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# The International Comparative Legal Guide to: International Arbitration 2011

## A practical cross-border insight into international arbitration work

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# The International Comparative Legal Guide to: International Arbitration 2011

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# Portugal



José Maria Corrêa de Sampaio



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## Abreu Advogados

### 1 Arbitration Agreements

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

Arbitration in Portugal is regulated by Law no. 31/86, of 29 August 1986, as amended by Decree-Law no. 38/2003, of 8 March 2003, also known as the Portuguese Law on Voluntary Arbitration (LAV).

The provisions of art. 1 of the LAV set forth the requirements of an arbitration agreement. Art. 1.1 limits disputes which can be arbitrated to those related to disposable rights, however excluding those which have been exclusively submitted by a special act to court or to compulsory national arbitration.

In addition, art. 1.2 of the LAV also provides that the subject matter of an arbitration agreement must be a present or future dispute, which can arise from a legal, contractual, or non-contractual relationship.

Also, there is a last requirement concerning private contracts involving a public entity, under which disputes arising out of them can only be subjected to arbitration if so authorised by a special act (art. 1.4 LAV).

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

The Arbitration agreement must be in writing (art. 2.1 LAV) for it to be valid. It does not necessarily need to be included in a document signed by the parties, and can merely be within an exchange of letters, telexes, telegrams, other means of telecommunications of which there is written proof, or even by reference, for it to be valid (art. 2.2 LAV).

The arbitration agreement may be, nonetheless, of two kinds, either a submission agreement (*compromisso arbitral*) or an arbitration clause (*cláusula compromissória*). Should the subject matter of an arbitration agreement be an actual dispute, even if it has been presented to a judicial court, we have a submission agreement. Should the subject matter be any future dispute arising from any given contractual or non-contractual legal relationship, we have an arbitration clause.

For it to be valid, the submission agreement must state precisely the subject matter of the dispute which will be resolved by arbitration (art. 2.3 LAV). The arbitration clause must specify the legal relationship to which the dispute relates to.

Apart from the two requirements stated in the previous answer, the LAV does not impose any other elements to be incorporated into the arbitration agreement.

Nevertheless, and particularly for international arbitration, apart from stating clearly and in writing which types of disputes it applies to, the arbitration agreement should also include provisions concerning its binding effect or not, if it will be subject to the procedural rules of an arbitration institution, the number of arbitrators and their method of selection (art. 6 LAV), the place of the arbitration, its language, and the possibility or not of an appeal against the award (art. 34 LAV).

The parties may also choose to include in the agreement a time limit for the proceedings (art. 19.1 LAV), to which substantive law will be applied, or if they wish the arbitrators to act as *amiable compositeurs* or rule in equity (art. 35 and 22 LAV).

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

Arbitration agreements are respected by Portuguese courts, as long as they comply with the minimum requirement mentioned above.

In addition, national courts have ruled on their lack of competence to decide on a breach of such an agreement to arbitrate.

### 2 Governing Legislation

#### 2.1 What legislation governs the enforcement of arbitration proceedings in Portugal? Were there any significant changes made to that arbitration legislation in the past year?

The enforcement of arbitration agreements is governed by the LAV, as well as by the Portuguese Civil Procedure Code (CPC), whereby it is provided that such an issue escapes the jurisdiction of the courts and must be subject to arbitration (art. 494.j CPC), as long as the minimum validity requirements are met.

Concerning the enforcement of arbitration proceedings themselves, the procedural rules are generally set by the arbitration institution chosen by the parties, unless otherwise decided by them. If no procedural rules are designated by the parties, the arbitrators will choose the procedure to follow (art. 15.3 LAV).

No changes were effectively brought to the law on voluntary arbitration in the past year; however, it is worth noting that the government's legislative bill for the new arbitration law, which was essentially based on the UNCITRAL Model law, was sent to Parliament in January 2011, but never enacted before the government fell and new elections were organised. There is no further indication as to when and in what form a new arbitration law will emerge, though the arbitral community expects developments still in 2011.

