PORTUGAL

LEGAL BASIS

1. Has your State signed and/or ratified the *European Convention on State Immunity* (1972) and/or the *United Nations Convention on Jurisdictional Immunities of States and Their Property* (2004)? Do the authorities of your State consider the provisions on these treaties on service of process as a codification of customary international law? Does your State apply any other international legal instrument (apart from bilateral agreements)?

Portugal has signed the European Convention on State Immunities (1972) on the 10th May 1979, however, Portugal has not yet ratified the Convention. The Department of Legal of Affairs of the Ministry of Foreign Affairs considers that many of the provisions enshrined in the European Convention concerning the proceedings against a Party in a court of another Party and the effects of judgments that Parties agree to give them, reflect International Customary law. However, the 1972 European Convention, due to its regional character and poor number of State Parties, is not part of the international consuetudinary law of nations.

Portugal is one of the very few State Parties to the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004). Portugal has signed the Convention on the 25th February 2005, later ratified the Convention on the 29th June 2006, and deposited the instrument of ratification on the 14th September 2006.

Even though the Convention has not yet entered into force, over the past decade, Portuguese judicial authorities have invoked the United Nations Convention as International Customary Law *(see point 3 bellow, case concerning the Republic of São Tomé e Principe).* The Department of Legal Affairs of the Portuguese Ministry of Foreign Affairs shares this view and urges other States, particularly European partners, to ratify the Convention.

2. Please provide information on:

a. National legislation (in particular its title, source and content; if available, please provide official translations and/or references to Internet sources).

As many other European States, Portugal has not enacted specific national legislation on service of process upon a foreign State. Article 230 of the Civil Procedure Code (*“Código de Processo Civil”)*[1], though not applicable to service of process upon a foreign State, enshrines a general rule applicable to service of process on Diplomatic agents, in accordance with International Treaty Law. Article 230 reads as follows (unofficial translation):

Service of process and notification upon diplomatic agents

“In respect of Diplomatic Agents treaty law shall be observed and in the lack thereof, the principle of reciprocity”.

b. Case-law and practice, specifying whether your national courts and tribunals review the lawfulness of the service of process by operation of law.

National courts have ruled on the lawfulness of service of process by instituting a judicial proceeding against a foreign State on several occasions:

In a case concerning the **Republic of São Tomé e Principe vs *Hospital Egas Moniz*** (29.05.2012), the District Court (*“Tribunal da Relação de Lisboa”)* reaffirmed that the Foreign

[1] The “*Código de Processo Civil” (in Portuguese) is available at: http://www.dgpj.mj.pt/sections/leis-da-justica/livro-iii-leis-civis-e/consolidacao-processo/codigo-processo-civil8579/downloadFile/file/CODIGO_PROCESSO_CIVIL_VF_Word.rtf?nocache=1286970457.73*

State did not enjoy immunity from jurisdiction (*acta jure imperii* e *acta jure gestionis*). The District Court considered that for the purposes of Article 22 of the United Nations Convention on Jurisdictional Immunities of States and their Property, service of process instituting a proceeding against a Foreign State should be effected by transmission through diplomatic channels via the Ministry of Foreign Affairs. The Court considered the United Nations Convention applicable – insofar as the Convention reflects "a well-established international state practice" as well as "a codification of customary law".

On the other hand, The Lisbon District Court ruled differently in a case where **Japan** was the defendant (08.10.2008). The Court did not consider the United Nations Convention applicable; the Court pointed out that Article 22 of the Vienna Convention on Diplomatic Relations (inviolability of the Mission), and Article 230 of the Civil Procedure Code (*"Código de Processo Civil")*[2]*,* though applicable to the Diplomatic agent and the Diplomatic Mission, are not relevant in respect to the foreign State; thus the Court considerered that the only relevant provisions were the general rules on service of process enshrined in the Civil Procedure Code.

In conclusion, recent Portuguese case law reflects the Doctrine of Relative Foreign States immunity. The issue is not ***if*** service of process should be served or not but ***how*** to effect it.

We point out that in March 2013 Portugal submitted a report containing ten judicial decisions (Supreme Court and District Court) on State practice regarding State Immunities. Those judicial decisions, including the selected aforementioned cases, reflect the evolution of national case law over the past 10 years.

