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ARBITRATION

Arbitration Procedures and Practice in Portugal: Overview

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USE OF ARBITRATION AND RECENT TRENDS

1. How is commercial arbitration used and what are the recent trends?

Use of Commercial Arbitration and Recent Trends

The use of arbitration in Portugal has been growing, especially since the entry into force of the Voluntary Arbitration Law 63/2011 of 14 December (VAL). Arbitration is frequently used for resolving commercial disputes between international and domestic parties.

The main types of disputes in which arbitration is used are:

- M&A, construction and real estate, shareholders disputes and telecommunications.

There are no known statistics regarding the use of arbitration in Portugal. Traditionally, ad hoc proceedings were more common than institutional arbitrations but there has been a growing preference for institutional arbitration, both in domestic and international institutions.

Advantages/Disadvantages

In Portugal, the principal advantages of arbitration over court litigation are speed, privacy, procedural flexibility and specialisation.

The main disadvantage is the cost, which tends to be higher than that for state court proceedings.

LEGISLATIVE FRAMEWORK

Applicable Legislation

2. What legislation applies to arbitration? To what extent has your jurisdiction adopted the UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Law)?

Arbitration in Portugal is governed by the VAL.

The VAL is substantially based on the UNCITRAL Model Law with the 2006 amendments (UNCITRAL Model Law), but contains some adaptations to reflect Portuguese legal tradition and practice. The VAL is a comprehensive law, governing both domestic and international arbitration, and containing specific solutions relating to jurisdictional scope of the arbitration tribunal (kompetenz-kompetenz), multi-party arbitration and joinder of third parties.

The VAL applies to:

- All arbitral proceedings seated in Portugal.
- The recognition and enforcement of foreign arbitral awards in Portugal.

Mandatory Legislative Provisions

3. Are there any mandatory legislative provisions? What is their effect?

Arbitral proceedings can be annulled if the mandatory provisions of the VAL are not upheld. The most important are:

- Article 2: arbitration agreement requirements (*see Question 8*).
- Article 9: arbitrators' requirements (*see Question 15 and Question 16*).
- Article 10(3): appointment of the chair by the co-arbitrators, in an arbitration with three or more arbitrators (*see Question 19*).
- Article 30(1): fundamental principles that must be followed during the proceedings (*see Question 19*).
- Article 36: rules on third-party joinder (*see Question 10*).
- Article 46(5): no waiver of the right to apply to set aside an award (*see Question 28*).

4. Does the law prohibit any types of dispute from being resolved through arbitration?

Under the VAL, any dispute involving economic interests can be subject to arbitration, provided the dispute:

- Is not subject to compulsory arbitration, such as for consumer disputes under EUR5,000, where arbitration is mandatory for companies if consumers require it (*Article 14(2) of Law No. 24/96, 31 July*).
- Does not fall under the exclusive jurisdiction of the state courts. Examples of these are:
  - matters related to the validity of public registry acts in Portugal;
  - suits for enforcement related to real estate located in Portugal; and
  - insolvency of legal persons with seat in Portugal.

(*Article 63, Code of Civil Procedure.*)

Disputes not involving economic interests can also be subject to arbitration, provided the parties are entitled to settle the disputed right (*Article 1(1)(2), VAL*).

Limitation

5. Does the law of limitation apply to arbitration proceedings?

The VAL does not establish any special limitation periods for arbitrations.

Under Portuguese law, limitation periods are a matter of substantive, not procedural, law. When Portuguese law applies to the merits of the dispute, the Portuguese Civil Code (Civil Code) general rules on limitation periods apply. The general rule on limitation periods for contractual matters is 20 years (*Article 309, Civil Code*). Certain rights (such as rents, interest, and any other periodic payments) must be exercised in a court or tribunal within shorter periods, otherwise they are time-barred (*Article 310, Civil Code*).

The limitation period under the Civil Code is interrupted by an agreement to arbitrate or, when an arbitration clause already exists, by the start of arbitral proceedings (*Articles 323 and 324, Civil Code*).

ARBITRATION INSTITUTIONS

6. Which arbitration institutions are commonly used to resolve large commercial disputes?

The most commonly used Portuguese arbitral institution is the Arbitration Centre of the Portuguese Chamber of Commerce and Industry (CAC). Other frequently used domestic institutions are the:

- Commercial Arbitration Institute of the Oporto Commercial Association.
- Concórdia Centre for Conciliation, Conflict Mediation and Arbitration.

There are no international arbitration bodies based in Portugal, but international centres are fully recognised and administer arbitrations here. The International Chamber of Commerce (ICC) has a national committee and is commonly chosen by parties doing business in Portugal.

The CAC and ICC are the institutions that most commonly administer arbitrations with their seat in Portugal.

