

Portugal

by

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Attachment of Assets

1. **What is the general nature and effect of judicial measures available for plaintiffs to obtain provisional relief affecting property of debtors to obtain security for judgments to be obtained (“attachments”)? Freezing property in place? Placing it in the custody of a third party, such as a court official, sheriff or marshal?**

The attachment proceeding in Portuguese Law consists of a request for the Court to issue an order regarding debtors property or rights (e.g., bank accounts, credits over a third party, shares, etc.). The effect of the judicial order differs depending on the aimed assets: (i) the attachment of real estate is registered at the competent Land Registry Department as an encumbrance in favour of the plaintiff; (ii) the attachment of non real estate is effective by seizing the assets and placing them in the custody of a third party appointed by the Court but named by the plaintiff; and (iii) the attachment of defendants rights is made through a judicial notification of the third party (garnishee, bank, company, etc.) in which the latest is commanded to place the credit at the Courts instructions.

2. **What is the form of the attachment? Injunction? Other kinds of judicial order? Specify.**

The judicial order that grants an attachment request is a judge’s decision commanding the attachment, naming the assets and/or rights attached and stating the measures to be endeavoured by Court officials (e.g. displacement to the defendants main office to seize all assets and place them with the trustee appointed by the judge).

3. **What is the jurisdictional basis for an attachment? Is the presence of the debtor’s property a sufficient basis for an attachment to be obtained, assuming other requirements are satisfied? To what extent may attachments be used as a basis for obtaining personal jurisdiction over a debtor? To what extent are attachments or similar orders intended to have extraterritorial effect?**

The existence of assets to be attached in Portugal is sufficient to establish Portuguese jurisdiction for the attachment request. However

it does grant jurisdiction for the following proceeding on the merits. The Portuguese Courts will only have jurisdiction for the proceeding on the merits if the defendant lives in our country or the obligations were to be fulfilled in Portugal.

- 4. May an attachment be obtained in support of a proceeding on the merits in another country? If so, may the other proceeding be in court, arbitration or in another type of forum? Are attachments used as a mechanism in enforcing judgments or arbitral awards?**

In what concerns international jurisdiction, Portugal is submitted as a member to both the Lugan Convention (1988) and the Brussels Convention (1968) on jurisdiction regarding enforcement of judgments in civil and commercial matters. Article 24 of these conventions states that any "Safety Proceeding" can be petitioned and obtained in the lex forum, even if a foreign forum has jurisdiction over the proceeding on the merits. Being so in Portugal an attachment may be obtained in support of a judicial or arbitration proceeding on the merits filed in another country. Attachments can also be used when the plaintiff already has a judicial or arbitration decision on the merits and in this case serve the purpose of a preliminary enforcement which will only become definitive with the following specific proceeding of enforcement of judgement.

- 5. What are the requirements for obtaining an attachment? Of property in your country? In support of a proceeding in another country, if different?**

For obtaining an attachment the plaintiff has to state and prove to a summary level (*summaria cognitio*) the facts that lead to the probable existence of the credit over the defendant and the facts that justify a fear of not recovering the amount in debt and the need to anticipate a security for an expected judgement (*periculum in mora*). The plaintiff also has to indicate the assets or rights to be attached and inform the Court of any necessary details for the enforcement of the attachment.

- 6. May an attachment be obtained without notice to the debtor? If so, what are the requirements for notifying the debtor, and what procedure is available to the debtor to challenge the *ex parte* attachment obtained? If not, what are the procedural**

requirements for obtaining an attachment on notice to the defendant?

In Portugal the attachment order is obtained without previous notice to the debtor. After the attachment is fully enforced the defendant is serviced with a copy of the plaintiffs request and of the judges decision. In a given judicial term the defendant can either appeal from such decision (on the grounds that the attachment could not have been sustained in light of the facts summarily proven) or oppose the attachment (presenting evidence that contradict the basis of the judges decision). If the opposition is overruled the defendant may also appeal from this decision.

