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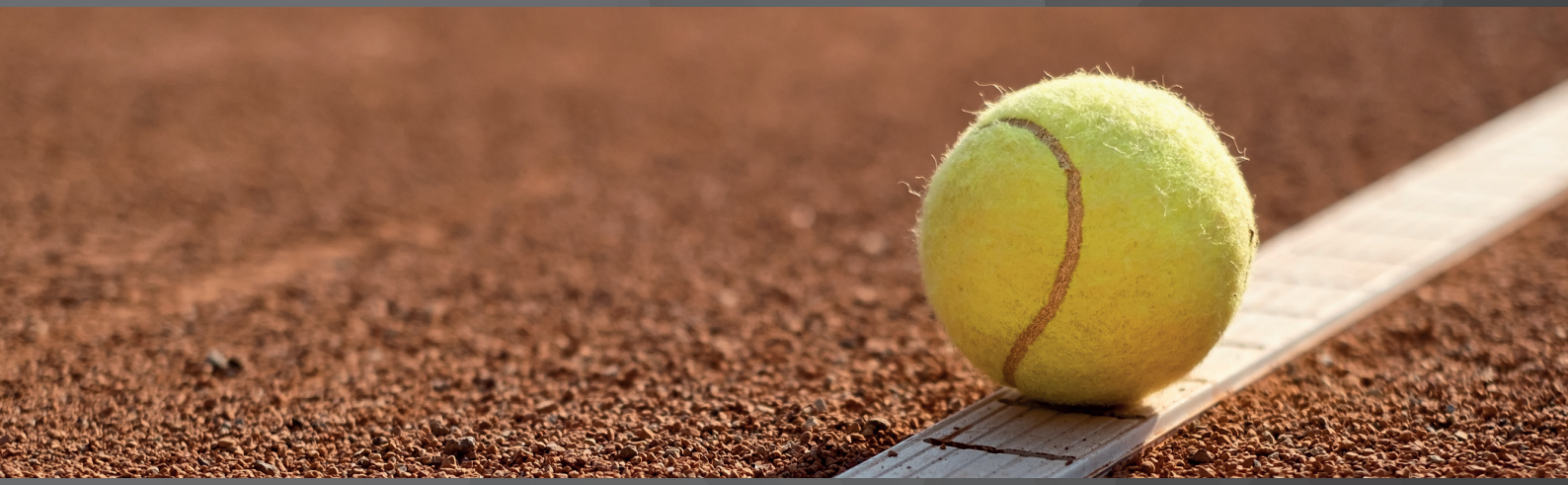

International Arbitration 2021

A practical cross-border insight into international arbitration work

18th Edition

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

The new Portuguese Voluntary Arbitration Law (Law 63/2011, of 14 December 2011 – "PAL") states that arbitration agreements must be in writing. The requirement applies whether the agreement takes the form of a stand-alone submission agreement or an arbitration clause in a contract (Art. 2 (1) PAL). An arbitration agreement is binding even when it is merely incorporated by reference into the contract giving rise to the dispute (Art. 2 (4) PAL).

This writing requirement is met "if the agreement is recorded in a written document signed by the parties, in an exchange of letters, telegrams, faxes or other means of telecommunications which provide a written record of the agreement, including electronic means of communication" (Art. 2 (2) PAL) or "if it is recorded on an electronic, magnetic, optical or any other type of support, that offers the same guarantees of reliability, comprehensiveness and preservation" (Art. 2 (3) PAL). This requirement is also met "if there is an exchange of statements of claim and defence in arbitral proceedings, in which the existence of such an agreement is invoked by one party and not denied by the other" (Art. 2 (5) PAL).

1.2 What other elements ought to be incorporated in an arbitration agreement?

The PAL sets forth that the "submission agreement" shall specify the subject matter of the dispute and that the "arbitration clause" shall specify the legal relationship to which the disputes are related (Art. 2 (6) PAL). The agreement to arbitrate is also subject to substantive requirements arising from the general principles of the law, in particular to the general principles and provisions of private law that stem from the Portuguese Civil Code ("CC"), and most notably from the law of obligations. Issues such as consent, validity and efficacy of transactional declarations and capacity apply to arbitration agreements. The PAL enables the parties to resort to arbitration not only to solve "dispute issues" but also "any other issues that require the intervention of an impartial decision maker, including those related to the need to specify, complete and adapt contracts with long-lasting obligations to new circumstances" (Art. 1 (4) PAL).

