules of International Law (namely, article 31 of the Vienna Convention on the Law of Treaties).

Nevertheless, the criteria defined by the European Court of Justice to interpret some expressions related to linking factors, such as, "*proceedings which have as their object rights in rem in immovable property*" have been used by the Portuguese Supreme Court of Justice to interpret similar expressions existent in article 65, A, a) of PCPC (see Judgment of the Portuguese Supreme Court of Justice of 13.01.2005 – **Annex III A** and **Annex III B**).

Moreover, the Brussels I Regulation has influenced the traditional national rules of jurisdiction in a way that has effected a change in the internal jurisdictional statutes (article 65-A PCPC) regarding the jurisdiction in proceedings concerned with the enforcement of judgments, pursuant to article 22, no. 5 of the Brussels I Regulation.

Although this change was justified by the necessity to harmonize the internal rules with the Brussels I Regulation, the truth is that the current Portuguese rule concerning this matter does not coincide entirely with the one established in article 22, no. 5 of the Brussels I Regulation.

Besides that, this article of the Brussels I Regulation, in its English version¹, states that "*in proceedings concerned with the enforcement of judgments, the courts of a Member State in which the judgment has been or is to be enforced*", while the official Portuguese version² reads differently: "*in proceedings concerned with the enforcement of judgments, the courts of the EU State member of the place of execution.*" (non official translation).

Therefore, while the EC Regulation rule states, as a linking factor to determine the jurisdiction in proceedings concerning the enforcement of judgments, the place of execution, without defining the place of execution; the Portuguese rule (article 65-A, e) of PCPC) states that it is the place of the assets or goods to be seized. According to this internal rule, the Portuguese

¹ As well as the German version of the Brussels I Regulation.

² Similar to the Spanish, French and Italian versions of this EC Regulation.

courts have jurisdiction in proceedings concerning the enforcement of judgments that relate to the seizure or attachment of assets or goods in Portugal.

5. Impact of Other Sources of Law

The national jurisdictional rules must follow the constitutional law, the human rights principles and the principles of public international law.

The international treaties are applied in Portugal according to article 8 of the Portuguese Constitution.

Although the public international law does not specifically define the jurisdictional rules, it provides general guidelines that are followed for the implementation of the jurisdictional rules.

For instance, the international public law states that the jurisdictional rules must not lead to the denial of justice. It establishes immunity in relation to foreign countries of the international organizations and their diplomatic and consular agents. The international public law also determines whether the courts of one State have jurisdiction in proceedings concerned with the enforcement of judgments from another State and whether the court has a sufficient personal or territorial link to the controversial situation to have jurisdiction.

These principles are often used by the Portuguese authors to defend limits in the application of the criteria of causality and of necessity (please see below paragraph 11) on the basis of *forum non conveniens*, although the Portuguese jurisdictional rules do not include such clauses.

6. Other Specific Features

Besides what has been described in this report, there are no other specific features in Portugal with respect to the jurisdiction of our courts.

7. Reform

There are no proposed changes currently contemplated in Portugal for the rules of jurisdiction applicable in cross-border cases.

(B) Bilateral and Multilateral Conventions

8. Conventions with Third States

International Multilateral Conventions:

- Warsaw Convention for the unification of certain rules relating to International Carriage by Air of 1929³ (replaced by Montreal Convention of 1999);
- Brussels Convention for the unification of certain rules relating to the Arrest of sea-going Ships of 1952 – article 7 establishes the linking factor of jurisdiction to judge the main action, regarding maritime credits, of the courts of the State in which the attachment was made⁴;
- Geneva Convention on the Contract for the International Carriage of Goods by Road of 1956⁵;
- Brussels Convention on civil liability for oil pollution damage of 1969 – article 9;
- Brussels Convention on the establishment of an International Fund for compensation for Oil Pollution Damage of 1971 – article 7;
- Munich Convention on European Patent of 1973 – Protocol of Recognition⁶;
- Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters⁷;
- Hague Convention on the Recognition and Enforcement of Judgments relating to Maintenance Obligations of 1973⁸;

International Bilateral Conventions:

- Judicial Agreement between Portugal and the Republic of Cape Verde, signed in Lisbon in 1976 – article 8, establishes the recognition of non-criminal judgments of arbitral decisions;

³ Approved for adhesion by Decree-law no. 26706 of 20.06.1936; the adhesion was notified on 20.03.1947 (Notice of the Portuguese Official Journal no. 185 of 10.08.1948). Protocol of 1955 approved by ratification by Decree-law no. 45069 of 12.06.1963. Protocols nos. 1, 2, 3 and 4 of Montreal and Protocol of Guatemala of 1971, approved for ratification by Decree-law no. 96/81 of 24.07; deposit of the ratification instrument on 7.04.1982 (Notice no. 122/82 of 29/05).

⁴ Approved for ratification by Decree-law no. 41.0007 of 16.02.1957; deposit of the ratification instrument made by Notice published in the Portuguese Official Journal of 27.05.1957.

⁵ Approved for adhesion by Decree-law 46235 of 18.03.1965; deposit of ratification instrument on 22.09.1969 (Notice in the Portuguese Official Journal no. 129 of 3.06.1970).

