

Interim measures in support of recognition and enforcement of foreign arbitral awards in Portugal

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In Portugal, the recognition and enforcement of foreign arbitral awards are governed by the provisions of the New York Convention, treaties and conventions which are binding on the Portuguese State and articles 55 to 58 of the Portuguese Arbitration Law (PAL). Under article 55 of PAL, “Without prejudice to the mandatory provisions of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as well as to other treaties or conventions which are binding on the Portuguese State, the awards made in arbitrations seated abroad are only effective in Portugal, irrespective of the nationality of the parties, if such awards have been recognized by the competent Portuguese state court”.

The procedure for the recognition of arbitral awards cannot be carried out *ex parte*, i.e. without hearing the opposing party. Therefore, once the request for recognition is presented, along with the relevant award, the respondent is notified and is given 15 days within which it may oppose the recognition of the award.

The mandatory notification of the respondent for the purposes of recognizing foreign arbitral awards may refrain interested parties from initiating such a procedure in Portugal, particularly when the arbitral award implies a payment in cash and the enforcing party is considering enforcement in different jurisdictions. The rationale is simple: there is a considerable risk that the respondent, when notified to oppose the request for the recognition of the arbitral award, dissipates its assets located in Portugal, thereby rendering the proceedings in Portugal, partially or utterly, meaningless. This risk is further amplified when the defendant’s assets are mainly bank accounts, given their volatile nature.

In an attempt to address these issues, it is possible to request Portuguese courts, interim measures of a pre-emptive nature, namely by ordering the judicial seizure of assets owned by the defendant. In the appropriate circumstances, the judicial seizure of assets may be requested before initiating the procedure for recognition thereby ensuring the claimant’s guarantee does not vanish and that its credit right may be timely enforced.

In this case, the judicial seizure of assets may be granted without hearing or notifying the defendant (who will be notified and heard afterwards), provided that the following requirements are verified: (i) the claim is supported by facts which indicate the existence of a debt or credit right – *fumus boni iuris*; and (ii) the claimant exposes a reasonable fear of being deprived of the patrimonial guarantee of its credit – *periculum in mora*. Concerning the first requirement, typically a foreign arbitral award may be sufficient. For the purpose of verifying the second requirement, it is necessary to plead and demonstrate some factual circumstance which supports the risk of payment of the debt becoming partially or completely unenforceable: courts often consider previous breaches of the defendant, which are usually deemed to support a reasonable probability of a future breach, and, additionally, whether the defendant intends to avoid voluntary payment of the amount in question, which is due to be recognized and enforced in Portugal.

Recently, a decision from the Lisbon District Court granted a judicial seizure of assets before the initiation of the procedure for recognition of a foreign arbitral award because it considered that the assets known to belong to the respondent – bank accounts – were of a volatile nature, easily squandered and concealed and the conduct of the respondent didn't lead one to believe that, once made aware of the proceedings aimed at the judicial enforcement of the debt, it would not endeavor to conceal or squander such assets.

In conclusion, the aforementioned solution makes it possible to overcome that in Portugal, one may not request the recognition and confirmation of foreign arbitral awards without the notification of the counterparty, that way, guaranteeing the effectiveness of the revision and confirmation procedure.