JURISDICTIONAL ISSUES

7. What remedies are available where one party denies that the tribunal has jurisdiction to determine the dispute(s)? Does your jurisdiction recognise the concept of kompetenz-kompetenz? Does the tribunal or the local court determine issues of jurisdiction?

The principle of kompetenz-kompetenz is recognised in Portugal, and its positive effect is expressly regulated in the VAL (*Article 18*).

If the objection is raised before the arbitral tribunal, the tribunal has jurisdiction to decide on its own competence. However, that decision can be appealed to state courts. If the case is filed directly in the state courts and one party alleges the existence of an arbitration agreement, the judge must dismiss the case unless there are strong reasons to conclude that the arbitration clause does not exist, does not apply or is null and void.

ARBITRATION AGREEMENTS

Validity Requirements

8. What are the requirements for an arbitration agreement to be enforceable?

Substantive/Formal Requirements

The substantive requirements depend on whether the arbitration agreement is:

- A submission agreement dealing with an existing dispute: these must determine the subject matter of the dispute.
- An arbitration clause dealing with future disputes that may arise in the context of a specific legal relationship, whether contractual or not: these must specify the legal relationship to which the disputes are related.

(*Articles 1 and 2(6), VAL.*)

In all cases, the arbitration agreement must be in writing or it will be deemed null (*Articles 2 and 3, VAL*).

In international arbitrations, the agreement will be considered substantially valid if it meets the requirements of one of the following:

- The law chosen by the parties to govern it.
- The law applicable to the subject matter of the dispute.
- Portuguese law.

(*Article 51, VAL.*)

Under these circumstances, there is a presumption that the dispute can be arbitrated (*favor arbitrandum*) to protect the parties' reliance on the validity of their arbitration clause.

Separate Arbitration Agreement

Arbitration clauses are usually inserted into contracts, and are enforceable as a provision of a valid contract. There is generally no need for a separate agreement.

However, references made in a contract to a separate document containing an arbitration clause can effectively incorporate the arbitration clause by reference, provided that both the:

- Contract referring to the clause is in writing.
- Reference is phrased in a way that effectively incorporates that clause into the contract.

(*Article 2(4), VAL.*)

Unilateral or Optional Clauses

9. Are unilateral or optional clauses, where one party has the right to choose arbitration, enforceable?

Under Portuguese law, scholars argue that under the general rules of contract law, unilateral or asymmetrical arbitration clauses are valid, provided they:

- Are not deemed as unconscionable, or contrary to good faith.
- Do not constitute an abuse of rights.

Consumer disputes can also be accepted for arbitration, provided they do not restrict the consumer's access to the state courts (*Article 14(2) Law No. 24/96, 31 July*).

Optional clauses are also enforceable, for example, the Industrial Property Code (*Decree-Law 110/2018*) provides that the parties can

choose between voluntary arbitration or the state courts regarding disputes over marketing authorisations for new medicines.

Third Parties

10. In what circumstances can a party that is not a party to an arbitration agreement be joined to the arbitration proceedings?

Third party joinder is governed by Article 36 of the VAL. However, parties can derogate from the VAL provisions in their arbitration clause, either directly by making other provisions (as long as the principle of equal participation of all parties in the choice of the arbitrators is maintained), or by reference to institution rules that regulate the joinder of third parties.

Under VAL, the general rule is that only parties bound by the arbitration agreement, whether originally or subsequently, can be parties to the proceedings.

The joinder of a third party that was not an original party to the agreement requires the consent of all the parties to the agreement, and is only permitted for the pending arbitration.

If the tribunal has already been constituted, the joinder depends on the third party accepting the composition of the tribunal. If not yet constituted, the joinder is only permitted in institutional arbitrations and provided the rules are based on the principle of equality of the parties in appointing the arbitrators.

In any case, the tribunal can only allow the joinder of a third party if this does not unduly disrupt the normal course of the proceedings and if there are reasons that justify it. These could include, in particular, that the:

- Third party has an interest in the subject-matter of the dispute equal to that of the claimant or respondent, to an extent that the tribunal would have originally permitted voluntary joinder or imposed compulsory joinder of one of the parties to the arbitration and the third party.
- Third party wishes to present a claim against the respondent with the same object as that of the claimant, but which is incompatible with the claimant's claim.
- Respondent against whom a credit is invoked that could be characterised as a joint and several credit, wants the other possible joint and several creditors to be bound by the final award.
- Respondent wants joinder of the third party(ies), against whom it (the respondent) may have a claim if the claimant's request is completely or partially granted.

(*Article 36(3), VAL.*)

11. In what circumstances can a party that is not a party to an arbitration agreement compel a party to the arbitration agreement to arbitrate disputes under the arbitration agreement?

The VAL has no provision allowing a non-signatory to compel a party to the arbitration agreement to arbitrate disputes under the agreement.