⁶ Approved for ratification by Decree no. 52/91 de 30.08; deposit of ratification instrument on 14.10.1991 (Notice no. 198/91 de 21/12). Protocol of 1978 approved for adhesion by Decree no. 28/88 of 6.09, deposit of ratification of adhesion on 17.08.1989 (Notice in the Portuguese Official Journal no. 206 of 7.08.1989).

⁷ Approved for ratification, as well as the Additional Protocol, by Decree no. 13/83 of 20.02; deposit of ratification instrument on 21.06.1983 (Notice of the Portuguese Official Journal no. 167 of 22.07.1983). Although the Convention has been adopted in Portugal on 20.08.1983, the application of the rules of the convention and of the additional protocol will only commence after the conclusion of the complementary agreements referred in article 21 of the Convention and no. 3 of the additional protocol, as mentioned in the deposit of the ratification instrument.

⁸ Approved for ratification by Decree no. 338/75 of 2.07, deposit of ratification instrument on 4.12.1975 (Notice in Portuguese Official Journal of 9.05.1977); see also Notice no. 144/98 of 31.07.

- Judicial Agreement between Portugal and the Republic of São Tomé and Príncipe, signed in Lisbon in 1976 - article 8, establishes the recognition of non-criminal judgments of arbitral decisions;
- Juridical Cooperation Agreement between Portugal and the Republic of Guinea-Bissau concluded in Bissau in 1988⁹ – the recognition of arbitral and judicial decisions is regulated in articles 13 and 14 and of decisions in matters relating to maintenance in articles 15 and others;
- Juridical and Judicial Cooperation Agreement between Portugal and Mozambique signed in Lisbon in 1990; the recognition of judicial and arbitral decisions is regulated in articles 13 and 14 and of decisions in matters relating to maintenance in articles 15 and others¹⁰;
- Juridical and Judicial Cooperation Agreement between Portugal and Angola signed in Luanda in 1995; the recognition of arbitral and judicial decisions is regulated in articles 12 and 13 and of decisions in matters relating to maintenance in articles 14 and others;
- Agreement between Portugal and the United States of America for the recovery of maintenance¹¹.

Please see **Annex II A** and **Annex II B**.

9. Practical Impact of international conventions with third states

Apart from the Brussels/Lugano Conventions, no other conventions have had a significant impact on the law and practice in this area.

(C) Applicable National Rules Pursuant to Article 4 of the Brussels I Regulation

10. Structure

When the Brussels I Regulation or the Conventions (or other bilateral conventions between Portugal and other States in different areas) are not applicable, jurisdiction must be found in the national rules pursuant to PCPC (articles 65 and 65-A). In other words, the national jurisdictional rules are of subsidiary application in relation to Brussels I Regulation and international treaties.

For example, see Judgment of Porto Court of Appeal of 23.10.2003 that reversed the judgement of First Instance Court which had wrongly applied national law (article 65, paragraph b)) instead of the Brussels I Regulation. See also the judgment of Lisbon Court of Appeal of 8.11.2005, where it was expressly recognized that the Brussels I Regulation prevails over internal jurisdictional rules (**Annex III A** and **Annex III B**).

See also Judgment of Portuguese Supreme Court of 12.02.2004 and 9.12.2004 and Judgment of Porto Court of Appeal of 26.02.2004 in which the application of the international conventions already mentioned excluded the application of the Portuguese criteria rules of jurisdiction (article 65 of PCPC) (**Annex III A** and **Annex III B**).

⁹ Approved for ratification by Resolution of the Parliament no. 11/89 of 19/5; ratified by Decree of the President no. 38/89 of 16.06, adopted on 10.01.1994.

¹⁰ Approved for ratification by Resolution of the Parliament no. 7/91 of 14.02; ratified by Decree of the President no. 8/91 of the same date; entered into force on 22.02.1996.

¹¹ Approved by Decree no. 1/2001 of 20.01; entered into force on 14.03.2001 (Notice no. 30/2001 of 10.04).

Portuguese jurisdictional rules - whether defined at a national level or approved by international conventions under the constitutional terms define the relevant linking factors to determine which courts have jurisdiction over disputes. The Portuguese Law is, therefore, structured upon the determination of linking factors that relate the issue in conflict with the most connected jurisdiction to resolve the conflict in an efficient and pragmatic way: Regarding articles 65 and 65-A of PCPC, these connecting factors always lead to Portuguese courts; as to the other above mentioned conventions, similar connecting factors may lead to different jurisdictions as a result of the same general principle of proximity to the conflict and the judgement's effects upon the parties.

In the case reflected in article 4 (1) of the Brussels I Regulation, the application of national law requires the previous application of the Brussels I Regulation, even though its rules do not become applicable due to the fact that the defendant is not domiciled in a Member State. If he was domiciled in a Member State, the Brussels I Regulation would apply.

Within the context of the subject mentioned above, national rules are applicable "when the defendant is not domiciled in a Member State".

Therefore, it should be emphasised that the first criterion under paragraph (a) of article 65 no. 1 of PCPC is automatically excluded from this analysis (which refers to actions against defendants domiciled in non-EU Members States), since it gives jurisdiction to Portuguese Courts when the defendant is domiciled in Portugal. The only situation when it may be applicable is when there is more than one defendant and at least one of them is domiciled in Portugal. In this case, article 65, no. 1, paragraph a) of PCPC will be applicable to those defendants not domiciled in Portugal.