Additionally, the tax arbitration law has been approved by decree-law no. 10/2011 of January, 20 2011, which came into force five days after its publication. Arbitrable tax disputes may now be settled under the auspices of the Centre for Administrative Arbitration (CAAD).

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

The Portuguese Law on Voluntary Arbitration covers both domestic and international arbitration; nevertheless, a chapter in the LAV concerns the specific provisions applicable to international arbitration. International arbitration is defined in the LAV as arbitration which implicates the interests of international trade (art. 32 LAV).

The LAV also provides that the parties may choose the applicable substantive law (art. 33 LAV), and that there can be no appeal of international arbitration awards (art. 34 LAV), unless allowed by the parties in the arbitration agreement.

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

The LAV is not based on the UNCITRAL Model Law; however, generally, both texts contain similar provisions. Certain significant differences are nevertheless present, and are worth mentioning:

- (a) While the UNCITRAL Model Law applies to international commercial arbitration exclusively, the LAV applies to domestic arbitration mostly, and includes specific provisions which concern international arbitration.
- (b) The LAV is silent on interim measures and preliminary orders.
- (c) Concerning procedural rules to be followed during the arbitration, the UNCITRAL Model Law set forth specific rules, whereas the LAV merely gives general principles, leaving the details to be chosen by the parties.
- (d) Whereas the UNCITRAL Model Law only has provisions concerning the setting aside of the award, according to the LAV, a Portuguese award can also be appealed. Such an appeal is however not applicable for Portuguese international arbitrations unless the parties have agreed to it.
- (e) There is a time limit of 6 months provided in the LAV (extendable by the parties) for the issuing of the award, which is not present in the UNCITRAL Model Law.
- (f) The LAV provides that the award shall state the reasons on which it is based, which is not a requirement in the UNCITRAL Model Law.
- (g) The LAV contains a provision stating that arbitrators cannot decide on issues not identified in the arbitration agreement, whereas such restrictions are not present in the UNCITRAL Model Law.

## 2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in Portugal?

The LAV does not set forth any mandatory rules governing international arbitration proceedings sited in Portugal.

However, the chapter of the LAV regarding international arbitration merely sets forth the following:

- (a) The parties can choose the applicable substantive law, or if they do not, the arbitral tribunal will (art. 33 LAV).
- (b) Unless decided otherwise in the arbitration agreement, the

award in an international arbitration may not be appealed (art. 34 LAV).

- (c) The parties can elect that the arbitrators act as amiable compositeurs (art. 35 LAV).

One must nevertheless bear in mind the fact that international arbitrations must respect Portuguese public policy rules (see question 4.2 below).

## 3 Jurisdiction

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

The LAV limits arbitration to disputes concerning disposable rights (art. 1.1 LAV), as long as the subject matter of the dispute is precisely explained in the arbitration agreement (art. 2.3 LAV), and is not subjected by special law to the exclusive jurisdiction of a court or to compulsory arbitration (art. 1.1 LAV).

Certain labour law issues have been considered to be within the scope of disposable rights and are thus arbitrable, as well as issues related to intellectual property.

However, disputes regarding copyright law have been deemed as non-arbitrable (art. 56 Copyright Law Code), as well as certain disputes within insolvency proceedings (please see question 3.7 below) and criminal proceedings.

### 3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

The LAV clearly states in its art. 21 that the arbitral tribunal may decide on its own jurisdiction (doctrine of *kompetenz-kompetenz*), which includes deciding on the existence, validity and effectiveness of the arbitration agreement.

Art. 21.2 also reaffirms the doctrine of separability, whereby the arbitration clause is still valid notwithstanding the nullity of the rest of the contract in which it is inserted, unless it is shown that the clause is an essential element of the contract for the parties, without which they would not have contracted in the first place.