Although controversial, some Portuguese scholars agree that, in certain circumstances, a signatory can force a non-signatory to arbitrate, but disagree on the ability of a third party to compel a signatory to arbitrate. However, there is a recent state court decision that has decided that the latter was permitted (*Court of Appeals of Porto, Case No. 2164/14.7TBSTS.P1,8 March 2016*).

However, the principle of good faith, and specifically in a claim for abuse of rights, can protect a party as a defence to the argument made by a third party that the tribunal lacks jurisdiction (*Article 334, Civil Code*). This provision could be used as a defence when, in the absence of an applicable legal rule, a party seeks to rely on the arbitration agreement. This could occur when, for example:

- A third party the agreement contradicts previous behaviour regarding their acceptance of the agreement.
- A third party that contributed to the underlying transaction and is bound to the contract containing the arbitration agreement later raises its invalidity.
- A party fails to exercise its right within a certain period and only raises an issue after the period has expired.
- A third party acted illegally and now attempts to rely on that illegality to its benefit.

Separability

12. Does the applicable law recognise the separability of arbitration agreements?

The VAL expressly recognises the principle of separability, under which an arbitration agreement that forms part of a contract is treated as an agreement independent of the other contractual clauses (*Article 18(2) and (3), VAL*).

Breach of an Arbitration Agreement

13. What remedies are available where a party starts court proceedings in breach of an arbitration agreement or initiates arbitration in breach of a valid jurisdiction clause?

Court Proceedings in Breach of an Arbitration Agreement

This situation is covered by Article 5 of VAL, reflecting the negative aspect of the principle of kompetenz-kompetenz (*see Question 7*). Where court proceedings are started in breach of an arbitration agreement, the court will dismiss the proceedings at the defendant's request unless it finds that the agreement is:

- Clearly null and void.
- Inoperative.
- Incapable of being performed.

The arbitral proceedings can then either be started or can continue if already started. The Portuguese courts have consistently upheld this principle.

Arbitration in Breach of a Valid Jurisdiction Clause

When a party denies that the tribunal has jurisdiction to determine the dispute, the tribunal can decide on its own jurisdiction, and does so in an interim decision or in the final decision on the merits (*see Question 7*).

14. Will the local courts grant an injunction to restrain proceedings started overseas in breach of an arbitration agreement?

Anti-suit injunctions are expressly forbidden in Portugal (*Article 5(4), VAL*).

Because Portugal is an EU member state, it applies the decision in *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc* (*Case C-185/07*) that anti-suit injunctions ordered by

state courts are not compatible with the Brussels I Regulation (*(EC) 44/2001*).

ARBITRATORS

Number and Qualifications/Characteristics

15. Are there any legal requirements relating to the number, qualifications and characteristics of arbitrators? Must an arbitrator be a national of, or licensed to practice in your jurisdiction to serve as an arbitrator there?

The tribunal can have one or an odd number of arbitrators (*Article 8(1), VAL*). This number can be fixed in the arbitration agreement or agreed later in writing (*Article 10(1), VAL*). Where the agreement is silent, the tribunal will have three arbitrators (*Article 8(2), VAL*).

Arbitrators must be independent and impartial individuals with full legal capacity. No person can be excluded from appointment based on their nationality (*Article 9, VAL*). No further qualifications or characteristics are required, except when agreed by the parties in an arbitration agreement.

However, when a state court acts as appointing authority, for the reasons set out in *Question 17* the court must consider any qualifications required of the arbitrator(s) by the agreement and any considerations likely to secure the appointment of an independent and impartial arbitrator.

In international arbitrations, when appointing any arbitrator, the court must also consider the advisability of appointing an arbitrator of a nationality other than those of the parties. (*Article 10(6), VAL.*)

Independence/Impartiality

16. Are there any requirements relating to arbitrators' independence and/or impartiality?

Arbitrators must be independent and impartial and must, throughout the proceedings, disclose any circumstances that, from the parties' perspective, could affect that status (*Articles 9(3) and 13(1), VAL*). These concepts are interpreted in the light of:

- Portuguese case law.
- International case law.
- Academic commentary.
- International and national soft law instruments, including the:
  - IBA Guidelines on Conflicts of Interests in International Arbitration;
  - Portuguese Arbitration Association Code of Ethics; and
  - CAC Code of Ethics for Arbitrators.

Appointment/Removal

17. Does the law contain default provisions relating to the appointment and/or removal of arbitrators?

Appointment of Arbitrators

The parties can appoint the arbitrator or arbitrators of their choice, or agree on the appointment procedure (*Article 10, VAL*).

When a party fails to appoint an arbitrator or the appointment procedure fails, the state court appoints the missing arbitrator(s) at the request of the interested party, taking into consideration the qualifications agreed by the parties and all relevant circumstances to ensure an independent and impartial arbitrator is appointed.

of a nationality other than those of the parties. (*Article 10(6), VAL.*) (*See Question 15*).