Finally, as an exception to these Portuguese rules on the determination of jurisdiction, articles 22 and 23 of Brussels I Regulation provide for exclusive jurisdictional rules and prorogation of jurisdiction which may be applicable even in the cases where the defendant is not domiciled in a Member State, as they regulate situations in which the subject matter of the litigation or the autonomy of the parties warrants a different linking factor.

For reasons of convenience our main references will be made to the national provisions of articles 65 and 65-A of PCPC, as the international conventions are currently applicable only to a reduced number of States. When there is any relevant issue regarding them, their provisions will also be mentioned.

11. General Jurisdiction

As referred to above, Brussels and Lugano Conventions provide for general and specific jurisdictional rules (articles 2, 3 and Sections II to VI) which are applicable to Portugal and States not bound by Brussels I Regulation. However, as the relevant connecting factors are very similar to those established in this Regulation, our analysis will focus on the internal provisions of PCPC.

Article 61 of PCPC stipulates that the Portuguese courts have jurisdiction in transnational cases when one of the criteria established in article 65 applies. This stipulation is not entirely accurate, as the jurisdiction of the national courts is not only determined pursuant to article 65 of PCPC.

According to article 65 of PCPC, the four criteria that determine Portuguese jurisdiction are:

- (a) **Criterion of domicile**, that states that the Portuguese Courts have jurisdiction if the defendant's domicile is (or the domicile of at least one of the defendants, when there is more than one) in Portuguese territory, with an exception regarding proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable properties. For the purpose of this definition, a legal entity is deemed to be domiciled in Portugal when it has its registered or effective office in Portugal or when it has any subsidiary, agency, branch or office (as an organized centre of activity) located in Portuguese territory. This criterion is also applicable to proceedings not related to the activity of the subsidiary, agency, branch or office which may lead to cases of exorbitant jurisdiction of the Portuguese courts. As mentioned previously (paragraph 10), this paragraph, when applicable pursuant to article 4 (1) of the Brussels I Regulation, may only be applied to those defendants not domiciled in a Member State when at least one of them is domiciled in Portugal;
- (b) **Criterion of coincidence**, which states a similarity between international and territorial rules of jurisdiction, i.e., once Portuguese courts have jurisdiction to judge a case according to Portuguese territorial jurisdictional rules (articles 73 to 89 of PCPC), they are legally deemed to be also internationally competent (see Judgment of Coimbra Court of Appeal of 26.10.1999 – **Annex III A** and **Annex III B**). This criterion results in the presumption that the connecting factors used to determine the territorial internal jurisdiction have a link strong enough between the controversial case and the Portuguese State to justify the national court's jurisdiction.
- (c) **Criterion of causality**, under the terms in which Portuguese courts have international jurisdiction when the facts that give rise to a lawsuit occurred in Portuguese territory; when there is more than one cause of action, the occurrence of any one of them in Portugal is sufficient grounds for Portuguese courts to have jurisdiction on the whole matter (see Judgements of Portuguese Supreme Court of 19.04.1979, 14.01.1993, 5.03.2002 and of 25.11.2004, Judgment of Lisbon Court of Appeal of 8.05.2001 and Judgment of Coimbra Court of Appeal of 11.11.2003 – **Annex III A** and **Annex III B**). This criterion may also lead to cases of exorbitant jurisdiction of the Portuguese Courts, whenever only one of the facts that give cause to the lawsuit occurred in Portugal and that fact is not a relevant one. For this reason some of the Portuguese authors have defended the application of the *forum non conveniens*, but that has not yet been integrated in the statute law;
- (d) **Criterion of necessity**: Portuguese jurisdiction is the appropriate one - even if not according to the criteria previously mentioned - if it is the only one that allows effective protection of the plaintiff's rights, or in those cases where the plaintiff may not be reasonably required to file the action in a foreign court, in both cases, there must be a strong link, whether personal or related to property, between the matter in conflict and the Portuguese legal system.

Furthermore, article 65-A of PCPC provides for **exclusive jurisdictional rules** based on specific matters such as rights *in rem* (paragraph a)), insolvency (paragraph b)), validity of incorporation, dissolution and validity of resolution of legal entities and companies (paragraph c)), validity of public registries (paragraph d)) and enforcement on assets located in Portugal (paragraph e))

12. Specific Rules of Jurisdiction

First, it must be emphasized that Portuguese rules of jurisdiction were not created to be applied only in actions against defendants domiciled in non-EU States but in all circumstances where there is a foreign element. However, as a result of improvement in international and European regulation, the scope of application of articles 65 and 65-A of PCPC has become gradually reduced in such a way that, currently, for the foreign element which is *conditio sine qua non* to apply these articles must be connected to a State not bound to Brussels I Regulation or to Brussels and Lugano Conventions.

As to the specific rules of jurisdiction, article 65-A, as already mentioned, provides for **exclusive jurisdiction rules** based on specific matters. There is also a specific rule of jurisdiction applicable in insurance matters that will be addressed in paragraph 13, c) below.