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

According to the dilatory exception stated in art. 494.j of the CPC, judicial courts are not competent to rule on a certain dispute when a party commences a court proceeding in apparent breach of an arbitration agreement.

However, the court will only decline its competence, referring the matter to the competent arbitral tribunal if such exception is brought up as a motion in the response to the initial claim. If no such motion is made in the response, the court will hear the dispute and rule on it (art. 495 CPC).

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

Prior or during the arbitration proceedings, a court cannot address the issue of the jurisdiction and competence of the Portuguese

arbitral tribunal, since the arbitral tribunal is competent to rule on its own jurisdiction (art. 21.1 LAV).

Nevertheless, once the award is rendered, and if the parties did not provide against it (for an international arbitration), one of the challenges against it is that the arbitral tribunal did not have jurisdiction, hence allowing the court to address the jurisdiction of the arbitral tribunal at this stage only (art. 27.1.b LAV).

Such a ground for challenging the award cannot be plead, however, if one party had known of the lack of jurisdiction of the arbitral tribunal during the proceedings and did not raise this at the appropriate moment (art. 27.2 LAV).

Also, there is no standard for review which is set out either by law or jurisprudence in respect of a tribunal's decision as to its own jurisdiction. The review will merely be based on a detailed analysis of the arbitration clause, which is also the object of analysis when an arbitral tribunal is deciding on its own jurisdiction. For the legal requirements of the arbitration clause, please see questions 1.1 and 1.2.

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

National laws are silent on this matter, and courts have not ruled on it so far, hence, it is our understanding that the arbitral tribunal only has jurisdiction over the parties to the dispute who have signed the arbitration agreement. Nonetheless, third parties which have not signed the arbitration agreement may be invited and voluntarily be part of the arbitration.

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

The timeframe provided by the LAV for the arbitrators to render the award is set at 6 months (art. 19.2 LAV).

However, this period can be extended to twice its original duration by a written agreement by the parties (art. 19.4 LAV).

Unless parties have agreed otherwise, the period for rendering the award shall be counted from the day of the appointment of the last arbitrator (art. 19.3 LAV).

If ever the arbitrators unjustifiably obstruct the rendering of the award within the determined time limit, they will be liable for the damages resulting from the obstruction (art. 19.5 LAV).

There are no additional procedural provisions which apply particularly to arbitrations in Portugal, including those concerning limitation periods, therefore leaving the choice of procedural rule to the parties, or if none were chosen, to the arbitrators. The rules can be those found in the Portuguese Civil Procedure Code, but can also be other procedural rules from an arbitration institution chosen by the parties.

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

Portuguese insolvency law actually foresees different effects on arbitration proceedings depending on whether the arbitration had

already started at the time of the insolvency declaration.

Art. 87, par. 1, of the Portuguese Insolvency Code provides that the effectiveness of arbitral agreements in which the insolvent is part of, regarding disputes that may affect the value of the insolvent estate, is suspended, notwithstanding any applicable international treaties.

Although there is no specific jurisprudence on this matter in Portugal, nor has it yet been thoroughly discussed amongst Portuguese scholars, as the referred Code is relatively recent, the aforementioned article aims to prevent any arbitration actions, which may affect any assets of the insolvent estate, from being initiated after the declaration of insolvency. This means that the suspension of the arbitration convention will only affect those proceedings that may influence the value of the estate, but not those which have any other object.

One should bear in mind that the insolvent estate consists of the insolvent's patrimony and all rights and assets that it may acquire during the insolvency proceedings. Therefore, the justification for what art. 87, par. 1, of the Portuguese Insolvency Code sets out is purely pragmatic: since the cases related to the "value of the estate" can only be decided within the scope of the insolvency proceedings, no arbitrations that may lead to awards which may influence the value of the estate may be brought against or by the Insolvent, after the insolvency declaration. The reasoning for this is that initiated arbitration proceedings could never be attached to the insolvency proceedings.