7. **What are the elements that must be established to the satisfaction of the court for it to grant an attachment? E.g., likelihood of success on the merits; likelihood that the debtor is removing, or will remove, its assets from the jurisdiction; fraudulent activity by the debtor; need for the attachment as security for an expected judgment or award?**

The Court grants the attachment request if the plaintiff succeeds in fulfilling the requirements stated on number 5. above.

8. **What is the procedure for obtaining an attachment? What is the nature and extent of the evidence that must be presented to the court and how must it be presented?**

For obtaining an attachment the plaintiff requests it to the Court following the requirements indicated in number 5. and with that request presents all available evidence (documents and witnesses). The judge will then schedule a hearing for the witnesses' inquiry. The evidence needed for the Court to grant the request is of a summary nature and extent.

9. **To what extent, and under what circumstances, is an undertaking, in the form of a third-party bond or guarantee or a deposit, required in order to obtain an attachment? In what amount, in relation to the amount claimed, is the undertaking required? How are such undertakings generally obtained as a matter of practice? How much to they cost?**

The judge can make the granting of the attachment depend on the plaintiff rendering bond or guarantee of any kind. According to the expressions of the Portuguese Law this can happen when the judge

finds it convenient in light of the circumstances of each case and such guarantee shall be rendered for an adequate amount determined by the judge. So there are no specific circumstances in which a guarantee is requested to the plaintiff and no guidelines to determinate its amount. This matter is within the discretionary power of the judge, nonetheless as a matter of practice the plaintiff is rarely requested to present a guarantee. If the judge decides to request a guarantee from the plaintiff he/she will determinate the nature of the same and the attachment shall only be granted after this requirement is fulfilled. There are no judicial costs involved in presenting a guarantee to the Court (depending on the type of guarantee it may involve specific costs like registry costs or bank costs).

10. What does the undertaking secure? Damages to the debtor if the attachment is ultimately vacated? Do such damages include interest? Other elements? Legal fees? To what extent? Court costs? To what extent?

This undertaking secures damages (including interest) caused to the defendant if the attachment is ultimately vacated or considered unjustified and the plaintiff is deemed responsible for not acting with average caution. The defendant must state and prove the damages suffered which can include loss of profit, legal fees and other damages resulting from the plaintiff's conduct. The party against which the final decision on the merits is ruled always supports judicial costs.

11. How specific must the application for an attachment be as to the nature, extent and location of the assets sought to be attached? How many potential garnishees may be served with an order of attachment?

The attachment request must provide the Court the necessary information regarding the assets or rights sought to be attached to allow the enforcement of the judge's decision. There is no limit to the number of assets or rights to be attached but its total value must not exceed the plaintiff's credit over the defendant. If the assets or rights value is unknown when the request is presented to the Court (e.g., the plaintiff names all bank accounts of the defendant not knowing the amounts deposited) the judge can afterwards reduce the attachment to the assets or rights found sufficient to guarantee the defendant's debt.

- 12. What are the obligations of a third party who is served with an order of attachment to report on the nature and extent of the assets of the debtor in his possession, and the extent to which other persons, including the party served itself, have prior or competing liens on the property covered by the attachment order?**

The third party who is served with an order of attachment must inform the Court of the existence, nature and extent of the assets or rights belonging to the defendant as well as of any details that may affect the attachment and place those assets or rights at the Courts instructions. If the order of attachment contends with prior or competing rights of a third party this third party will have to file an opposition to the attachment to defend its position.

- 13. To whom are such reports given? To the court? To the attaching plaintiff? What is the form of such reports? In writing? Oral? Hints?**

The information on the existence, nature and extent of the assets or rights belonging to the defendant must be presented to the Court in writing in a given judicial term. If the third party that is served for this purpose does not comply the Court presumes the assets and/or rights exist as described by the plaintiff and if the third party does not place those assets or rights at the Courts instructions it can be criminally charged.

- 14. What kinds of property of a debtor may be attached? Debts of third parties to the debtor? Claims of the debtor against third parties? Expectancies?**

As stated in paragraph 1. above all kinds of assets or rights belonging to the defendant can be attached except the ones mentioned in paragraph 16. below. Claims of the debtor, its expectancies or litigious rights can only be attached if the third party concedes that they represent a right of the defendant or the plaintiff succeeds in proving so.