Apart from these cases, there is no special provision on specific matters, except when the **criterion of coincidence** (article 65, b) of PCPC) is applicable, since it refers to specific rules of internal territorial jurisdiction (articles 73 to 89 of the same Code). For this reason, due to the double function of these rules, international jurisdiction is found by means of the relevant connecting factors specifically determined according to each matter in question.

a) Contract

In contract matters, the creditor can choose the relevant connecting factor, under the terms of article 74, no. 1 of PCPC, between the place of performance of the contract or the defendant's domicile. To find the place of performance, if the parties do not otherwise agree the material rules that regulate the contract must be applied. If the contract is regulated by Portuguese law, we must look to the PCC, namely articles 772 to 776. Pursuant to these rules, the general principle is that the performance will be done in the debtor's place of domicile. If the debtor is obliged to deliver a movable thing to the creditor, it shall be made to the place where the item was located at the time the contract was entered into. If that obligation is pecuniary, performance shall be done in the creditor's place of domicile at the time the contract is performed.

b) Tort

In tort matters, the connecting factor is the place of tort (*forum delicti commissi*, article 74, no 2 of PCPC);

c) Criminal Proceedings

Concerning civil claims or restitution based on an act giving rise to criminal proceeding, there is a general principle - called **principle of adhesion** - which states that the two claims, civil and criminal, shall be carried through concurrently in the same court (a criminal court). In this situation, the plaintiff may only bring separately a civil claim in a civil court in certain cases specifically provided for in article 72 of Portuguese Criminal Procedural Code.

d) Secondary Establishment

According to article 86, no. 2 of PCPC, it is possible to bring an action against an establishment (subsidiary, agency, branch, office or representative) located in Portugal and belonging to a foreign legal entity or company. In this situation, Portuguese jurisdiction is extended to all disputes or claims not only arising out of the establishment's operations but also of those related to the main legal entity or company, since this article provides for the possibility of filing the action in Portugal even when the service must be done upon the foreign legal entity or company outside of Portugal.

e) Trust

Regarding trust matters, Portuguese Law does not have this legal concept and regime.

f) Arrest and/or location of Property

In property matters, due to the high connection with Portuguese territory, there is a special reference to the exclusive jurisdiction of the Portuguese courts as to any kind of rights *in rem* as well as enforcement on assets located in Portugal (article 65-A, paragraphs a) and e) of PCPC). These rules also apply to proceedings regarding tenancy of immovable property, without the limit established in the Brussels I Regulation (tenancy contracts with a duration of more than six months). Furthermore, there are specific rules providing international jurisdiction pursuant to the criterion of coincidence already mentioned: article 73 of PCPC sets the linking factor to the place where the property is situated; article 83 of PCPC allows the plaintiff to apply for provisional, including protective measures on the arrest of property, whether by the court with jurisdiction as to the substance of the matter or by the court of the place where the assets are located (see Judgment of the Portuguese Supreme Court of 25.05.2006 where the Court expressly admitted a provisional measure of arrest of a credit located in Portugal even when a foreign Court had jurisdiction over the main proceeding – Annex III A and Annex III B).

13. Protective Rules of Jurisdiction

Unlike Brussels I Regulation, Portuguese rules of jurisdiction have a lesser standard of protection for the weaker party in the different areas addressed below. If, in certain cases, there is specific protective regulation of that party's interest (for instance, in PLPC), in other cases, general rules that continue to be applicable were not created with that intention and only indirectly do they offer some protection. This means that this concern with the weaker party is less visible and consolidated in Portuguese procedural rules than in private law - whether internal or international (for instance, protective rules regarding consumer contracts, employment contracts) - or in procedural rules of Brussels I Regulation.

a) Consumer Contracts

Given the referred to above, regarding consumer matters, Portuguese Courts are competent under articles 65-A, paragraph a) of PCPC (if the consumer matter relates to immovable assets and rights *in rem*), 65, paragraph c) of PCPC (if, for instance, the contract was entered into in Portugal) and paragraph b) of PCPC (which leads us to the rules of article 74 of PCPC regarding the performance of obligations, liability and termination for breach of contracts where the relevant connecting factor is dependent upon the creditor's choice between the court of the place where the obligation should be performed and the court of the defendant's domicile). Besides that, and only when the Regime of the General Contractual Clauses is applicable (i.e., whenever clauses are established by one party without the intervention of the other, who accepts them), article 19, paragraph g) of Decree-Law no. 446/85 of 25 October prohibits any clause stating that a court is to have jurisdiction to settle any disputes which has arisen or which may arise in connection with a particular legal relationship, when that competent court may raise and cause relevant and serious inconvenience to one of the parties without a reasonable interest of the counterparty; and article 21, paragraph h) of the same regime prohibits any clause which implies an exclusion or a limitation of the right to obtain effective judicial protection, which may happen in determining international jurisdiction.

b) Individual Employment Contracts

Concerning employment matters, article 10 of the PLPC defines an alternative to relevant connecting factors applicable in this matter: a claim can be brought before Portuguese courts according to the rules of territorial jurisdiction established therein (again, criterion of coincidence) or if any fact giving cause to the action has occurred in Portugal (again, criterion of causality).