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Portuguese courts have shown a pro-enforcement bias in a number of decisions, even when the subject matter of the dispute involves issues of public interest and consumer protection.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The recognition and enforcement of arbitral awards is subject to the PAL and the Portuguese Code of Civil Procedure ("CCP"). According to the PAL, the party seeking to enforce an arbitral award must supply the original or a certified copy of the award, and, if the award was not made in Portuguese, a certified translation thereof into Portuguese (Art. 47 (1) PAL). The New York Convention on the Recognition and Enforcement of Arbitral Awards of 1958 ("New York Convention") also applies in Portugal.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

Indeed, the PAL applies to both domestic and international arbitration, albeit with slight nuances as regards the latter (for instance, in international arbitration there is no possible appeal of the final award, and if the parties wish to have a review on the merits of the dispute, they must conclude a supplementary agreement so as to hold a second arbitration to review that final award).

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The PAL was inspired by the provisions and principles of the UNCITRAL Model Law.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

As mentioned above, there is a mandatory rule to the effect that the appeal is not admissible. On the other hand, international arbitral awards applying a law other than Portuguese law may always be challenged on the grounds of Art. 46 of PAL and Art. V of the New York Convention, and also whenever the outcome of its enforcement is in manifest violation of the principles of Portuguese international public policy (Art. 54 PAL).

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Art. 1 (1) PAL provides that negotiable patrimonial rights can be arbitrated. Whenever disputes do not involve patrimonial interests, "the arbitration agreement is also valid provided that the parties are entitled to conclude a settlement on the right in dispute" (Art. 1 (2) PAL). Disputes related to copyright and related rights may also be submitted to arbitration if they are "disposable" or "alienable" rights (Portuguese Code on Copyright and Related Rights (1995)). Other "arbitrable" disputes include:

- Industrial property rights related to reference medicines and generic medicines (Law No. 62/2011 of 14 December 2011).
- Particular issues related to sport federations, leagues and other sports entities, and disputes related to doping in sport (Law No. 74/2012 of 6 September 2013).
- Particular issues of collective bargaining (Portuguese Labor Code).
- Issues related to copyrights and intellectual property involving:
  (a) rewards for the lease of works protected by copyright (Decree-Law No. 332/97 of 27 November 1997);
  (b) rights to authorise or prohibit cable retransmission of works protected by copyright (Decree-Law No. 333/97 of 27 November 1997);
  (c) compensation for the recording or reproduction of works (Decree-Law No. 62/98 of 1 September 1998); and
  (d) technological protection measures (Portuguese Code on Copyright and Related Rights 1995).

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Under the PAL, an arbitrator is competent to decide, *ex officio* or at a party's request, matters relating to the existence, validity and effectiveness of the arbitration agreement and the contract in which the arbitration clause is inserted (Art. 18 (1) PAL). This provision embodies the well-settled principle of *kompetenz-kompetenz*. The arbitral tribunal may rule on its own jurisdiction either in the final award or in an interim decision. In the latter case, a party may challenge the arbitral decision before the state courts within 30 days (Arts 18 (9) and (10) PAL). If the arbitral tribunal rules on the jurisdictional issue for the first time in the final award, the decision by which the tribunal finds itself competent will only be open for challenge in set-aside proceedings (Art. 46 (3) PAL).

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

According to Art. 5 (1) of the PAL (in line with the New York Convention), when a party commences court proceedings in apparent breach of an arbitration agreement, the state court before which a lawsuit is brought shall, if the respondent so requests not later than when submitting its first statement on the substance of the dispute, dismiss the case, unless it finds that the arbitration agreement is blatantly null and void, is or became inoperative or is incapable of being performed. National courts have constantly upheld the *kompetenz-kompetenz* principle and, therefore, do refer the parties to arbitration whenever the arbitration agreement is invoked by one of them.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

According to Art. 5(1) of the PAL, the state court can only address the issue of the jurisdiction and competence of an arbitral tribunal when the existence of an arbitration agreement is invoked by one of the parties and the court judge concludes that said agreement is manifestly null and void, is or became inoperative or is incapable of being performed.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