Moreover, it should be noted that art. 87 explicitly refers to applicable international treaties, insofar as its application cannot, for instance, contradict the provisions of the New York Convention.

On the other hand, art. 87, par. 2 states that any arbitration already pending at the moment of the insolvency declaration shall proceed and the insolvency administrator shall substitute the insolvent party in these proceedings, regardless of the agreement of the other party.

## 4 Choice of Law Rules

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

For international arbitration, the parties may elect the law to be applied by the arbitrators when deciding on the merits and rendering the award (art. 33.1 LAV), unless they choose for the arbitral tribunal to rule according to equity (art. 35 LAV).

In case parties do not expressly choose the applicable substantive law, the arbitral tribunal shall apply the one that it finds to be most adequate to resolve the dispute (art. 33.2 LAV), according to the circumstances of the case.

In addition, if the arbitrators deem it relevant, they may apply conflict of law rules when determining which law govern the arbitration. They will generally do so when choosing the law to be applied to the formation, validity and legality of the arbitration agreement, as well as to the contract from which the agreement has arisen.

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

Regardless of the law chosen by the parties, an arbitral tribunal seated in Portugal cannot violate Portuguese international public policy, as stated in art. 22 of the Portuguese Civil Code.

Although the Portuguese Civil Code does not define the concept of public policy, case law has described it as general fundamental principles, which are identified by judges on a case-by-case basis, and which can change with the evolution of customs and morals (Supreme Court of Portugal, 7-11-1989).

Compliance with the chosen substantive laws of the Portuguese arbitration is therefore subject to these currently identifiable fundamental principles.

In addition, and notwithstanding the substance of the law chosen by the parties, an arbitration which has its seat in Portugal must follow the mandatory procedural rules set forth in art. 16 of the LAV, which will be covered in question 6.1.

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

The choice of law rules governing the formation, validity and legality of arbitration agreement are the same as those explained in question 4.1 above.

## 5 Selection of Arbitral Tribunal

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

According to the LAV, the arbitral tribunal may be composed of a sole or of an uneven number of arbitrators (art. 6.1 LAV).

The parties should include in the arbitration agreement the appointed arbitrators, or the method of their appointment (art. 7.1 LAV).

If the number of arbitrators was not determined in the arbitration agreement, the arbitral tribunal shall be composed of three arbitrators (art. 6.2 LAV).

In addition, only individuals enjoying full legal capacity can be appointed as arbitrators (art. 8 LAV).

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

The default procedure in case the parties' chosen method for selecting arbitrators fails is that each party is to appoint one of the arbitrators, after which both selected arbitrators are to select a third arbitrator who will complete the arbitral tribunal (art. 7.2 LAV).

In addition, if parties have not selected the arbitrators nor have provided for the method of their selection, the president of the competent Court of Appeal will appoint the arbitrators (art. 12.1 LAV), as explained in question 5.3.

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

If no appointment of arbitrators or any determination of a method of selection is made by the parties, the president of the Court of Appeal at the place of arbitration (or domicile of applicant) will appoint the arbitrators (art. 12.1 LAV).

Whereas for the appointment of the arbitrators by choice of the parties such nomination is subject to challenge (the same challenges as those applicable to a judge, as provided by the Civil Procedure Code), if the arbitrators are appointed by the president of the competent Court of Appeal, no challenge is possible (art. 12.3 LAV).

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

Despite the fact these requirements (independence, neutrality and/or impartiality) are central and fundamental to the arbitration process, the LAV merely provides that the civil procedural requirements established in the CPC may also be applicable, regarding impediments or excusal of judges, to the arbitrators not appointed by agreement of the parties (art. 10 LAV), except for the arbitrator(s) appointed by the president of the Court of Appeal, who are not subject to challenge.

Therefore, if arbitrators are neither independent nor impartial during the arbitration proceedings and regarding the dispute, an impediment may occur.