- (i) if an employee wishes to file a claim in Portugal against his employer domiciled in a non-EU State, he may do so (1) if the defendant has an establishment in Portugal (article 13, no. 2), (2) if Portugal is the place where the employee usually carries out his work (article 14 no. 1) or (3) if Portugal is the place of the defendant's domicile (article 14 no. 1). If the matter in question relates to work accidents or illness, Portuguese courts have competence (1) if Portugal is the place where the accident occurred (article 15 no. 1) or (2) the last place where the ill employee has worked when the illness began (article 15 no. 1) or (3), when the accident took place abroad, if Portugal is the place of the plaintiff's domicile (article 15 no. 2) (see Judgment of Lisbon Court of Appeal of 3.07.2002 – **Annex III A** and **Annex III B**).
- (ii) If an employer wants to bring a claim in Portugal against his employee, only the general rule (article 13) is applicable, which means that the

employer may only file a claim in Portugal if it is the country of the employee's domicile.

c) Insurance Contracts

In insurance matters, Portuguese Courts have exclusive jurisdiction to hear actions arising out of insurance contracts provided that the contract (1) was entered into in Portugal or (2) the contracting parties were domiciled in Portugal on the date when the contract was executed or (3) the contract relates to assets located in Portugal.

d) Distribution Contracts

Commercial agency agreements are the only distribution contracts that have their own specific national legal regulations and remaining commercial agreements, such as distributorship and franchise agreements, usually benefit from that regime. However, there are no specific or protective rules of jurisdiction applied to those cases, for only general rules (and the corresponding linking factors analysed above) provided for in PCPC are applicable.

e) Protective Rules in Other Matters

Besides the specific matters mentioned above, there are other protective rules of jurisdiction related to international maritime law, passenger carriage by sea, carriage of goods by sea, towage agreements, charter and sub-charter agreements, maritime rescue (article 7 of the Law no. 35/86 of 4 September, article 20 of the Decree-law no. 349/86 of 17 October, article 30 of Decree-law no. 352/86 of 21 October, article 16 of Decree-law no. 431/86 of 30 December, article 47 of Decree-law no. 191/87 of 29 April and article 15 of Decree-law no. 203/98 of 10 September – please see Annexes I A and I B).

14. Rules for the Consolidation of Claims

There are no specific rules on this issue. Thus, the general internal jurisdictional rules are applicable.

a) Co-Defendants

Pursuant to the criterion of domicile (article 65, a) PCPC), if one of the defendants is domiciled in Portugal, the Portuguese Courts also have jurisdiction to judge a co-defendant domiciled in a non EU-State, in a joint action (necessary or voluntary joint action), with the exception of proceedings in property matters (rights *in rem* and tenancy contracts).

b) Third Party Proceedings

Under Portuguese law, a third party in an action on a warranty or guarantee is also a co-defendant. This situation may result in a plaintiff suing several defendants for different claims. This can happen at the beginning of the proceeding or during the proceeding by raising the intervention of the third party.

In the first case, a defendant domiciled in a non-EU State may be sued before Portuguese courts as a third party, pursuant to the criterion of domicile, i.e., if the other defendant or one of the other defendants is domiciled in Portugal, as explained above.

Article 31 of PCPC determines that this prospective connection between parties is subject to the rules of international jurisdiction. Due to this article, it would seem that a defendant domiciled in a non-EU State may only be sued before the Portuguese courts as a third party in a proceeding against a defendant domiciled in Portugal if the Portuguese court would also be competent to judge the claim against him due to the occurrence of a relevant linking factor under the terms of articles 65 and 65-A of PCPC. However, as the criterion of domicile states if one of the defendants is domiciled in Portugal, the Portuguese courts have jurisdiction, meaning that the Portuguese courts also have jurisdiction to judge a separate claim against the co-defendant domiciled in a non-EU State.

In the second case, i.e. when the intervention of a third party happens during the proceeding, according to article 96, no. 1 of PCPC, the Portuguese courts have jurisdiction to judge the co-defendant domiciled in a non-EU State.

c) Counter-Claims

The Portuguese rules are different to determine the jurisdiction regarding **counterclaims**. Article 98, no. 1 of PCPC stipulates that *the Portuguese Court competent to the main action has jurisdiction to judge all matters presented by counterclaim, provided that it is also competent for them pursuant to the criterion of nationality (...); otherwise, the party against whom the counterclaim is filed shall be dismissed from the case*. This reference to the criterion of nationality shall be understood as a reference to the Portuguese rules of international jurisdiction of articles 65 and 65-A of PCPC.

d) Related Claims

The jurisdiction of the Portuguese courts for the principal claims includes the jurisdiction relating to prejudicial questions.

e) Any Problems Pertaining to Lack of Harmonisation

To the best of our knowledge, we are not aware of any specific problem in practice due to the **lack of harmonization of these rules**.