At least two Portuguese courts have decided that arbitration agreements can only be extended to non-signatory parties in exceptional circumstances. In both cases, the court denied the extension of the arbitration agreement to those non-signatory parties (see decisions of the Lisbon Court of Appeal of 24 March 2015 and 11 January 2011). The Supreme Court of Justice affirmed the 11 January 2011 decision on 8 September 2011.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

There are no specific laws or rules prescribing limitation periods for the commencement of arbitrations in Portugal. This is without prejudice of those established in substantive law applicable to the merits of the case. For example, the CC establishes limitation periods of three and 20 years for non-contractual and contractual civil liability, respectively. Legal rules applicable to statutes of limitations are of a substantive nature.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Arbitration agreements to which the insolvent is a party, concerning disputes whose outcome may influence the value of the insolvency, shall be suspended, without prejudice to the provisions of applicable international treaties and pending arbitration proceedings, on the date that the insolvency decision continues (Art. 87 of Decree-Law No. 53/2004 of 18 March).

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

The parties may choose the rules of law to be applied by the arbitral tribunal if the latter is not authorised to decide *ex aequo et bono*. Without a choice of law provision, the arbitral tribunal

applies the law of the state with the closest connection to the subject matter of the dispute (Art. 52 (1) and (2) PAL).

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Portuguese mandatory rules will apply whenever the outcome deriving from the application of a foreign legal rule violates the principles of the Portuguese international public policy.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

According to Art. 51 of the PAL, the arbitration agreement is valid as to its substance, and the dispute it governs may be submitted to arbitration if the requirements set out either by the law chosen by the parties to govern the arbitration agreement, by the law applicable to the subject matter of the dispute, or by Portuguese law are met.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

The parties are free to agree on the number of arbitrators. However, the panel must be constituted by an uneven number of arbitrators.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

According to Art. 10 (4) of the PAL, unless otherwise agreed, if a party is to appoint an arbitrator or arbitrators and fails to do so within 30 days of receipt of the other party's request to do so, or if the arbitrators appointed by the parties fail to agree on the choice of the chairman within 30 days of the appointment of the last arbitrator to be appointed, the appointment of the remaining arbitrator or arbitrators shall be made, upon request of any of the parties, by the competent state court. If the arbitration is to be conducted under an institutional framework, that appointment shall be made according to the arbitration rules of the institution in question.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

As said above, state courts can appoint arbitrators, including the chairperson of the arbitral tribunal, when the parties have failed to do so in a timely manner. However, this intervention from state courts applies only in *ad hoc* arbitrations.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Arbitrators have a duty to be (and remain throughout the proceedings) impartial and independent (Art. 9 (3) PAL). Arbitrators are also subject to the rules applicable to the challenge of court judges (Art. 9 (4) PAL). Therefore, before accepting an appointment, arbitrators have a duty to disclose any facts that might give rise to justified doubts with regard to their impartiality or independence (Art. 13 (1) PAL). The rules of most arbitration centres and institutions also require the arbitrator to sign a statement of independence when accepting an appointment.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

In general, the parties are free to determine the proceedings applicable to the arbitration in the context of the arbitration agreement, and may also follow the rules of arbitration institutions. This is without prejudice of mandatory principles applicable to arbitration proceedings (Art. 30 (1) PAL).

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

In the absence of a party agreement or the applicable institutional rules, the arbitral tribunal may conduct the arbitration in the manner it considers appropriate, defining the procedural rules it deems adequate. Arbitration procedures are bound by the following principles:

- The respondent must be given notice of the proceedings and an opportunity to present its defence.
- Equal treatment of the parties.
- Adversarial process (Art. 30 (1) PAL).

The tribunal decides whether to hold evidentiary hearings or to conduct proceedings based on documents and other means of proof (Art. 34 (1) PAL).

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

There are no specific rules to this matter, other than those applicable to Portuguese lawyers when practising before national courts (Portuguese Bar Association Code of Conduct). Counsel shall, under all circumstances, act with diligence and loyalty before courts, tribunals, colleagues and parties throughout the proceedings.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

Any individual can act as an arbitrator (Art. 9(1) PAL). The parties may impose additional qualifications, and some arbitral institutions have specific requirements for arbitrators on their lists. Arbitrators' ethical duties are set out in Art. 9 (3) of the PAL, which states that an arbitrator must be independent and impartial.