The state courts' decisions on the appointment of the arbitrator cannot be appealed and their decisions are usually taken in one to two months.

Removal of Arbitrators

An arbitrator's appointment can be challenged on the grounds of justifiable doubts as to their impartiality or independence, or failure to meet the agreed qualifications.

The parties are free to agree on the procedure to challenge an arbitrator. However, a party can only challenge an arbitrator appointed by it, or in whose appointment it has participated, for reasons it becomes aware of after the appointment (*Articles 13(3) and 14(1), VAL*).

The party intending to challenge the arbitrator must provide supporting reasons. If the arbitrator does not resign and the appointing party insists they remain in office, the tribunal, including the challenged arbitrator, decides whether to accept or reject the challenge (*Article 14(2), VAL*). If the challenge is rejected, the interested party can appeal to the state courts, but this does not suspend the proceedings (*Article 14(3), VAL*).

The arbitrator's mandate also terminates if:

- They become, legally or factually, incapable of performing their duties.
- They withdraw from office.
- The parties agree on the termination based on the arbitrator's incapacity.

(*Article 15(1), VAL.*)

PROCEDURE

Commencement of Arbitral Proceedings

18. Does the law provide default rules governing the commencement of arbitral proceedings?

Up until the acceptance by the first arbitrator of their role as an arbitrator, the parties can agree on the procedure to be followed in the proceedings, including the start date of the arbitration, in compliance with the fundamental principles and mandatory provisions of the VAL (*Article 30(2), VAL*) (*see Question 19*).

Unless agreed otherwise, the arbitration formally begins when the respondent receives a request for arbitration. Within the period agreed by the parties or determined by the tribunal, the claimant must submit its claim and the respondent must present its defence, unless the parties have agreed otherwise regarding the requirement for those pleadings (*Article 33 (1) and (2), VAL*).

Unless otherwise agreed, during the proceedings, either party can amend or supplement its claim or defence, provided the tribunal does not oppose this (*Article 33(3), VAL*).

Applicable Rules and Powers

19. What procedural rules are arbitrators bound by? Can the parties determine the procedural rules that apply? Does the law provide any default rules governing procedure?

Applicable Procedural Rules

The tribunal must comply with the procedure agreed by the parties before the acceptance by the first arbitrator, respecting the fundamental principles and mandatory provisions of the VAL (*Article 30(2), VAL*).

The VAL's fundamental procedural principles are that:

- The defendant must be summoned to present its defence (although the law does not provide for any specific minimum notice).
- The parties must be treated equally and given a reasonable opportunity to assert their rights before the issuance of a final award, orally or in writing.
- Arbitrations must be conducted on the basis of the adversarial principle at all stages, except where otherwise provided by the law. This means that the parties must be heard before the tribunal renders procedural decisions.

(*Article 30(1), VAL.*)

- Any breach of any of these principles which has a decisive influence on the outcome of the dispute may lead to the setting aside of the award (*Article 46(3), VAL*).
- In addition, the VAL also provides other rules related to the procedure which bind the arbitrators, such as the one in Article 10(3), under which in an arbitration with three or more arbitrators, the parties appoint an equal number of arbitrators, which arbitrators appoint the chair of the tribunal.

Default Rules

In the absence of party agreement or applicable institutional rules, the tribunal can conduct the arbitration as it sees fit, setting out the procedural rules it considers appropriate, although always in compliance with the above principles (*Article 30(3), VAL*). that the application of the Portuguese Code of Civil Procedure (CCP) rules is discouraged and is rarely seen in practice.

Evidence and Disclosure

20. If there is no express agreement, can the arbitrator order disclosure of documents and attendance of witnesses (factual or expert)?

The powers of the tribunal include determine the admissibility, relevance and weight of any evidence (*Article 30(4), VAL*). The arbitrator can therefore order the parties to produce specific documents that must be reasonably identified (discovery requests are not accepted).

Tribunals can order non-parties to produce evidence, but they have no enforcement powers. However, when the evidence in question depends on the willingness of a party or a non-party to the proceedings to co-operate, a party can, with the tribunal's authorisation, ask the competent state court to take evidence where they have refused to provide it (*Article 38(1), VAL*).

Such requests are also admissible in arbitrations with their seat abroad (*Article 38(2), VAL*).

EVIDENCE

21. What documents must the parties disclose to the other parties and/or the arbitrator? How, in practice, does the scope of disclosure in arbitrations compare with disclosure in domestic court litigation? Can the parties set the rules on disclosure by agreement?

Scope of Disclosure

The parties can submit all the documents they consider relevant with their written statements and refer to other documents or other evidence to be submitted later (*Article 33(2), VAL*).

The VAL does not address the scope of disclosure in arbitration, and the parties and arbitrators can agree to follow any model they wish. The International Banking Association (IBA) Rules on Taking of Evidence in International Arbitration are commonly adopted.