15. Rules of Jurisdiction Pursuant to Annex I of Brussels I

a) The rules listed in annex I

The rules of jurisdiction listed in annex I of Brussels I Regulation are articles 65 and 65-A of PCPC and article 11 of PLPC which have been previously addressed, namely in paragraphs 1), 10), 11), 12) and 13), among others, and are attached hereto as Annex I A and Annex I B.

b) Practical use of the rules listed in Annex I

In addition to the references made during this report to relevant Judgments of Portuguese Courts, it should be emphasized that the most important of the Portuguese Judgments analyzed refers to the application of article 65, no. 1, paragraph c), of PCPC which provides the criterion of causality due to at least one of the relevant facts having occurred in Portugal. For example, the repair of a damaged car was made in Portugal even though the accident occurred in France (Judgment of Coimbra Court of Appeal of 11.11.2003 – Annex III A and Annex III B), or the place to perform the obligation of restitution of the borrowed amount is Portugal even though the contracts were entered into in a different country (Judgment of Portuguese Supreme Court of 5.03.2002 – Annex III A and Annex III B). Furthermore, other decisions apply the territorial linking factors pursuant to the criterion of coincidence (paragraph b) of article 65 of PCPC): the most frequently invoked legal provisions are those of article 74 of PCPC (jurisdiction regarding performance of obligations whether legal, contractual or connected with torts) and articles of PLPC (Judgment of Portuguese Supreme Court of 4.12.2002 and Judgment of Lisbon Court of Appeal of 3.07.2002 – Annex III A and Annex III B).

c) Extension of jurisdiction pursuant to article 4(2) of Brussels I

To the best of our knowledge there are no reported or known case where our courts have applied article 4 (2) of Brussels I Regulation.

16. Forum *necessitatis*

Article 65, no 1, paragraph d) of PCPC provides for the **criterion of necessity** under the terms of which Portuguese courts may exercise jurisdiction due to the fact that the plaintiff's right can not become effective otherwise or when the available forum abroad may cause the plaintiff unreasonable difficulty, provided that there is a strong linking factor (whether connected to the person or to the thing) between the conflict and the Portuguese legal system.

The application of this criterion has created a complex question in Portugal: whether applicable only when the impossibility of the plaintiff's right becoming effective results from the lack of a foreign jurisdiction or if it results from the material (substantive) solution given by the foreign jurisdiction to the case. There are three positions¹²:

- (i) The first one, defended by the Portuguese authors Alberto dos Reis, Barbosa de Magalhães, Varela, Bezerra, Sampaio e Nora, states that the impossibility derives only from the lack of foreign jurisdiction.

¹² These three positions are summarized in Luís de Lima Pinheiro, "Direito Internacional Privado, volume III, Competência Internacional e Reconhecimento de Decisões Estrangeiras", Almedina, page 201.

- (ii) A second one, defended by the Portuguese authors Anselmo Castro, Ferrer Correia e Teixeira de Sousa, considers that impossibility includes also the material solution given by the foreign jurisdiction, specially, if the plaintiff is Portuguese.
- (iii) The last position defended by Luís de Lima Pinheiro states that the Portuguese courts have jurisdiction when the solution given by the foreign jurisdiction offends the Portuguese international public principles and in circumstances when the potential judicial decision of a foreign court that must be enforced in Portugal does not comply with the Portuguese rules of recognition and enforcement of judgments and the case has a strong link with Portugal.

As examples of the application of this criterion: in Judgment of 23.05.1978, Lisbon Court of Appeal decided that "*the impossibility of making a right effective through a lawsuit filed in another country may be legal or merely practical but it has to be absolute, which means that the greater or smaller difficulty in bringing the action against that foreign court is not sufficient to make the provision of article 65, no. 1, paragraph d) become applicable*" (**Annex III A** and **Annex III B**).

(D) National Jurisdiction & Enforcement of Non-EU Judgments

17. National rules of jurisdiction barring the enforcement of a non-EU judgment

Besides the relevant provisions of Brussels and Lugano Conventions (article 28) and of Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters (which currently have a very reduced scope of action), article 1096, paragraph c) of PCPC allows the Portuguese Courts to deny recognition and enforcement of a foreign judgement on the basis of their exclusive jurisdiction over the matter in cause.

These exclusive rules of jurisdiction are those listed (and already explained in previous paragraphs) in article 65-A of PCPC. (Please see paragraph 11 above).

Judgment of Portuguese Supreme Court of 21.02.2006 stated the rule of acceptance of a foreign jurisdiction, which is: under no circumstances may a foreign judgment be reviewed as to its substance (**Annex III A** and **Annex III B**). Therefore, there is a legal assumption that all jurisdictional conditions are fulfilled and, therefore, the burden of proof of any circumstance that would allow the Portuguese Courts to deny the recognition and enforcement of a decision rests with the requested party.

(E) Declining Jurisdiction

18. Forum Non Conveniens

There is no general rule or practice allowing the Portuguese Courts to decline jurisdiction on the basis of *forum non conveniens* or any other similar technique. According to a legal opinion issued by the Consultative Committee of the Portuguese Public Prosecution Department, on 14.07.1999, "*it is not compatible with the nature of the sovereign body of the courts, under constitutional terms, and with the obligation to render justice, to admit that they can assign part*

of their jurisdiction to foreign courts by their own decision. And it is also incompatible with our constitutional system that Portuguese courts can receive jurisdiction conferred by foreign courts”.

Thus, the only possibility – *rectius*, duty – to decline jurisdiction is when the Portuguese Court is not competent pursuant to Portuguese rules of international jurisdiction and therefore must declare itself absolutely incompetent (article 101 and 102 of PCPC) and dismiss the action.