Several arbitral institutions, including the Commercial Arbitration Centre of the Chamber of Commerce and Industry of Portugal, have directly or indirectly incorporated the

International Bar Association ("IBA") Guidelines on Conflicts of Interest in International Arbitration. The "Code of Ethics" of the Portuguese Arbitration Association, which is applicable to all its members by virtue of their membership, has also incorporated the IBA Guidelines.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

Contrary to the cases brought before state courts, in which lawyers must be admitted to the Portuguese Bar Association, there are no specific rules that restrict foreign lawyers from other jurisdictions from participating in arbitration proceedings.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

In Portugal, once an arbitrator has accepted his or her appointment, that arbitrator will not be held liable for any damage caused by the decisions or judgments they make, except in the same circumstances in which judges can be held liable (Art. 9(4) PAL). However, arbitrators may also be liable for damage caused to the parties by an unjustified delay in deciding a dispute that has been submitted to the arbitral tribunal (Art. 43 (4) PAL).

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

As mentioned above, state courts are prevented from dealing with procedural issues in the context of an arbitration, except when the PAL sets forth otherwise. However, state courts may be called to decide on matters such as assisting the tribunal in the taking of evidence.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

State courts may issue interim, urgent, and provisional measures in aid of arbitration (Art. 29 (1) PAL). The law provides that it is not incompatible with an arbitration agreement for a party to request from a state court, before or during the arbitral proceedings, an interim measure, and for a state court to grant that measure (Art. 7 PAL).

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Once constituted, the arbitral tribunal may also grant interim measures (Art. 20 PAL) and modify, suspend, or terminate an interim measure or a preliminary order it has granted or issued, upon application of any party or, in exceptional circumstances and after hearing the parties, on the arbitral tribunal's own initiative (Art. 24 (1) PAL). An interim measure issued by an arbitral tribunal shall be binding on the parties and, unless otherwise provided by the arbitral tribunal, shall be enforced upon application to the competent state court, irrespective of whether the arbitration in which it was issued being seated abroad (Art. 27 (1) PAL).

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

State courts may issue interim, urgent and provisional measures in aid of arbitration (Art. 29 (1) PAL). The law provides that it is not incompatible with an arbitration agreement for a party to request from a state court, before or during the arbitral proceedings, an interim measure, and for a state court to grant that measure (Art. 7 PAL). Once constituted, the arbitral tribunal may also grant interim measures (Art. 20 PAL) and modify, suspend or terminate an interim measure or a preliminary order it has granted or issued, upon application of any party or, in exceptional circumstances and after hearing the parties, on the arbitral tribunal's own initiative (Art. 24 (1) PAL).

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

As a rule, parties cannot resort to anti-suit injunctions in state courts to prevent the constitution or functioning of an arbitral tribunal (Art. 5 (4) PAL).

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

On the grounds of general principles and procedural rules applicable in arbitration, it is admissible to request an arbitral tribunal or a state court to issue a security for costs order. However, there is no record of such measures having been granted by state courts or arbitral tribunals.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

State courts enforce decisions issued by arbitral tribunals. In this scenario, an interim measure issued by an arbitral tribunal shall be binding on the parties and, unless otherwise provided by the arbitral tribunal, shall be enforced upon application to the competent state court, irrespective of whether the arbitration in which it was issued is seated abroad (Art. 27(1) PAL).

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

The applicable rules of evidence are to be chosen by the parties. If the arbitration is conducted under an arbitral institution, then the arbitration shall be governed by the rules contained in the respective arbitration rules. If it is an *ad hoc* arbitration, and the parties have not chosen an applicable law, then the arbitrators shall decide considering all the relevant applicable principles, notably the principle of equal treatment of the parties.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Arbitral tribunals may decide that witnesses shall attend the hearing and that parties are obliged to comply with disclosure and/or discovery orders if it is considered relevant and material to the outcome of the case. However, in order to enforce those decisions, the arbitral tribunal must seek the assistance of state courts.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

Whenever the parties do not comply with the orders issued by the arbitral tribunal.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

The PAL does not have a criterion as to the production of written and/or oral witness testimony. Like in many other jurisdictions, the IBA Rules on the Taking of Evidence are commonly used in Portugal; however, in any case, flexibility and suitability are features in arbitration proceedings. Witnesses are not subject to sworn rules and cross-examination is allowed.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

All communications between outside counsel and their clients are subject to legal privilege, and no arbitrator may ask to produce evidence on the matter. Such privilege may only be waived with express consent of the client. Communications with and/or from in-house counsel may not be considered covered by legal privilege, and production of evidence could be requested, although this depends on a case-by-case analysis.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contains reasons or that the arbitrators sign every page?