The matter is not alien to the Portuguese system, as the CCP provides rules on producing documentary evidence. However, these rules do not apply in arbitration (unless the parties agree, *see Question 19*) and historically they have been restrictively interpreted even in litigation.

Validity of Parties' Agreement as to Rules of Disclosure

Up until the acceptance by the first arbitrator of their appointment, the parties can determine the rules of the proceedings, including on disclosure, provided they respect the mandatory provisions of the VAL (*Article 30(2), VAL*) (*see Question 19*).

CONFIDENTIALITY

22. Is arbitration confidential? If so, what is the scope of that confidentiality and who is subject to the obligation (parties, arbitrators, institutions and so on)?

The VAL requires arbitrators, parties, and arbitral institutions to maintain confidentiality regarding all information and documents seen in the arbitration, except when disclosure proves necessary to protect their rights or comply with any communications or disclosure obligations in relation to the authorities (*Article 30(5), VAL*). However, the duty of confidentiality does not prevent the publication of awards and other decisions of the tribunal, excluding any details identifying the parties, unless any party oppose publication (*Article 30(6), VAL*). Therefore, when the publication of the award is permitted with the parties' agreement, an arbitration is private, but not confidential.

All public law arbitral decisions must be published online, with any details identifying the parties redacted, as a condition for enforcement (*Law 118/2019 of 17 September*).

COURTS AND ARBITRATION

23. Will the local courts intervene to assist arbitration proceedings with their seat in their jurisdiction?

State courts can intervene to assist arbitration proceedings only in the specific circumstances established in the VAL, including:

- The appointment and challenge of arbitrators (*see Question 17*).
- Assistance in taking evidence (*see Question 20*).

Under the VAL, the courts of first instance or the courts of appeal have jurisdiction over arbitration-related applications, depending on the subject-matter (*Article 59, VAL*). For example, in the appointment of an arbitrator, the competent court is the court of appeal for the place of arbitration (*Article 59(1)(a), VAL*). However, in assistance in taking evidence, the competent court is the court of first instance for the place of arbitration (*Article 59(4), VAL*).

24. What is the risk of a local court intervening to frustrate an arbitration with their seat in its jurisdiction? Can a party delay proceedings by frequent court applications?

Risk of Court Intervention

State courts only intervene in the specific circumstances established in the VAL (*Article 19, VAL*) (*see Question 23*). Therefore, there is no risk of a local court arbitrarily intervening to frustrate an arbitration taking place in its jurisdiction.

Delaying Proceedings

Beginning court proceedings does not delay arbitration proceedings, because the filing of the claim does not suspend arbitration proceedings.

If court proceedings are brought regarding an arbitration agreement, it must, at the defendant's request, dismiss the proceedings unless the court finds the arbitration agreement is null and void or incapable of being performed (*see Question 13*).

An award can be issued while the state court proceedings are pending (*Article 5(1) and (2), VAL*).

Other requests for state court intervention (for example, an appeal against a decision by arbitrators regarding their jurisdiction) do not stay the arbitral proceedings.

INSOLVENCY

25. What is the effect on the arbitration of pending insolvency of one or more of the parties to the arbitration?

A party's declaration of insolvency suspends the effects of an arbitration agreement whenever the outcome could influence the value of the insolvent estate (*Article 87, Insolvency and Corporate Recovery Code*) (CIRE). However, arbitral proceedings already pending when insolvency is declared will continue, with the insolvency administrator replacing the insolvent party in the proceedings (*Article 85(3), CIRE*).

REMEDIES

26. What interim remedies are available from the tribunal?

Interim Remedies

Under the VAL (which reproduces the UNCITRAL Model Law on the matter), unless otherwise agreed by the parties, the tribunal can order interim measures whenever it sees fit (*Article 20(1), VAL*).

An interim measure is a temporary measure which, at any time before issuance of the final award, orders a party to:

- Maintain or restore the status quo pending determination of the dispute.
- Take action that would prevent, or refrain from taking action that is likely to cause, harm or prejudice to the arbitral process itself.
- Provide means of preserving assets that may satisfy a subsequent award.
- Preserve evidence that may be material to resolving the dispute.

(*Article 20(2), VAL.*)

Together with the request for an interim measure, a party can, without giving notice to any other party, ask the tribunal to make a preliminary order directing a party not to frustrate the purpose of the interim measure requested (*Article 22(1), VAL*).

Both interim measures and preliminary orders are binding on the parties, but only interim measures can be enforced by state courts (*Articles 23(5) and 27(1), VAL*).

Ex Parte/Without Notice Applications

Only preliminary orders can be granted on an ex parte basis. However, they are not enforceable in state courts (*Articles 22(1)) and 23(5), VAL*).

