



ARBITRATION

We are going to make Portugal a hub for international arbitration

Already considered by its investors as “the best place in the world to invest”¹, Portugal seems to have changed from the country of discoverers to the country to be discovered. Will Portugal and its arbitration community be prepared to take on this new economic dynamic?

¹ Liz Alderman, 'Portugal Dared to Cast Aside Austerity. It's having a Major Revival'. The New York Times, 22 July 2018.

According to the most recent QMUL study on international arbitration², 97% of respondents revealed they prefer international arbitration as a means of resolving cross-border disputes and 99% would recommend arbitration to resolve disputes in the future.

There is no room for doubt. The figures confirm the position of international arbitration. Arbitration as a means of dispute resolution is here to stay and the market confirms it.

It is imperative for the Portuguese arbitration community to reflect on this message.

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It is true that the arbitration in Portugal, in Portuguese, with parties and lawyers who are Portuguese or have ties to Portuguese-speaking countries, has been a topic of discussion in various forums. It seems Portugal should be considered when it comes to international arbitration, essentially for two reasons: it is a country at the hub of Portuguese-speaking investment and it has a modern legal framework for arbitration. However, what is really interesting is to see the extent to which Portugal passes the test of arbitration users themselves. In other words, the extent to which it meets the criteria considered essential to the users of this means of alternative dispute resolution.

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The QMUL study provides data allowing a decisive comparison that makes us increasingly optimistic about the role of Portugal, the Portuguese and the Portuguese-speaking community in this scenario of international arbitration.

Firstly, the interviewees in the QMUL study revealed that the choice of both the seat and the arbitration institution depends mainly on the "reputation and recognition in general" of both, followed by the neutrality and impartiality of the legal system, and the consideration of national arbitration laws.

Portugal passes the test with flying colours.

We have a modern arbitration law, largely based on the UNCITRAL Model Law, which lays down principles as fundamental as the autonomy of the parties and the arbitration clause, the principle of *Kompetenz-Kompetenz*, equality of the parties, fair process and the definitive character of arbitral award. But not only this.

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It is seen as a country that is friendly to arbitration in general, in the context of public law, for example, particularly in tax and administrative matters, and Portugal also has arbitral activity in other non-commercial sectors.

In the administrative field, it is a tradition for the Portuguese State to actively promote the inclusion of arbitration clauses in administrative contracts. This has resulted in several arbitral disputes involving the State and it has made the Portuguese system one of the most advanced in the arbitration of public law disputes. The same thing is happening in other areas. Some tax disputes between private citizens / companies and the tax authorities are also resolved by arbitral tribunals. So are claims based on industrial property rights relating to reference medicinal products and generic medicines whose resolution through arbitration was compulsory until recently. This situation also demonstrates the legislature's preference for arbitration as a means of dispute resolution.

With further respect to these criteria, it is important to point out that Portugal has a legal and judicial system that provides security whenever it is necessary for the state courts to intervene to support arbitration.

In addition, Portugal is party to 45 bilateral investment treaties in force (and 60 signed) covering a large part of the world, including countries like Germany, China and India. It is also a signatory to the 1965 Washington Convention on the settlement of investment disputes between States and nationals of other States (ICSID).

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45

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Secondly, the enforcement of arbitral awards was the main advantage pointed out by the respondents in this study. This criterion is also met. Portugal is a signatory to the New York Convention of 1958 on the recognition and enforcement of foreign arbitral awards, and this is applied by the Portuguese courts to arbitration. This Convention has 159 signatory countries, including Brazil, Mozambique, Angola and Cape Verde, the last two countries more recently, in 2017 and 2018 respectively.

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Thirdly, Portugal enjoys an excellent geographical location in Southern Europe and on the Eastern Atlantic. It also has great weather and hospitality, and it is a safer than average destination, with a low crime rate. Its prices are also moderate compared with other European arbitration hubs, such as London, Paris or Geneva, which were the first, second, and fifth preferences for seats of arbitration of the QMUL study respondents. To welcome the arbitrators and parties who choose to resolve their disputes here, we have international institutions such as the Arbitration Centre of the Portuguese Chamber of Commerce and Industry. These institutions offer good quality facilities to efficiently administer arbitration hearings, and they also benefit from rules that were recently revised in the light of best international practices and translated into several languages.

Fourthly, Portugal is becoming increasingly attractive to investors and there is a gradual and growing presence of Portuguese companies abroad. This is happening in sectors like real estate, technology, construction, tourism and renewable energies, illustrating the economic dynamism and the consequent expertise acquired by lawyers in general on these issues. As the respondents to the study predict that arbitration will grow precisely in these areas (energy, construction, technology and banking and finance), Portugal has a legal community on the front line that is prepared for these challenges.

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Fifthly, Portuguese is the sixth most spoken language in the world, with 250 million speakers. Its privileged connection with Portuguese-speaking countries, that comes either from a common historical heritage, or from constant trade relations, is undisputed. The opportunities for exchange and investment are increasing in countries like Brazil, Angola, Mozambique, Cape Verde, Guinea Bissau, São Tomé and Príncipe, Macao and Timor-Leste, and, to a large extent, these countries share a common legal framework with Portugal, even when it comes to arbitration legislation. Together with a common language, the same legal approach places Portuguese professionals in a privileged position to contribute to the development of international arbitration in these countries.

In light of all this, there is no doubt that Portuguese businesses and lawyers have all the conditions not just to take part, but to play an influential role in international arbitration, whether the seat is in Portugal or in any other part of the world. ■