19. Declining Jurisdiction when the Defendant is Domiciled in a Third State

(a) Non-EU Jurisdiction Agreements

Regarding the faculty of establishing a **choice of court clause**, article 99 of PCPC provides for the conditions in which the parties may agree upon competent jurisdiction to solve disputes. This article applies whether the Court appointed is situated in an EU state or in a non-EU State. However, in the first case, only when the parties that have agreed on that jurisdiction, are not domiciled in a EU State. Otherwise, if the parties, one or more of whom is domiciled in a Member State, have agreed that a court of a Member State is to have jurisdiction to settle any disputes, article 23 of the Brussels I Regulation shall be applicable.

The parties may agree that such jurisdiction shall be exclusive or alternative but the law assumes that, when the parties do not regulate this issue, the jurisdiction is alternative with those of the Portuguese Courts, in opposition to rule of article 23 of Brussels I Regulation.

The validity of this agreement depends on the following conditions:

- (i) Connection with more than one legal system;
- (ii) Disputes involving disposable rights;
- (iii) The law of the court designated shall accept this agreement;
- (iv) The agreement has to be based on a serious interest of both parties or one of them, provided that there is not a severe inconvenience to the other party;
- (v) The matter in question shall not fall within the scope of Portuguese Courts exclusive jurisdiction (article 65-A of PCPC);
- (vi) It must be a written agreement with express reference to the competent jurisdiction.

Nevertheless, the Portuguese courts are not mandatorily obliged to acknowledge the violation of a choice court clause, only if the defendant specifically argues that violation (articles 108 and 109 of the PCPC).

(b) Parallel Proceedings in a non-EU court

As general rule, the Portuguese courts do not declined jurisdiction when a foreign court is already seized of the same dispute. In the matter of ***lis pendens***, article 497, no. 3, of PCPC sets out that, when a parallel proceeding is seized in a foreign court, this fact shall not prevent the Portuguese Court’s jurisdiction to judge the same cause, except if otherwise established by International Convention (see Judgment of Porto Court of Appeal of 17.12.1999 – **Annex III A** and **Annex III B**). The only situation that we know of that constitutes an exception is set out in article 20 of Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters concluded on 1 February 1971.

Only after the recognition of the foreign judgement in a parallel proceeding, one may argue *res judicata*.

Furthermore, regarding the recognition of foreign judgements, note that article 1096, paragraph d), of PCPC establishes as a negative condition for that recognition, the *lis pendens* of the cause before Portuguese Courts, except if the foreign court has prevented jurisdiction.

(c) "Exclusive" Jurisdiction in a non-EU State

As we have explained in paragraph 18, there is no general or specific rule related to this matter. Portuguese Law expressly regulates the Portuguese Court's jurisdiction but not the Portuguese Court's position before foreign jurisdictional rules. In Portuguese Law there is no rule as to article 22 of Brussels I Regulation to the Member States.

20. Declining Jurisdiction When the Defendant is Domiciled in the EU

Brussels I Regulation does not provide an answer on this subject, therefore, even though the jurisdiction is based on the rules of the Brussels I Regulation, the possibility of declining that jurisdiction in these cases shall be found within national rules.

Article 23 of the Regulation refers only to prorogation of jurisdiction to a court of a Member State.

Article 27 relates to actions brought in courts of different Member States.

Article 22 sets out exclusive jurisdictions that always lead to the courts of Member States, regardless of domicile.

Therefore, paragraph 19, a), b) and c) above shall be applicable herein.

(F) The Adequate Protection (or lack thereof) of EU Nationals and/or Domiciliaries through the Application of Domestic Jurisdictional Rules

21. Use of National Jurisdictional Rules to Avoid an Inadequate Protection in Non-EU Courts

We are not aware of any known case or practice on that issue where the Portuguese courts have exercised jurisdiction using domestic jurisdictional rules to avoid inadequate protection in a non-EU state. However, the basis of that jurisdiction would be article 65, no. 1, paragraph d) of PCPC already referred and explained in previous paragraphs.

22. Lack of Jurisdiction Under National Rules Having the Effect to Deprive EU Plaintiffs of an Adequate Protection

We are not aware of any known case or practice where the Portuguese courts have declined jurisdiction under domestic rules having the effect to deprive EU plaintiffs of an adequate protection.

23. Lack of Adequate Protection as a Consequence of Transfer of Domicile to or from a Third State

To the best of our knowledge, there is no published case or practice where a national of Portugal has not been able to invoke the protection of Community legislation because the person(s) involved was (were) no longer domiciled in the EU at the time the proceeding was instituted.

24. The Risk that EU Rules and Principles be Put in Jeopardy Because of the Application of National Jurisdictional Rules

To the best of our knowledge, there is no published case or practice where the application of domestic jurisdictional rules have jeopardized the application of mandatory Community legislation or the proper functioning of the internal market or the adequate judicial protection of EU national and domiciliaries.

(G) Residual Jurisdiction under the new Brussels II Regulation

25. Applicable National Rules Pursuant to article 14 of the New Brussels II Regulation (Parental Responsibility)

On the assumption that there is no specific rule of jurisdiction regarding matters of parental responsibility, the grounds of jurisdiction that can be used to establish the jurisdiction of the Portuguese Courts in matters of parental responsibility are those that we have referred: articles 65 and 65-A of PCPC.