Security

Under the VAL, the tribunal **can** require the party requesting the interim measure to provide appropriate security (*Article 24(2), VAL*). However, in the case of preliminary orders, the tribunal must ask the party applying for it to provide appropriate security, unless the tribunal considers it inappropriate or unnecessary (*Article 24(3), VAL*).

The traditional position was that, following the UNCITRAL Model Law, the VAL did not allow security for costs, but arbitrations in Portugal increasingly follow international best practice, and this area is developing.

27. What final remedies are available from the tribunal?

The final remedies available depend on the substantive law of the dispute.

The VAL does not limit the remedies that can be awarded. In fact, it provides that, in addition to matters of a strictly contentious nature, the parties can agree to submit to arbitration other issues that require an impartial decision , including those relating to the need to specify, complete and adapt contracts with long-lasting obligations, to new circumstances (*Article 1(4), VAL*).

However, if the content of the award made in Portugal conflicts with the principles of international public policy of the Portuguese State, it can be set aside or not enforced by state courts (*Articles 46(3)(b)(ii), 48(1) and 54, VAL*).

APPEALS

28. Can arbitration proceedings and awards be appealed or challenged in the local courts? What are the grounds and procedure? Can the parties waive any rights of appeal or challenge to an award by agreement before the dispute arises (such as in the arbitral clause itself)?

Rights of Appeal/Challenge

Unless the parties agree otherwise, they cannot appeal an award on its merits (*Article 39(4), VAL*).

If the dispute has been decided on a fair and equitable basis (ex aequo et bono) no appeal is possible.

In international arbitrations with their seat in Portugal, the parties are also not entitled to appeal unless they have expressly agreed a route of appeal to another arbitral tribunal and have regulated its terms and conditions (*Article 53, VAL*).

Therefore, unless otherwise agreed by the parties, an award can only be challenged before a state court through an application for setting aside (*Article 46(1), VAL*).

Grounds and Procedure

An action to set aside an award begins with an application to the court of appeal for the place of the arbitration (*Article 59, VAL*) with a certified copy of the award and, if necessary, a translation into Portuguese. Evidence must be presented with the application.

The opposing party is served with notice to present its opposition to the request and its evidence. Further, the applicant can present a statement in reply to any objections raised by the opposing party.

The taking of any necessary evidence follows (with the necessary adjustments) the rules on appeals before state courts (*Article 46(2), VAL*).

An arbitral award can be set aside where:

- One of the parties to the arbitration agreement lacked capacity, or the agreement is not valid under the governing law agreed to

by the parties agreed (or, if there is no explicit reference to a governing law, under the VAL).

- There has been a violation of any of the mandatory principles in Article 30(1) of the VAL, with a decisive influence on the outcome of the dispute.
- The award dealt with a dispute not contemplated by the arbitration agreement, or it contains decisions on matters beyond the scope of the agreement.
- The composition of the tribunal or the arbitral procedure did not conform to the parties' agreement (unless that agreement conflicted with a provision of the VAL from which the parties cannot derogate) or, if there is no such agreement, was not in accordance with the VAL, and, in either case, this inconformity had a decisive influence on the decision.
- The tribunal awarded an amount above what was claimed, or on a claim different to the one presented, addressed issues that it should not have addressed or failed to decide issues that it should have decided.
- The award was made in breach of certain formal requirements of the VAL.
- The award was served on the parties after the time limit applicable under the VAL or agreed by the parties.

(*Article 46(3), VAL.*)

Additionally, an award can be set aside if the court finds that:

- Under Portuguese law, the subject of the dispute cannot be decided by arbitration.
- The award conflicts with Portuguese international public policy.

The grounds to appeal (if available) an award before the state courts include:

- The assessment of the facts.
- The assessment of the legal framework applicable to the facts.
- The invalidity of the award under the CCP.

Procedurally, arbitral awards are subject to appeal on the same grounds as domestic judgments of state courts (*Articles 627 and following, CCP*).

The appeal deadline is:

- Generally, 30 days from service of the decision (*Article 638, CCP*).
- 15 days in urgent cases and in the cases specified in Articles 644(2) and 677 of the CCP.

However, the date the period starts running may vary (*Article 638(2)(3) and (4), CCP*).

Within the same period for appeal, the respondent can respond to the appellant's arguments (*Article 638(5), CCP*).

Waiving Rights of Appeal

The parties cannot waive their right to set aside an arbitral award (Article 46(5), VAL). However, an appeal is only available if the parties expressly provide for this (*see above, Rights of Appeal/Challenge*).

29. What is the limitation period applicable to actions to vacate or challenge an international arbitration award rendered inside your jurisdiction?

The application to set aside an award must be submitted within 60 days of the date of the notice of the award or, if the appeal follows a request for the tribunal to correct or clarify the award, 60 days from the date the tribunal decided on that request (*Articles 46(6) and 45, VAL*).

