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Securing assets during a claim in EU countries

Portugal

1 What are the different types of measures?

Interim and precautionary measures are types of protective measures that can be requested of the court within the scope of protective proceedings. The interim protection of rights is not limited to protective proceedings, since the Portuguese legal system provides for other provisional measures for the protection of certain legal situations, such as, for example: a) interim measures during interdiction or disqualification proceedings; b) provisional curatorship of an absentee's property; c) appointment of a curator *ad litem* d) measures necessary to protect property comprising an estate in abeyance.

Protective measures are intended to eliminate *periculum in mora* (the fear that a delay in the court judgment will cause serious and or irreparable damage to the asserted right) and to ensure the effectiveness of the final judgment (cf. Article 2 of the Civil Procedure Code).

Unless reversal of responsibility for action is ordered, protective proceedings relate to cases based on protected rights (Article 364 of the Civil Procedure Code), protecting or provisionally anticipating the effects of the definitive measure on the assumption that the decision handed down in the main proceedings will be favourable to the applicant.

The threat of *periculum in mora* authorises the court to preliminarily and summarily consider a substantial legal relationship which must then undergo a deeper and more lengthy examination. When this preliminary consideration is favourable to the applicant, measures are decreed with the aim of safeguarding against the threat.

Protective measures are intended to ensure the practical outcome of the action, to avoid serious damage or to anticipate the realisation of the right, achieving a balance, to the greatest extent possible, between the interests of speed and legal certainty.

Portuguese civil procedural law provides for two types of protective measures:

- common protective measures (Articles 362 to 376 of the Civil Procedure Code);
- specified protective measures (Articles 377 to 409 of the Civil Procedure Code).

The first is governed by Article 362 of the Civil Procedure Code, which stipulates that where someone shows a justified fear that another person may cause serious and irreparable damage to their rights, they may, if none of the protective measures laid down by law are suitable for the case, request the appropriate precautionary or anticipatory measure to secure the effectiveness of the right at risk. The interest of the applicant may be based on an existing right or on a right emerging from a decision to be handed down in constitutive action, whether pending or already brought. Common protective measures are not applicable when the intention is to safeguard the risk of injury specifically prevented by any of the specified measures.

Specified protective measures are those expressly provided for in the Civil Procedure Code or in separate legislation.

The following are specified protective measures set out in the Portuguese Civil Procedure Code:

- provisional restitution of ownership;*
- suspension of corporate decisions;*
- provisional maintenance;*
- provisional compensation;*
- seizure;*
- embargo on new works;*
- impounding of goods.*

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 damage to their rights, they can request the appropriate precautionary or anticipatory measure to secure the effectiveness of the right at risk. The interest of the applicant may be based on an existing right or on a right emerging from a decision to be handed down in constitutive action, whether pending or already brought.

Measures of this kind are taken if there is a serious likelihood that the right is real and if there is a sufficiently well-founded risk of its being infringed.

Measures may, however, be refused by the court if the damage to the defendant resulting from its application would considerably exceed the damage the applicant wishes to avoid through use of the measure.

The use of common protective measures, in a subsidiary manner, also depends on the absence of a specified protective measure that is appropriate to the actual situation.

Thus, the **unspecified preventive measures** referred to in Article 362 of the Civil Procedure Code have the following legal requirements:

- the apparent existence of a right;
- the well-founded fear that another person may cause serious and irreparable damage to their right (*periculum in mora*);
- the practical suitability of the precautionary or anticipatory measure to ensure the effectiveness of the right at risk;
- the measure to be obtained must not be covered by other protective procedures.

In order for measures to be decreed, there needs to be summary evidence of the serious likelihood that the right asserted is real (*fumus bonis juris*) and the justified fear that the natural delay in the final resolution of the dispute may cause irreparable damage or damage that is difficult to repair (*periculum in mora*).

The judge must be inclined to believe that the outcome of the main case will be favourable to the applicant, as precautionary measures entail clear interference within the defendant's legal sphere.

With regard to **specified protective measures**:

- Provisional restitution of ownership:** In the case of violent robbery, the owner may request that their property be provisionally returned to them, alleging the facts that constitute possession, robbery and violence. The judge may order restitution without summoning or hearing the robber if they believe, on examining the evidence, that the applicant had possession and was violently robbed of it (Articles 377, 378 and 379 of the Civil Procedure Code).

b) **Suspension of corporate decisions:** If any kind of association or company takes resolutions contrary to the law, the Articles of Association or the memorandum, any partner may, within 10 days (starting from the date of the meeting during which the resolutions were taken or the date on which the applicant became aware of them, if they were not duly summoned to the meeting), request that the implementation of these resolutions be suspended. They must substantiate their role as a partner and prove that implementation of the resolutions may cause considerable damage. The application is accompanied by a copy of the minutes in which the resolutions were taken and, with the exception of annual general meetings, the copy of these minutes is replaced by documentary evidence of the resolution (Articles 380 to 383 of the Civil Procedure Code).

c) **Provisional maintenance:** A person entitled to maintenance may request the setting of the monthly amount they should receive in the form of provisional maintenance, provided the first definitive payment has not been made. Once the court has received the application for provisional maintenance, a date is set for the trial and the parties are advised that they must appear in person at the hearing or be represented by proxy with special powers to settle. The defence is submitted during the hearing itself and the judge endeavours to reach an agreement on the setting of maintenance, which is then approved by judgment (Articles 384 to 387 of the Civil Procedure Code).