The award must be made in writing and signed by the arbitrator or a majority of the arbitrators. If only the chair is available to sign, the reason for omitting the remaining signatures must be stated in the award (Art. 42 (1) PAL). The award must state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is rendered based on a settlement (Art. 42 (3) PAL).

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Arbitrators may only correct or interpret an award at a party's request in the event of:

- a computation, clerical or typographical error; or
- obscurity or ambiguity (Art. 45 (1) and (2) PAL).

The arbitral tribunal may exercise these powers on its own initiative within 30 days of notice of the award (Art. 45 (4) PAL). Within 30 days of receiving notice of the award, any party may, with notice to the other party, ask the arbitral tribunal to make an additional award concerning parts of the claim or claims submitted in the arbitral proceedings but omitted from the award. Any additional award must be rendered within 30 days of the requests (Art. 45 (5) PAL).

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Parties may only request annulment of awards by means of a set-aside action, according to Art. 46 of the PAL. The party making the application for an arbitral award to be set aside by the competent state court must show that:

- one of the parties to the arbitration agreement was under some incapacity or the agreement is not valid under the applicable law;
- there has been a violation of the due process principles set forth in Art. 30 (1) of the PAL, with a decisive influence on the outcome of the dispute;
- the award dealt with a dispute not contemplated in the arbitration agreement, or contains decisions beyond the scope of the arbitration agreement;
- the composition of the arbitral tribunal or the arbitral proceedings did not comply with the agreement of the parties, unless the agreement was in conflict with a mandatory provision of the PAL or the composition of the tribunal or the proceedings were not in accordance with this Law, and, in any case, if this inconformity had a decisive influence on the decision of the dispute;
- the arbitral tribunal awarded an amount in excess of what was claimed or on a different claim from that that was presented, or has dealt with issues that it should not have addressed, or failed to decide issues that it should have decided;
- the award does not comply with the formal requirements set out in Art. 42 (1) and (3) of the PAL; or;
- the award was notified to the parties after the deadline contained in Art. 43 of the PAL.

In addition, the court may annul the award if it finds that:

- the subject matter of the dispute cannot be decided by arbitration under Portuguese law; or
- the contents of the award violates the principles of Portuguese international public policy.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

Arbitral awards may be subject to appeal if the parties' agreement contemplated such option. Otherwise, awards may only be challenged by way of a setting-aside lawsuit, the right to which the parties cannot waive before the award is made.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

The scope of the appeal may not be subject to any expansion, even if with the agreement of the parties.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

If the appeal was contemplated in the arbitration agreement, the award may be challenged in an appeal that will follow the procedure of any ordinary appeal. That is, the appeal must be lodged within 30 days after its notification to the parties, and the parties must plead in written form within that deadline. This deadline is subject to a 10-day extension if the parties challenge the decision on the facts that have been established.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Portugal is signatory to the New York Convention. It acceded to it on July 8, 1994 and it came into force in Portugal on January 16, 1995. Portugal has made a reciprocity reservation in the following terms: "Within the scope of the principle of reciprocity, Portugal will restrict the application of the Convention to arbitral awards pronounced in the territory of a State bound by the said Convention."

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Yes, Portugal is party to the ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"), which came into force on 1 August 1984.

Portugal is also party to several other bilateral treaties dealing with the recognition and enforcement of arbitral awards with other countries.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

The PAL provides that the party seeking to enforce an arbitral award must supply the original or a certified copy of the award, and if the award was not made in Portuguese, a certified translation thereof (Art. 47 (1) PAL). The arbitral award may be enforced even if it has been subject to a setting aside procedure. In that event, the party against whom enforcement is sought may request a stay of the enforcement procedures if the resisting party offers to provide security and does so within the time limit set by the court (Art. 47 (3) PAL). Portuguese courts apply a pro-recognition and pro-enforcement bias and very seldomly annul the award or refuse its enforcement, unless the grounds to do so are clearly verified.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

The effects of *res judicata* of an arbitral award are identical to those produced by state court decisions.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

Under Art. 56(1) (b) of the PAL, the state court may refuse to recognise or enforce a judgment if the subject matter of the dispute cannot be submitted to arbitration in accordance with Portuguese law, or the outcome of the award would be manifestly incompatible with Portuguese international public policy.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

The arbitrators, the parties and the arbitral institutions must maintain the confidentiality of any information obtained and any documents produced during the arbitration proceedings, without prejudice to the duty to communicate or disclose information or activities to the competent authorities, if imposed by law (Art. 30 (5) PAL). Unless a party objects, awards and other decisions may be published, excluding details that would identify the parties' law (Art. 30 (6) PAL).