The following are some of the cases of impediment provided in the CPC (art. 122 CPC):

- (a) the judge (or members of his family) are parties in their own right, or on behalf of another person, or have an interest in the proceedings;
- (b) when the judge has intervened in the proceedings as counsel or an expert, or when it is necessary to decide a question on which he has given or stated an opinion;
- (c) when the judge has deposed, or will be called upon to depose as a witness; or, *inter alia*, and
- (d) judges who are spouses, relations or kin in the direct line or in the second degree in the collateral line may not simultaneously be members of a collective court.

Apart from the impediments or excusal of the arbitrators applicable by the CPC (arts. 122 and 126), the LAV has no rules concerning the disclosure of potential conflicts of interest by arbitrators.

Nevertheless, the Code of Conduct for European Lawyers provides in art. 3.2 that a lawyer may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of a conflict, between the interests of those clients. In those cases, the lawyer must cease to act for both or all of the clients concerned.

Moreover, the Rules of the Arbitration Centre of the Portuguese Chamber of Commerce and Industry (Commercial Arbitration Centre) provide that any person who agrees to sit on an arbitral tribunal shall sign a statement of independence and impartiality in which he/she shall mention any circumstances which may reasonably give rise to doubts concerning his/her independence or impartiality (art. 10.2 Rules CAC).

Finally, in January 2010, the Portuguese Arbitration Association (APA) approved the Arbitrator's Code of Ethics, applicable to all its members.

## 6 Procedural Rules

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

The LAV governs both domestic and international arbitral proceedings, establishing the provisions and the general principles of law which shall apply to those arbitrations that take place in Portugal (ruled by LAV).

It rests on the parties or on the arbitral tribunal (only in the absence of agreement between the parties) to choose the procedural rules

applicable to the arbitral proceedings (art. 15 LAV).

The procedural rules and the place of arbitration should be stipulated in the arbitration agreement, or subsequently in writing, prior to the acceptance of the first arbitrator, where the parties can make reference to the rules of an arbitration institution (arts. 2.1 and 15.1 LAV).

Failing an agreement by the parties on the procedural rules governing the arbitration and on the place of arbitration, such choice shall be made by the arbitrators or arbitral tribunal (art. 15.3 LAV).

The following fundamental and basic principles shall always be observed during the arbitral proceedings (art. 16 LAV):

- (a) the parties shall be treated with absolute equality;
- (b) the respondent shall be summoned to submit his defence;
- (c) in all stages of the proceedings the adversarial system shall be observed, and
- (d) both parties shall be given an opportunity to present their case, either orally or in writing, before the final award is rendered.

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

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Except for the provisions chosen by the parties governing procedural matters which are included in the arbitration agreement, the only procedural rules set forth by the LAV are the compliance with the basic principles established in art. 16 LAV, even though the law does not state how the arbitral tribunal should proceed in order to do so.

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### 6.3 Are there any rules that govern the conduct of an arbitration hearing?

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The LAV does not contain any rules or procedures regarding the conduct of an arbitration hearing. As mentioned in question 6.1, the arbitral tribunal and the arbitrators are only limited by the basic principles that should always be observed during the arbitral proceedings (art. 16 LAV).

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### 6.4 What powers and duties does the national law of Portugal impose upon arbitrators?

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Under the LAV, if parties have not defined any other procedural rules, the arbitrators have the power and duty to conduct the arbitration in complete accordance with the basic principles referred to in question 6.1 (art. 16 LAV).

The arbitrators must guarantee that the award shall be rendered within the time limits defined by the parties (art. 19.1 LAV). Failing such agreement of the parties, the time limit to render the award shall be six months (art. 19.2 LAV).

Additionally, arbitrators must comply with the relevant formal and material requirements for the drafting of the arbitral award (art. 23 LAV).

Finally, unless otherwise agreed, the chairman of the arbitral tribunal shall be empowered to prepare the proceedings, to direct the taking of evidence, to conduct the hearings and to coordinate the debates (art. 14.3 LAV).