- 15. What is the effect of the service of an order or attachment on assets of the debtor that came into the possession of the garnishee after the time of the service of the attachment order? Are there any time limits on the effectiveness of the order of attachment? In particular, what is the effect of the service of the**

order of attachment on a bank that has issued or confirmed a letter of credit of which the debtor is a beneficiary?

The limits of the attachment order result from the judge's decision. For instance if the judges decision commands the attachment of the defendants bank accounts up to a certain amount (in relation to the amount claimed by the defendant) and the banks reports on the existing deposits state an inferior amount the attachment order is also effective over deposits made by the defendant after service was made upon the bank. The same applies when the judge commands the attachment of the defendant's credit over a third party if the last reports that the credit is not due at the time of the service. As soon as the credit is due it shall be placed at the Courts instructions.

16. Are there certain kinds of assets or property of a debtor that are immune, or in some other way protected from attachment, e.g., pension funds, salaries, wages, diplomatic property, other sovereign property, other property specified under consumer-protection laws?

The following assets/property are protected from attachment under the Portuguese Civil Procedure Code:

- (a) Inalienable assets or inalienable rights;
- (b) State assets or these belonging to public corporations;
- (c) Objects which attachment might be offensive or whose value is economically not justifiable;
- (d) Tombs;
- (e) Objects related to public cult;
- (f) Essential assets located in the defendants home for domestic use (if the attachment concerns the payment of these assets or its repairs the same are not protected from attachment);
- (g) Working equipment/tools or essential assets for learning or studying;
- (h) Handicap devices or to be used on patient care;
- (i) Currency essential for the debtors and his family's survival;
- (j) The currency or bank deposit rendered to fulfil a credit originally protected from attachment.

Regarding the debtor's salary, pension, funds, indemnification, insurance or other amounts of similar nature only the attachment of one third of the same is admitted.

17. For how long may an order of attachment remain in effect? If the attachment order is in support of a proceeding in another forum, are there any requirements concerning when, in relation to the date of the issuance of the order of attachment, the proceeding in the other forum must be commenced? Completed?

The attachment order remains in effect until the plaintiffs credit is satisfied unless one of the following occurs:

- (a) The plaintiff does not file the proceeding on the merits within ten days after being notified that service was made upon the defendant;
- (b) The proceeding on the merits is brought to a standstill for more than thirty days due to the lack of initiative of the plaintiff;
- (c) The final decision on the merits is against the plaintiff;
- (d) The final decision on the merits is in favour of the plaintiff and the same does not file an enforcement of judgement within two months after the final decision or this enforcement is brought to a standstill for more than thirty days due to the lack of initiative of the plaintiff.

Any of these circumstances lead to the cancellation of the attachment.

When another jurisdiction is competent for the proceeding on the merits the plaintiff must prove that the same was filed within ten days after being notified that service was made upon the defendant, by presenting a certificate issued by the foreign Court to the Portuguese Court that granted the attachment.

18. What rights in the plaintiff are created by the service of an order of attachment? Priority over creditors attaching later? Do banks and other garnishees have set-off or other priority rights superior to those of creditors attaching assets of debtors who are also debtors of such garnishees?

The plaintiff who was granted an attachment order is entitled to the

right of first credit fulfillment in relation to other creditors who do not have previous real estate security.

- 19. How are attachments ultimately enforced as judgments? What is the procedure? What happens if multiple plaintiffs seek judgments against the same property at roughly the same time?**

The attachment order is provisory until the judgement on the merits is enforced and within this proceeding (enforcement of judgement) the attachment is converted in a definitive measure. Afterwards the attached assets are sold or directly delivered to the plaintiff depending on the kind of assets, to fulfil the plaintiff's credit. The plaintiff who has obtained an attachment order firstly has priority over any other plaintiffs seeking enforcement against the same property as long as these do not have a previous real estate security on their behalf.

- 20. What is the procedure for challenging or vacating an order of attachment?**
- 21. If there are any other aspects of attachment law that have not been addressed in the questions, please discuss them here, or elsewhere as appropriate.**