COSTS

30. What legal fee structures can be used? Are fees fixed by law?

Legal fees are not fixed by law. Structures including hourly rates and task-based billing are the most common for lawyers' fees. Contingency fees are not allowed under the Portuguese Bar Association Statutes, but success fees can be charged.

The VAL does not contain any provision on third-party funding. There is, however, increasing interest in funders of litigation and arbitration. The Portuguese Arbitration Association 2021 Code of Ethics proposes that the parties' representatives should disclose the intervention and identity of a funder, and any information they consider relevant.

31. Does the unsuccessful party have to pay the successful party's costs? How does the tribunal usually calculate any costs award and what factors does it consider?

Cost Allocation

Unless otherwise agreed by the parties, the award must determine the amounts to be borne by each party relating to the costs directly resulting from the arbitration (*Article 42(5), VAL*). If the arbitrators consider it fair and appropriate and if the necessary evidence is provided, they can decide in the award that one or more parties must compensate the other(s) for all or part of reasonable costs and expenses.

The winning party is almost always allocated a portion of the costs, even if reduced.

Cost Calculation

Traditionally, costs followed the event in state courts, but only concerning court fees and, sometimes, costs of experts. This does not apply to lawyers' fees, so, although the VAL grants broad discretion to the arbitrators, there is still substantial resistance to ordering one party to pay the other's legal costs. Often, the relief sought is limited to the tribunal's costs and expenses, and each party bears its own legal costs.

In cases where costs are pleaded, tribunals normally accept the values presented by the parties and allow them to make submissions on costs before issuing an award.

Factors Considered

Factors that arbitrators may consider in assessing whether it is fair and appropriate to allocate costs include if an to what extent the parties' claims were granted ("costs follow the event") and the parties procedural conduct.

ENFORCEMENT OF AN AWARD

Domestic Awards

32. To what extent is an arbitration award made in your jurisdiction enforceable in the local courts?

An arbitration award rendered in Portugal is enforceable in the same way as a state court judgment (*Article 42(7), VAL*), and therefore constitutes an enforceable title.

Enforcement takes place in the first instance courts, with no need for any recognition or confirmation procedure (*Article 59(9), VAL*). The enforcement application is made directly to the enforcement agent (a professional with public powers to carry out the acts

inherent to executive proceedings) who immediately prepares the ex parte attachment of assets (*penhora*), unless the agent either:

- Rejects it for formal reasons.
- Sends it to a judge to decide on any irregularities or to confirm the requirements of the enforceable title.

The other party is served with notice of the enforcement proceedings and notice to oppose the attachment of assets within 20 days. In the opposition, that party can ask to provide security, in which case the enforcement is stayed (*Articles 855, 856, 725 and 733, CCP*).

Foreign Awards

33. Is your jurisdiction party to international treaties relating to recognition and enforcement of foreign arbitration awards, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)?

Portugal ratified the New York Convention on 18 October 1994.

When ratifying the Convention, Portugal made a reservation under Article 1(3), stating that it would only apply the Convention to the recognition and enforcement of awards rendered in other states bound by the Convention.

Portugal is also party to other international conventions, including the:

- Geneva Convention on the Execution of Foreign Arbitral Awards.
- Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States.

34. To what extent is a foreign arbitration award enforceable?

Without prejudice to the mandatory provisions of the New York Convention and other conventions that bind the Portuguese State, foreign arbitration awards are only effective in Portugal if recognised by a Portuguese state court (*Article 55, VAL*). This recognition does not involve revision of the merits of the case.

Any party seeking recognition must supply:

- The original award (authenticated) or a certified copy.
- The original arbitration agreement or a certified copy.
- If the award or the agreement are not in Portuguese, a certified translation into Portuguese.

Once the application is filed, the opposing party is served with notice to present its opposition within 15 days. After the written pleadings and the procedural steps, the parties and the Public Prosecutor have access to the file for 15 days, to present closing arguments. The hearing is conducted under the rules for appeals (*Article 57, VAL*).

The court of appeal for the district of domicile of party against whom the decision is to be invoked has jurisdiction to decide the recognition of the foreign award and, once recognised, enforcement proceedings must be brought in the first instance court (*Article 59, VAL*).

UK and US awards are enforceable in Portugal under the New York Convention.

35. What is the limitation period applicable to actions to enforce international arbitration awards rendered outside your jurisdiction?

The VAL does not set any limitation period for actions to enforce international arbitration awards.

Length of Enforcement Proceedings

36. How long do enforcement proceedings in the local court take, from the date of filing the application to the date when the first instance court makes its final order? Is there an expedited procedure?

The main difference between enforcement of foreign and domestic awards is that foreign awards require the recognition phase (*see Question 34*). This phase can be quick if the other party can be served promptly. The length of enforcement proceedings will depend on finding assets, but they can be lengthy.

REFORM

37. Are any changes to the law currently under consideration or being proposed?

Currently, no changes to the VAL are under consideration. However, the arbitration community is discussing a proposal for arbitration rules regarding corporate law conflicts, and, since April 2021, the CAC has had rules of corporate arbitration.