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

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The LAV stipulates that parties may choose those who will represent or assist them before the tribunal (art. 17 LAV).

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### 6.6 To what extent are there laws or rules in Portugal providing for arbitrator immunity?

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According to the LAV, arbitrators have no immunity while performing their duties.

---

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

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There are certain moments during arbitration when a judicial court may intervene:

Whenever an arbitrator or arbitrators have not been appointed according to the provisions of arts. 6 to 11 LAV, such appointment shall be made by the president of the competent Court of Appeal (*Presidente do Tribunal da Relação*) at the place of arbitration (art. 12.1 LAV).

Also, in the event of the replacement of arbitrators by reason of death, excusal or permanent impossibility, withdrawal from office, permanent inability to perform his functions or if his appointment ceases to have effect, the president of the competent Court of Appeal of the place of arbitration may be called upon to appoint a new arbitrator (arts. 12.1 and 13 LAV).

Moreover, the Portuguese courts have jurisdiction to deal with the challenge of arbitrators for reasons related to impediment (art. 123.1 CPC) and suspicion (art. 126.3 CPC), which are matters also to be decided by the Court of Appeal of the place of arbitration.

Finally, the Portuguese courts may intervene when granting preliminary and interim measures, at the request of the arbitration tribunal (or with its consent), as well as for the production of evidence.

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### 6.8 What is the approach of the national courts in Portugal towards *ex parte* procedures in the context of international arbitration?

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There is no Portuguese case law regarding *ex parte* procedures in the context of international arbitration.

This can be explained by the basic principles to be observed in the arbitral proceedings (art. 16 LAV), which state, among other requirements, that the adversarial system shall be observed during all stages of the proceedings.

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## 7 Preliminary Relief and Interim Measures

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### 7.1 Is an arbitrator in Portugal permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

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Although the matter regarding preliminary or interim relief is not addressed in the LAV, unlike the UNCITRAL Model Law, it is generally accepted that arbitrators have jurisdiction to grant them if expressly authorised to do so in the arbitration agreement.

Nevertheless, the enforcement of such preliminary measures or

interim relief, if not accepted on a voluntary basis by the party against whom the order is made, must be granted through the *jus imperii* of the Portuguese national courts.

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**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?**

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The LAV does not contain any provisions concerning preliminary or interim relief/measures. Despite the existence of an arbitration agreement and if limited to the scope of the dispute subject to arbitration, it is largely accepted to consider the Portuguese arbitral tribunal entitled to grant those relief/measures.

It is comprehensively accepted that the parties' recourse to Portuguese national courts in order to obtain preliminary and interim relief is neither a violation of the arbitration agreement, nor does it affect the arbitral tribunal's competence to decide on the merits of the case.

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

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Despite the fact that this issue is not yet clearly resolved, there are few court decisions related to it, but some contradictory.

Nevertheless, the latest Portuguese case law has shown to be more cooperative in supporting arbitration, regarding the request and acceptance to grant preliminary and interim relief.

The enforcement of interim measures must always be performed by judicial courts, which are also the only competent forum for ordering such measures which involve issues of *ius imperii*.

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

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In Portugal there is no national regulation regarding this matter. Furthermore, there is also no jurisprudence regarding this subject. Consequently, we cannot state which are the circumstances in which a national court will issue an anti-suit injunction in aid of an arbitration. However, please note that this is a debated question amongst the legal doctrine which is yet to be settled.

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

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There is no provision in the LAV concerning the security for costs, either regarding the Portuguese national courts or the arbitral jurisdiction. However, if the parties grant the arbitral tribunal with the powers to decide on security for costs, nothing prevents them from doing so.

If nothing has been agreed regarding the matter, such a decision would be outside the scope of the subject matter of the dispute, and therefore outside of the arbitration tribunal's powers, opening a door to the setting aside of the award, based on the grounds that the tribunal dealt with matters beyond its mandate (art. 27.1.e LAV).