In **Diplomatic Practice,** service of process upon a Foreign State through the diplomatic channels is effected by sending a copy of the summons, complaint and notice of suits (and a translation, if so is required), to be addressed and dispatched by the clerk court to the Ministry of Foreign Affairs.

If the court clerk sends the court's letter directly to the Foreign State (Embassy in the State of the Forum), the Portuguese Ministry of Foreign Affairs, as a Defendant, considers process not effected and asks the court to transmit the original, or a copy of the document to be served via the "*Service du Protocole"* of the Ministry of Foreign Affairs.

PROCEDURE

3. Please describe the procedure(s) applicable to service of process on a foreign State, specifying the hierarchy between the different methods for serving process. In particular, please provide information on when the service is deemed to be effected, time-limits, the grounds to refuse service of process and the consequences of the unlawfulness of the service.

Article 22, paragraph 1 c) ii) of the UN Convention does not specify a procedure *on how* to effect service through the diplomatic channels. Upon receiving the copy of the summons, complaint and notice of suits (and a translation, if so is required), the Ministry of Foreign Affairs follows one of two possible procedures outlined in the following section:

The Portuguese Ministry of Foreign Affairs considers that service upon a foreign State through the diplomatic channels is effected by sending a copy of the summons, complaint and notice of suits (and a translation, if so is required), to be addressed and dispatched by the court clerk to the Ministry of Foreign Affairs following one of two possible procedures:

[2] The "*Código de Processo Civil" (in Portuguese) is available at: http://www.dgpj.mj.pt/sections/leis-da-justica/livro-iii-leis-civis-e/consolidacao-processo/codigo-processo-civil8579/downloadFile/file/CODIGO_PROCESSO_CIVIL_VF_Word.rtf?nocache=1286970457.73*

Option 1 - service of process via the Embassy of the State of the Forum or

Option 2 - service of process via the Ministry of Foreign Affairs of the Defendant State

Option 1 (Service of Process through the Diplomatic Channels « simple»)

Court Clerk > Ministry of Foreign Affairs > Foreign State Embassy in the State of the Forum

Option 2 (Service of Process through the Diplomatic Channels « formal »)

Court Clerk > Ministry of Foreign Affairs > Portuguese Embassy in the Foreign State > Ministry of Foreign Affairs of the Defendant State

It is important to note that Article 22, paragraph 1 c) ii) of the UN Convention does not impose a particular procedure *on how* to effect service through the diplomatic channels, in line with either option 1 or option 2.

There is enough room for States (The State of the Forum and the Defendant State) to decide which procedure is more adequate on a case by cases basis. However, quite a number of States prefer to follow the more formal option (2) and serve process via the Ministry of Foreign Affairs of the Defendant State.

Portugal accepts both options and considers that the important aspect is to make sure that States may choose between options 1 or 2. Article 22, paragraph 1 c) ii) should not be interpreted restrictively, and it does not specify a particular procedure or implies that the more formal option is in fact a customary rule. We take a rather pragmatic view in this matter and consider that the choice of the procedure is really up to the Defendant State.

In our experience, most litigation related with foreign States concerns **labor issues** and Portuguese labor law. In such cases, many Embassies have local legal counselors and instructions from theirs capitals to deal with the issue locally (Portuguese courts applying Portuguese labor law). So, in these cases, a more formal procedure, in line with option 2, may not be adequate.

In Portuguese law, the standard deadline to reply to a Court summon is 30 days. In this respect it is not that important the choice of the procedure (option 1 or option 2) but it is crucial to determine exactly **when the deadline starts running:**

Option 1: The deadline starts running upon a) receipt of the Note Verbal sent by Ministry of Foreign Affairs by the Embassy or b) upon receipt of a “courtesy Note” sent by the Embassy to the MFA. Procedure b) has the advantage of extending the time limit and giving an extra time to the local Embassy to send a copy of the courts documents and whatever other elements the Embassy deems necessary to the MFA of the Defendant State.

Option 2: Service is considered effective upon receipt of the Note Verbal (send by the MFA of the State of the Forum) by the MFA of the Defendant State. Many States consider that this is probably the best solution, since it extends the time limit for another 30 days (Article 252-A paragraph 3 of the Civil Procedure Code) and is probably the procedure that most accurately establishes when the deadline starts running: upon receipt of a copy of the courts documents summon, notice of suit by the MFA of the Defendant State.