In the absence of any of the parties or if the attempt to reach an agreement is unsuccessful, the judge orders the taking of evidence before delivering an oral judgment for which succinct grounds must be provided.

d) **Provisional compensation:** In connection with claims for compensation for death or bodily injury, the injured party and those who may be entitled to maintenance from the injured party, as well as those to whom the victim paid maintenance in compliance with a natural obligation, may request the award of a given monetary amount in the form of a monthly sum as provisional compensation for injury. The judge will grant the requested measure provided there is evidence of a situation of need as a result of the injuries suffered and evidence of the defendant's obligation to provide compensation. The provisional settlement, which will be taken into account in the final settlement of damages, will be determined equitably by the court. This also applies to cases where the claim for damages is also founded on damages which may seriously jeopardise the subsistence or accommodation of the injured party. The aforementioned points relating to provisional maintenance also apply to the processing of this measure, *mutatis mutandis* (Articles 388 to 390 of the Civil Procedure Code).

e) **Seizure:** Seizure allows a creditor who is justifiably afraid of losing the assets guaranteeing their claim to obtain judicial seizure of goods. The applicant for seizure submits the facts that make the existence of the claim likely and justify the alleged fear, listing the goods to be seized along with all the information necessary for the investigation to be completed. If seizure is requested against the buyer of the debtor's property, the applicant, if the purchase is not shown to have been judicially challenged, still submits the facts that make the merits of the dispute likely (Articles 391 to 396 of the Civil Procedure Code).

After the evidence has been examined, the seizure is decreed without a hearing of the other party, provided that the legal requirements are deemed to be satisfied.

In the case of seizure of ships or their cargo, the applicant is responsible for demonstrating, in addition to fulfilling the general requirements, that seizure is permissible given the nature of the claim. In this case, the seizure will not take place if the borrower immediately provides acceptable security to the creditor or, within two days, the judge deems it appropriate that the departure of the vessel be halted until security is provided.

f) **Embargo on new works:** Anyone who feels that their right to sole or joint ownership or any other right in rem or in personam of use or ownership is infringed as a result of new works or a new service which causes or is likely to cause them loss may request, within 30 days of the date on which they become aware of the fact, the immediate suspension of the works or service. The applicant may also impose the embargo directly out of court by notifying the developer, or failing that, the person in charge or their substitute, before two witnesses, to cease works. This non-judicial embargo has no effect if confirmation is not requested from the court within five days (Articles 397 to 402 of the Civil Procedure Code).

g) **Impounding of goods:** Where there is a reasonable fear of the loss, concealment or dissipation of moveable or immoveable assets or documents, their impounding may be requested. This impounding is connected to the action relating to the specification of goods or proof of ownership of the rights to the impounded goods (Articles 403 to 409 of the Civil Procedure Code).

Impounding may be requested by any person with an interest in the conservation of the goods or documents, although only creditors may request impounding in cases which give rise to the collection of inheritance. The applicant must summarily prove the right relating to the goods and the facts on which the fear of their loss or dissipation are based. If the right relating to the goods depends on a pending action or an action that has been brought, the applicant has to convince the court of the likely validity of the application in question. Once the required evidence has been produced, the judge grants the measures if they believe that without the impounding the applicant's interest is at serious risk.

2.1 The procedure

Except for the embargo on new works, for which it is possible to take initial out of court action followed by an application for confirmation by the court, all the other protective measures 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 Civil Procedure Code.

Upon request, the judge, in the decision ordering the measure, may waive the applicant's burden of bringing the main action if the material acquired in the proceedings has led them (the judge) to believe that the protected right is real and the nature of the measure decreed is appropriate to reach final settlement of the dispute. This exemption may be applied for until the end of the final hearing. In the case of non-adversarial proceedings, the defendant may oppose the reversion of the responsibility for action together with a challenge of the measure decreed.

The regime of reversal of responsibility for action applies *mutatis mutandis* to the provisional restitution of ownership, the suspension of corporate decisions, provisional maintenance, embargoes on new works and other measures provided for in separate legislation which, by their nature, enable final settlement of the dispute.

When the law does not establish that the measure will be adopted without hearing the defendant, the defendant will be heard by the court, except if the hearing would place the aims or effectiveness of the measure at serious risk.

When they are heard before the measure is decreed, the defendant is summoned to oppose within ten days. The summons is replaced by a notification when the defendant has already been summoned for the main case.

When the deadline to oppose has expired and the defendant has been heard, where appropriate, the evidence required or determined by the court is taken. If the defendant has not been heard and the measure is to be decreed, the defendant is only notified of that decision after it has been made. Following notification they are entitled to appeal, in general terms, against the order decreeing the measure if they consider that, in light of the facts, it should not have been granted. They may also lodge an opposition if they wish to put forward facts or produce evidence not taken into account by the court that may remove the grounds for the protective measure or cause it to be reduced.