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## 8 Evidentiary Matters

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**8.1 What rules of evidence (if any) apply to arbitral proceedings in Portugal?**

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Any evidence admitted by the CPC (e.g. witnesses, experts, documents, inspection by the court, party evidence) may be submitted to the arbitral tribunal (art. 18.1 LAV).

As mentioned in question 6.1, despite the fact that parties may establish their own rules, in compliance with the basic principles to be observed during the proceeding (art. 16 LAV), some Portuguese arbitral tribunals have applied, in a subsidiary way, the principles of civil procedure law.

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**8.2 Are there limits on the scope of an arbitrator's authority to order the disclosure of documents and other disclosure (including third party disclosure)?**

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Yes, there are.

Portuguese law (LAV/CPC) has not established a procedural stage where the parties can proceed with the disclosure of documents or other forms of discovery (including third party disclosure).

Thus, this means that the arbitrators are subject to the production of evidence within the same limits which apply to the Portuguese national courts.

There are also restrictions regarding the obtaining of information which is considered confidential, whether for reasons of professional ethics, internal security, State secrecy or information related to commercial or technological secrets.

Despite this limitation, if one of the parties (or a third party) refuses the necessary cooperation in the gathering of evidence, a party may, with the permission of the arbitral tribunal, request a judicial court to gather the evidence and send it to the tribunal (art. 18.2 LAV).

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**8.3 Under what circumstances, if any, is a court able to intervene in matters of disclosure/discovery?**

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See the last paragraph of question 8.2 above.

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**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? Is cross-examination allowed?**

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The LAV provides that the evidence admitted by the CPC may be also be submitted to the arbitral tribunal (art. 18.1 LAV), but does not make any reference regarding the production of written and/or oral testimony.

This means that the parties are free to agree on the production of evidence (or the arbitral tribunal in the absence of agreement between the parties before the acceptance by the first arbitrator), and how evidence is to be produced (art. 15 LAV).

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**8.5 Under what circumstances does the law of Portugal treat documents in an arbitral proceeding as being subject to privilege? In what circumstances is privilege deemed to have been waived?**

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Although this issue is not addressed in the LAV, it is understood that the documents that are not public must be kept confidential during and after the arbitration. The parties may nevertheless agree to waive the confidentiality of the documents.

Also, the original of the award shall be deposited with the registry of the court of the place of arbitration. However, the parties can, in the arbitration agreement or in a subsequent written document, decide to relieve the tribunal of such deposit, or, in the case of institutional arbitration, if the rules provide for another form of deposit (art. 24.2 LAV).

## 9 Making an Award

### 9.1 What, if any, are the legal requirements of an arbitral award?

The final award of the arbitral tribunal must be made in writing and must contain (art. 23.1 LAV):

- (a) the identity of the parties;
- (b) a reference to the arbitration agreement;
- (c) the subject matter of the dispute;
- (d) the identity of the arbitrators;
- (e) the place of arbitration and the place and the date on which the award was rendered;
- (f) the signature of the arbitrators, and
- (g) a mention of the arbitrators who could not or were not willing to sign the award.

Also, the award must be signed by at least the majority of the arbitrators and must include the appropriately identified dissenting opinions (art. 23.2 LAV).

Moreover, the award must state the grounds upon which it is based (art. 23.3 LAV) and contain a decision on the costs of the proceedings and their apportionment among the parties (art. 23.4 LAV).

If a breach of the provisions of art. 23.1.f, 2 or 3 occurs, the arbitral award may be set aside by a court (art. 27.4 LAV).

Finally, regarding the notification and deposit of the award, the chairman of the tribunal must order that each party be notified of the award and that a copy be sent by registered mail to each of them (art. 24.1 LAV), at which point the arbitrators' jurisdictional power shall terminate upon notification of the deposit of the award that has settled the dispute or, if the tribunal has been relieved of the necessity of such deposit, upon notification of the award to the parties (art. 25 LAV).