Practical Law **Contributor profiles**

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Areas of practice. Construction and infrastructure, energy, telecom and M&A.

The following sections are optional:

Recent transactions

- Acting for MEO in an ad hoc arbitration against Vodafone, regarding a fibre network project, seat in Lisbon.
- Acting for INGKA (IKEA) in an ad hoc arbitration against a Spanish joint venture, regarding the construction of shopping centre, seat in Lisbon.
- Acting for the Portuguese State in an ad hoc arbitration against EDP, regarding the construction and concession of a hydro-electric power plant, seat in Lisbon.
- Acting for Mozambican national energy fund (FUNAE) in a PCA arbitration against South African Enersys, regarding a solar photovoltaic project.

Languages. English

Professional associations/memberships. Member of the:

- International Court of Arbitration of the ICC.
- Arbitration Commission of the ICC.
- board of the Portuguese Arbitration Association.
- International Bar Association.
- Club Español Del Arbitraje.
- ICC Institute of World Business Law.
- ICCA.

Publications

- *Portugal overview on arbitration* (co-author) (European Arbitration Review 2021).
- *Consequences of non-disclosure: a win for foul players? Decision of the Oberlandesgericht Frankfurt am Main (26 SchH 2/18), 24 Jan 2019* (PLMJ Arbitration Review 04, 2020).
- *Lei da Arbitragem Voluntária Anotada* (co-author) (4th ed 2021, Almedina).

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Areas of practice. Finance, securities, corporate, M&A and insurance.

The following sections are optional:

Recent transactions

- Advising EQT and SAUR International in arbitration proceedings, including emergency arbitration dispute, against competing shareholder block backed by Aqualia regarding the validity and exercise of a SHA and SPA pre-emption right, seat in Lisbon.
- Acting for CIMPOR, held by the Oyak Fund in an arbitration regarding a shareholder dispute, against competing shareholder ETE preceded by a mediation, seat in Lisbon.
- Acting for Celbi, part of the Altri group, focused in wood pulp production and co-generation, against EDP in a dispute regarding breach of covenants in the purchase of power agreement in place, seat in Lisbon.

Languages. English

Professional associations/memberships.

- President of the professional ethics committee of the Portuguese Arbitration Association.
- Vice-President of the executive committee of the centre for mediation and arbitration, Concórdia.
- Member of the Arbitration Commission of the ICC, the Portuguese Arbitration Association, the International Bar Association and the Cour Europeéne d'Arbitrage.

Publications

- *O árbitro de emergência* (Estudos em Homenagem a Rui Pena, 2019, Almedina).
- *Caução e Medida Cautelar Arbitral* (Arbitragem Comercial, Estudos Comemorativos, 2019, Almedina).
- *Lei da Arbitragem Voluntária Anotada* (co-author) (4th ed 2021, Almedina).

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The following sections are optional:

Recent transactions

- Acting as counsel for MEO in an ad hoc arbitration against Vodafone, regarding a fibre network project, seat in Lisbon.
- Acting as counsel for Celbi, part of the Altri group, focused in wood pulp production and co-generation, against EDP in a dispute regarding breach of covenants in the purchase of power agreement in place, seat in Lisbon.
- Acting as tribunal secretary in an ICC arbitration proceeding, regarding a transport and infrastructure project in the Middle East, seat in Madrid.

Languages. English, Mandarin, French

Professional associations/memberships.

- Events Co-director at Young International Council for Commercial Arbitration (Young ICCA).
- Coach of the NOVA School of Law Vis Moot Team.
- Founding Member and Communications Officer at Portugal Very Young Arbitration Practitioners (VYAP-PT).
- Member of the ICC Institute of World Business Law.
- Member of the Portuguese Association of Arbitration (APA-40).
- Member of the Club Español Del Arbitraje.
- Member of the ICC Young Arbitrators Forum (ICC YAF).

Publications

- *Can Machine Arbitrators Issue Enforceable Awards? Consensus and Challenges Under the New York Convention and the UNCITRAL Model Law* (co-author) (Arbitraje y Nuevas Tecnologias, Themis, 03/2021).
- *Arbitration and the Energy Charter Treaty: An analysis of the FET standard in cases decided against Spain* (co-author) (Revista Internacional de Arbitragem e Conciliação, Ano XIV, 2020).
- *Arbitragem e Providências Cautelares no Delta do Rio das Pérolas. Comentário ao Ac. do Tribunal de Segunda Instância da Região Administrativa Especial de Macau de 15 de março de 2018* (Revista PLMJ Arbitragem, No. 3, 2019).
- *Dealing with Privileges in International Arbitration: A Pragmatic Approach* (co-author) (ICC Dispute Resolution Bulletin No. 2, 2019).