Article 22, paragraph 1 c) ii) of the UN Convention *gives enough room for States to freely agree to choose between option 1 and option 2. These are procedural aspects with practical implication that may be decided on a case by case basis by mutual agreement between the State of the Forum and the Defendant State. Option 1 may be the best solution when labour litigation arises (in practise local issues treated locally) but the Defendant State but this may not be the very best solution concerning other forms of litigation.*

In conclusion, whatever option the Defendant State and the State of the Forum freely agree to follow, it is instrumental to determine the exact moment when service is considered effected is an important procedural point to look after since it prevents the possibility of judgments *in absentia* and guarantees that the Defendant State has the possibility to adequately prepare its defense.

a. How are the terms "diplomatic channels" (Article 16 § 2 of the European Convention and Article 22 § 1 c) i) of the United Nations Convention) interpreted by your national authorities? Please indicate whether these terms include a notification to the embassy of the State concerned in the State of forum.

The Portuguese Minister of Foreign Affairs considers that service of the documents sent by the court clerk via the Ministry of Foreign Affairs is deemed to have been effected by their receipt by the Ministry of Foreign Affairs (in line with Article 16, paragraph 3 of the European Convention).

On the other hand, if service of process is effected by the court clerk directly to the Ministry of Foreign Affairs of the Defendant State or the Embassy in the State of the Forum, service is not considered effected and not in line with of Article 22 of the UN Convention and Customary International Law.

The Portuguese Ministry of Foreign Affairs also understands that in the absence of a clear procedure outlined in Article 22 paragraph 1 c) I of the UN Convention, upon receiving the Court's letter, the Ministry of Foreign Affairs sends a Note Verbal to the Embassy the State concerned in the State of Forum, or to the Ministry of Foreign Affairs of the Defendant State, in accordance with the longstanding customary rules expressed in the UN Convention *(in line with the procedures outlined in point 3).*

Portugal considers that there is no clear obligation to send a letter to the Court giving notice of the receipt and onward transmission to the Foreign State, however, as a courtesy, we tend to do so.

We also point out that once that process is served and the Defendant State is given notice of suit, all succeeding communications between the foreign State and the Court of the State of the Forum are carried out directly and not trough the diplomatic channels.

b. How are the terms "if necessary" (Article 16 § 2 of the European Convention and Article 22 § 3 of the United Nations Convention) interpreted by your national authorities?

In respect to the meaning given to the words "if necessary" in Article 22, paragraph 3 of the UN Convention, in line with the statement of the Portuguese delegation at the 45th CAHDI Session, we are unsure to what extent this provision imposes an obligation to translate judiciary documents and welcomed other views on this particular issue.

When the defendant is a foreign State we tend to consider that there is no obligation to translate the courts documents .Service is effected by sending a copy of the summons and complaint and a notice of suit to the Defendant State, however, there is no obligation to send a translation of each into the official language of the foreign state. In fact, when the Defendant is a foreign State, the Portuguese Judiciary never translates legal documents and Portuguese is the only official language in Portuguese courts.

Up until now, the Department of Legal Affairs of the Portuguese MFA, when serving process through the diplomatic channels, has never dealt with any case where the Defendant State requested the Court a translation of the Court's documents.

If the Defendant States requires the translation of the Courts documentation (summon and notice of suit), the Ministry of Foreign Affairs sends the Foreign State's request to the competent national court, however, the decision to translate or not the court's documentation is a discretionary decision of the national judge.

The Portuguese Ministry of Foreign Affairs, through its Department of Legal Affairs, is unable to carry such a burden.

4. Where your State is the defendant in the proceedings, what is accepted as an adequate service of process? Please specify whether your State accepts the service to its embassy in the State of forum.

As the Defendant in the proceedings, and in line with its diplomatic practice regarding third States, the Portuguese Ministry of Foreign Affairs accepts service of process to be delivered to the Embassy in the territory of the State of the forum or to the Ministry of Foreign Affairs.

We recall that at the 45th Session of the CAHDI, the Portuguese Delegation briefly introduced document CAHDI (2013) 4 and pointed out that as regards the issue of the form in which service of process was to be effected pursuant to Article 22 paragraph 1 c) of the UN Convention, certain third countries had invoked the existence of a customary norm requiring service of process to be delivered to the foreign embassies in the territory of the State of the forum.