

ENFORCEMENT OF FOREIGN DEEDS IN PORTUGAL

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Problem definition

- What are the **effects of foreign deeds** (i.e, documents issued by foreign authorities or notaries) in Portugal?
- Can they serve as the **basis of enforcement** proceedings in Portugal?
- Can they be used as **documentary evidence** in:
 - Judicial proceedings,
 - The drafting notarial acts, or
 - The registration of legal acts in Portugal?



Problem relevance

- Portugal is a relatively small country (10 million inhabitants)
- But has a proportionately very large number of emigrants (5 million people)
- Portugal is also a country of immigration (almost 500.000 foreigners living and working in Portugal)
- Portuguese economy is highly dependent upon international trade and foreign investment and tourism
- Enforcement of foreign deeds is thus a necessity in a large number of situations in Portugal



Relevant sources of the Law

Need to combine different sources on this subject:

- **Internal sources**
 - 1961 Code of Civil Procedure (CCP)
 - 1966 Civil Code (CC)
 - 1984 Code of Land Registry (CLR)
 - 1995 Code of Notariate (CN)



Relevant sources of the Law (contd.)

- **International sources**
 - 1956, 1957 and 1976 CIEC Conventions nos. 1, 2 and 16 – ratified by Portugal in 1981 and 1983
 - 1961 Hague Convention on Apostille (HC) – ratified by Portugal in 1968
 - 2007 Lugano Convention (LC) – approved by Council decision 2007/712/CE



Relevant sources of the Law (contd.)

- **European sources**
 - Regulation 44/2001 (Brussels I Reg.)
 - Regulation 1215/2012 (Brussels I recast Reg.)
 - Regulation 805/2004 on European Enforcement Order for Uncontested Claims (EEO Reg.)
 - Regulation 650/2012 on succession matters (Successions Reg.)



Applicable rules

BASIC REQUIREMENTS FOR THE ENFORCEMENT OF FOREIGN DEEDS:

- A) Exequatur (declaration of enforceability)**
- B) Legalisation (certification of authenticity)**
- C) Translation**

These requirements are not dealt with identically by the abovementioned sources of Law



Applicable rules (contd.)

A) EXEQUATUR

I – Internal Law

- **Article 49, 2, CCP** – Foreign deeds are enforceable in Portugal, with the **exemption of any previous *exequatur***, as long as they:
 - Fall into one of the categories of enforceable titles provided for in Portuguese law (art. 46 CCP) – the *lex fori*;
 - and
 - Comply with the formalities required by the law of their country of origin – the *lex loci*.



Applicable rules (contd.)

- This rule contrasts with **article 49, 1 CCP** which requires an *exequatur* by a higher court for the enforcement of foreign judgments and awards (except insofar as they are covered by international conventions or EU acts providing otherwise)
- Reason:
 - According to **art. 816 CCP**, in enforcement proceedings based upon foreign deeds, the defendant may resort to **all means of defense allowed in declaratory proceedings;**
 - Whilst the enforcement of foreign judgments and awards **may only be contested on one of the formal or supervening grounds** provided for in art. 814, 1, of the CCP



Applicable rules (contd.)

- **Article 365, 1, CC**
 - Authentic documents issued abroad according to the *lex loci* have the **same evidentiary effect** of equivalent documents issued in Portugal
 - This effect includes their use as evidence of facts occurred abroad which are to be registered in Portuguese Land Registries
 - **No *exequatur* is thus required** for this purpose



Applicable rules (contd.)

II – European Law

- **Brussels I Reg.** - *Exequatur* is required for the purpose of the enforcement in a member State of documents drawn up or registered as authentic documents in another member State (=LC)
- **EEO Reg.** – Dispenses *exequatur* in what concerns instruments certified as European Enforcement Orders in their member State of origin
- **Brussels I recast Reg.** – Abolishes *exequatur* of foreign judgments and authentic instruments
- **Successions Reg.** – No *exequatur* required for authentic instruments to have evidentiary effects; but *exequatur* required for enforcement



Applicable rules (contd.)

B) LEGALISATION

I – Internal Law

- **540 CCP** – Documents issued abroad are deemed legalised if the issuing authority's signature is recognised by a Portuguese diplomatic or consular agent and this agent's signature is authenticated with a seal.
- **For enforcement purposes**, legalisation of foreign documents is in principle required in Portugal, unless they are manifestly authentic.
- **But for evidentiary purposes**, articles 365, 2, CC and 44 CN only require legalisation of foreign documents if there are reasonable doubts concerning their authenticity.



Applicable rules (contd.)

II – International Law

- **CIEC Conventions nos. 1, and 16** – Have abolished the requirement of legalisation in what concerns certain categories of public documents concerning civil status.
- **HC 1961** – Replaces legalisation by an apostille placed on the document by an appointed authority, which proves the authenticity of the document.



Applicable rules (contd.)

III – European Law

- **Proposal for Regulation on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the EU - COM (2013) 228 final of 24 April 2013**
 - Exempts documents issued by public authorities of member States from legalisation and similar formalities, such as apostille
 - Where a reasonable doubt arises concerning authenticity of such documents, a request for information may be submitted to the issuing authority
 - Part of the **2009 Stockholm Programme** «*An open and secure Europe serving and protecting citizens*»



Applicable rules (contd.)

C) TRANSLATION

- **Article 43, 3 CLR** – Currently exempts from translation foreign documents drafted in English, French or Spanish if the competent civil servant dominates these languages (one of the SIMPLEX measures introduced by the Portuguese Government in 2008 aimed at cutting red tape in Public Administration)
- **Translation of foreign deeds is thus not required** by Portuguese Land Registries, as long as they are issued in one of those languages
- **Proposed Regulation on the acceptance of public documents in the EU** – Authorities shall accept non-certified translations of public documents issued by the authorities of other member States. In case of reasonable doubt, they may require a certified translation.



Interaction of the applicable rules

- According to **article 8 of the Constitution**, International and EU law prevail over internal law.
- ***Exequatur of foreign deeds*** originating in EU member States may be thus required in Portugal in cases in which internal law does not demand it.
- **Judgment of the Supreme Court** of 16 June 2005: enforcement of a deed issued by a German notary in Hamburg was refused in Portugal because an *exequatur* as required by Brussels I Reg. had not been previously granted, although Portuguese law did not require it.



Conclusions

- **A trend to exempt or mitigate *exequatur* proceedings, as well as legalisation and translation requirements,** in regard of deeds originating in other member States has emerged in EU Law.
- Portuguese law has **anticipated this trend**, in some cases by several decades.
- Paradoxically, **due to the prevalence of EU law over internal law**, it may be **more difficult** to enforce EU deeds in Portugal than non-EU deeds.
- The most recent developments in EU Law may however **bring this paradox to an end.**



Thank you