The defendant may challenge, by any of the aforementioned means, the decision to reverse responsibility for action. If the defendant lodges an opposition, the court must decide whether to maintain, reduce or withdraw the previously decreed measure. This decision and, where applicable, the maintenance or withdrawal of reversal of responsibility for action is appealable and leads, where appropriate, to the taking of the evidence required or determined by the court of its own motion.

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

- a) Applications for seizure and impounding of goods may be filed with the court where the related proceedings are 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;
- b) For an embargo on new works, the court of the place where the work is to be done has jurisdiction;
- c) For the other protective measures, the court of jurisdiction is the court before which the related action is to be brought.

If the responsibility for action is not reversed, the proceedings are joined to the files as soon as the action has been brought; if the action has been brought in another court, it is forwarded there and that court has exclusive jurisdiction over the next steps.

If protective measures are requested in the course of an action, they should be brought in the court where the attached action is taking place, unless the action is pending an appeal. In that case the joinder only takes place when proceedings have finished or when the files of the main action are remitted to the court of first instance.

Representation by a lawyer is mandatory where the value of the measure exceeds €5 000.00 or where appeals are admissible, under Article 58 in conjunction with Article 1090, both of the Civil Procedure Code.

The value of protective measures is determined as follows:

- a) for provisional maintenance and provisional compensation, based on the monthly payment requested, multiplied by twelve;
- b) for provisional restitution of ownership, based on the value of the item of which the owner has been deprived;
- c) for suspension of corporate decisions, based on the extent of the loss;
- d) for embargoes on new works and unspecified protective measures, based on the loss to be prevented;
- e) for seizure, based on the amount of the claim to be guaranteed;
- f) for impounding of goods, based on the value of the goods impounded.

2.2 The main conditions

When assessing the criteria for ordering a protective measure, the court must always examine whether the fear invoked is well-founded and how serious and difficult it will be to repair the potential infringement of the right at issue. 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 that is based on the protected right. In this type of proceeding, it is for the court to obtain a summary (i.e. less rigorous than in the main proceedings) demonstration that there is a real likelihood that the right to be safeguarded exists and that the fear of its being infringed is sufficiently justified.

All protective measures are regarded as urgent, taking priority over any other non-urgent judicial acts, 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.

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 protective measures.

3.2 What are the effects of such measures?

Since they are ordered by the courts, protective 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 protective measure decreed will incur the penalty of qualified disobedience, notwithstanding the measures appropriate to their enforcement.

3.3 What is the validity of such measures?

Notwithstanding the applicant being relieved of the burden of bringing the main action, Article 373 of the Civil Procedure Code stipulates that the protection measure is extinguished and, when decreed, 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 and unappealable;
- b) if, after the action has been brought, proceedings have been stopped for more than 30 days due to the applicant's negligence;
- c) if the action is dismissed, by a final and unappealable decision;
- d) if the defendant is acquitted and the applicant does not bring any further action in time to take advantage of the effects of the previous action;
- e) if the right which the applicant seeks to safeguard is extinguished.

Notwithstanding the rules on the distribution of the burden of proof, as soon as the judgment decreeing the protective measure and reversing the responsibility for action has become final and unappealable, the defendant is notified that any action to challenge the existence of the protected right must be brought within 30 days of notification, otherwise the measure enacted is consolidated as a definitive component of the dispute.

The same penalty provision applies when, after the action has been brought, proceedings have been stopped for more than 30 days due to the applicant's negligence or if the defendant is acquitted and the applicant does not bring any further action in time to take advantage of the effects of the previous action. The expiry of the measures decreed depends on the validity, by final and unappealable judgment, of the action brought by the applicant.

4 Is there a possibility of appeal against the measure?

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 disadvantageous to the party bringing the appeal by more than half of this amount. Appeals may also always be brought against decisions relating to the value of protective measures on the grounds that the value exceeds the limit of the court which took the contested decision and the preliminary refusals of initial applications for protective measures.

Decisions ordering reversal of responsibility for 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 of the Civil Procedure Code).

Appeals may not be brought before the Supreme Court of Justice (*Supremo Tribunal de Justiça*) against decisions ordering protective measures, including those that determine the reversal of responsibility for action, without prejudice to cases in which an appeal is always admissible.

A decision may be challenged by:

- any party to the proceedings who loses the case;
- anyone who is not a party to the proceedings but suffers a direct and real loss as a result thereof.

The court with jurisdiction to hear the appeal is a court of second instance 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 judgment. If the appeal also concerns the reappraisal of recorded evidence, the time limit increases by 10 days.

An appeal brought against an order which rejects outright or does not order the measure has a suspensive effect. In other cases it has a purely devolutive effect.

Related links

Further information may be obtained from the following websites:

[Justice Portal](#);

[Directorate-General for Justice Policy](#)

[Citius Portal](#)

[Legal Document Database](#)

[Official Journal of Portugal](#)

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