Consequently, pursuant to paragraph b) of article 65, no. 1 of PCPC, according to the **criterion of coincidence**, there is one specific rule in this matter related to territorial competence: article 155 of Decree-Law no. 314/78 of 27 October as amended by Law no. 133/99 of 28 August and Law no. 31/03 of 22 August. This article defines as relevant linking factors (i) the minor's domicile at the time the proceeding is brought before the Court, (ii) if that domicile is unknown, the parents' domicile and (iii) if the parents have different domiciles, the domicile of the father or mother who has custody or, in case of joint custody, the domicile of the mother or father with whom the minor has primary residence (see Judgments of Lisbon Court of Appeal of 11.04.1991, 13.04.2000 and 8.05.2001, Judgment of Coimbra Court of Appeal of 26.10.1999 and also Judgment of Porto Court of Appeal of 26.02.2004 – **Annex III A** and **Annex III B**).

There are also two International Conventions which regulate matters of parental responsibility: Hague Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in Respect to the Protection of Minors and Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation regarding Parental Responsibility and Measures for the Protection of Children.

INDEX OF ANNEXES

I A – Portuguese version of the internal rules

I B – English version of the internal rules

II A – Portuguese version of the bilateral and multilateral treaties

II B – Official version of the bilateral and multilateral treaties

III A – Portuguese version of case law

III B – English version of case law

SUPPLEMENTAL REPORT FOR:

PORTUGAL

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26. NA

27. Conventions with Third States in Matters of Parental Responsibility (and maintenance of children)

What are the international (and in particular bilateral) conventions concluded between your country and non-EU countries that include rules of jurisdiction in matters of parental responsibility (and maintenance of children)?

The International Bilateral Conventions concluded between Portugal and non-EU countries that include rules of jurisdiction in matters of parental responsibility are:

- Judicial Agreement between Portugal and the Republic of Cape Verde, signed in Lisbon on February 16, 1976,¹³ article 8, establishes the recognition of non-criminal judgments of arbitral decisions;
- Judicial Agreement between Portugal and the Republic of São Tome and Príncipe, signed in Lisbon on March 23, 1976,¹⁴ article 8, establishes the recognition of non-criminal judgments of arbitral decisions;
- Juridical Cooperation Agreement between Portugal and the Republic of Guinea-Bissau concluded in Bissau on July 5, 1988,¹⁵ establishes the recognition of arbitral and judicial decisions regulated in articles 13 and 14 and decisions in matters relating to maintenance in articles 15 and others;
- Juridical and Judicial Cooperation Agreement between Portugal and Mozambique signed in Lisbon on April 12, 1990,¹⁶ establishes the recognition of judicial and arbitral decisions regulated in articles 13 and 14 and decisions in matters relating to maintenance in articles 15 and others;

¹³ Ratified by Decree no. 524-O/76 of 5.07, (in Official Journal no. 155, 1st series, 3rd supplement, of 5.07.1976, rectified in Official Journal no. 187, 1st series, of 11.08.1976).

¹⁴ Ratified by Decree no. 550-M/76 of 12.07, (in Official Journal no. 161, 1st series, 2nd supplement, of 12.07.1976), effective 20.04.1979.

¹⁵ Approved for ratification by resolution of the Parliament no. 11/89 of 19/5; ratified by Decree of the President no. 38/89 of 16.06, adopted on 10.01.1994.

¹⁶ Approved for ratification by resolution of the Parliament no. 7/91 of 16.10; ratified by Decree of the President no. 8/91 of the same date effective 22.02.1996.

Juridical and Judicial Cooperation Agreement between Portugal and Angola signed in Luanda on August 30, 1995,¹⁷ establishes the recognition of arbitral and judicial decisions regulated in articles 12 and 13 and of decisions in matters relating to maintenance in articles 14 and others;

28. Jurisdiction as a Ground for Resisting the Enforcement of non-EU Judgment in Matters of Parental Responsibility

Can the judgment of a non-EU State relating to matters of parental responsibility (for instance, a judgment given the guardianship of a child to one of the parents) be denied recognition or enforcement in your country on the basis that the courts of your country are the only ones who have jurisdiction to entertain the matter? If so, what is (are) the ground(s) of these "exclusive" rules of jurisdiction (e.g., habitual residence of the child in your country, citizenship of one or several of the parties, etc.)

Article 1096, paragraph c) of PCPC allows the Portuguese Courts to deny recognition and enforcement of a foreign judgement on the basis of their exclusive jurisdiction over the matter in cause.

These exclusionary rules of jurisdiction are those listed and already explained in previous paragraphs in article 65-A of PCPC. (Please see paragraph 11 of our previous report). However, the internal jurisdictional rules do not confer on the Portuguese Courts exclusive jurisdiction regarding matters of parental responsibility. , Portuguese Courts may not deny recognition or enforcement of a judgement relating to matters of parental responsibility from a non EU State on the basis that the courts in Portugal are the only ones having jurisdiction to entertain the matter.

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¹⁷ Approved for ratification by Resolution of the Parliament no. 11/97 of 11.10.1996 (in Official Journal no. 53, 1st series A, of 4.3.1997); ratified by Decree of the President no. 9/97 of 4.03 (in Official Journal no. 53, 1st series A, of 4.3.1997).