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

If a subsequent arbitral proceeding is subject to confidentiality obligations, there seems to exist no impediment that the parties make use of any document and/or information disclosed during the previous proceedings.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

Portuguese law does not allow punitive damages, i.e. in addition to the existence of actual damages. However, penalty clauses are valid and enforceable under Portuguese law. Otherwise, there are no limitations as to the types of remedies available in arbitration.

13.2 What, if any, interest is available, and how is the rate of interest determined?

The general principle is that interest applies to all outstanding debts at a rate that will depend on the nature of the obligation at stake. The interest rate, fixed by a governmental decision, varies from time to time. Currently, commercial obligations are subject to a 7%/year interest, while non-commercial obligations are subject to a 4%/year interest. The parties are, in any event, admitted to set forth different interest rates, except if that rate is considered "usurious" (that is, 3% or 5% above the legal interest rate, depending on the existence or not of *in rem* securities).

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

According to Art. 42 (5) of the PAL, where the parties have not

agreed on the apportionment of the costs arising out of the arbitral proceedings, the award shall contain such apportionment. The arbitrators may also decide in the award, if they consider it fair and appropriate, that one or some of the parties shall compensate the other or others for all or part of the reasonable costs and expenses they have incurred by reason of their intervention in the arbitration. Also, Art. 17 (1) of the PAL states that the fees of the arbitrators, the way their expenses are to be reimbursed, and the manner in which the parties shall make payments on account of such fees and expenses shall be the subject of a written agreement between the parties and the arbitrators prior to the acceptance of the last of the arbitrators to be appointed. In the absence of an agreement, the arbitral tribunal will fix its fees, costs and how they are apportioned.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

The award in itself is not subject to tax.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

In Portugal, there are no major legal obstacles regarding third-party funding. However, although third-party funding is still at an early stage of development, there is a steadily growing awareness of such funding among players and professionals. There are no relevant records as to relevant players in the market. Contingency fees are subject to ethical regulation of the Portuguese Bar Association.

14 Investor-State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Yes, Portugal signed and ratified the ICSID Convention in 1984.

14.2 How many Bilateral Investment Treaties ("BITs") or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Portugal is party to 55 BITs and is also party to the Energy Charter Treaty – the "Lisbon Treaty".

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example, in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Portugal uses internationally accepted terms within its investment treaties. The language will vary from treaty to treaty.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

State immunity is not a legal rule in force in the Portuguese jurisdiction. In fact, there is no express legal provision enacting the principle of *par in parem non habet judicio* (state immunity). Although Portugal is party to the United Nations Convention on Jurisdictional Immunities of States and Their Property, drawn up on 17 January 2005 in New York (Portugal acceded to the New York Convention on State Immunity by Decree of the President of the Portuguese Republic No. 57/2006 of 20 June 2006, which entered into force on 14 September 2006), this international legal instrument is not yet in force. However, Portuguese courts tend to apply these international instruments and accord jurisdictional and enforcement limited immunity (i.e., it is not applicable to private and or commercial relationships entered into by foreign states).

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the types of dispute commonly being referred to arbitration?

Currently, there are no projects or proposals to amend the PAL.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

The most relevant arbitral institution in Portugal (the Arbitration Centre of the Portuguese Chamber of Commerce and Industry) has adopted "expedited procedures". It has also enacted rules on the appointment of arbitrators and ethical codes that are in line with international standards (such as the IBA Guidelines on Conflicts of Interest). Other arbitral institutions have followed these steps.

15.3 What is the approach of the national courts in your jurisdiction towards the conduct of remote or virtual arbitration hearings as an effective substitute to in-person arbitration hearings? How (if at all) has that approach evolved since the onset of the COVID-19 pandemic?

Portuguese courts have already begun using technology mechanisms to hold remote hearings, as a result of the COVID-19 pandemic. However, use of such technology will very much depend on the agreement of the parties and/or counsel. Generally speaking, most parties and counsel do not forego the right to a physical hearing.

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