## 10 Appeal of an Award

### 10.1 On what bases, if any, are parties entitled to appeal an arbitral award?

The LAV distinguishes between grounds for appeal and grounds for challenge of an arbitral award (art. 27 and 29 LAV).

Regarding the possibility of appealing an arbitral award, the regime differs whether one is dealing with a national arbitration or an international arbitration (see question 2.2).

For national arbitrations, if parties have not previously waived the right to appeal the arbitral award, the latter may be appealed before the Court of Appeal at the place of arbitration, in the same conditions as a judicial decision rendered by a Court of First Instance (art. 29.1 LAV). However, in case arbitrators have been granted the power to decide according to equity, the right to appeal is considered to have been waived (art. 29.2 LAV).

For international arbitrations, there is no appeal of the arbitral award, unless parties have mutually agreed to it and have regulated its terms (art. 34 LAV).

Regarding the grounds for challenging an award, these are stricter

than the grounds for appeal and are limited to the following:

- (a) when the dispute is not capable of settlement by arbitration (non-arbitrability);
- (b) when the award was rendered by a tribunal which had no jurisdiction or which was irregularly constituted;
- (c) the occurrence during the proceedings of the breach of basic principles to be observed in the proceedings which had a decisive influence on the outcome of the dispute (art. 16 LAV establishes such principles, notably the existence of absolute equality between the parties and the opportunity to present their case);
- (d) lack of signature of the arbitrators in the award (art. 23.1.f), *ex vi* art. 27.d LAV) and lack of reasoning upon which the award is based (art. 23.3, *ex vi* art. 27.d LAV); and
- (e) when the tribunal dealt with matters beyond its mandate or it failed to decide matters it should have decided.

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

Parties can not exclude the right to set aside an arbitral award, as per art. 28.1 LAV.

However, parties may waive the right to appeal an arbitral award in the same terms as a judicial decision of the Court of First Instance (art. 29.1 LAV). According to art. 681 of the CPC, parties may waive the possibility of appealing as long as it is commonly agreed by the parties and if the frustrated party has not accepted the award after it has been rendered.

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

No, parties cannot expand the scope of appeal of an arbitral award beyond the grounds established in national law (CPC).

### 10.4 What is the procedure for appealing an arbitral award in Portugal?

The procedure for appealing an arbitral award is the same as an appeal of a Court of First Instance judicial decision (art. 29.1 LAV).

Thus, for arbitral awards rendered after January, 1 2008, the losing party has a period of 30 days counting from the service of the arbitral award to lodge an ordinary appeal (allegations included) before the competent Court of Appeal.

Moreover, if parties have agreed on the right to appeal the arbitral award and have effectively lodged it in court, the grounds for challenge of an award referred to in question 10.1 may only be examined in the appeal (art. 27.3 LAV). One should note that that the above-mentioned prerogatives imply that the appeal was not excluded or regulated differently by the parties.

## 11 Enforcement of an Award

### 11.1 Has Portugal 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 has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (NYC) on

March, 10 1994.

Portugal, however, made the following reservation: “*In accordance with the principle of reciprocity, Portugal will only apply the Convention when the arbitral awards are made in states which are bound by the Convention.*”

The CPC also governs the recognition of foreign judgments and awards in arts. 1094 to 1102. These provisions are particularly important as they apply in the situation where an award was rendered by a State which is not a member of the NYC.

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

Yes, apart from the NYC, Portugal has signed the following Conventions and Protocols:

- (a) the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention);
- (b) the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA);
- (c) the Inter-American Convention on International Commercial Arbitration, signed in Panama in 1975;
- (d) the Geneva Protocol on Arbitration Clauses of 24 September 1923; and
- (e) the Geneva Convention on Execution of Foreign Arbitral Awards, dated 26 September 1927.

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

Regarding the steps parties are required to take, Portuguese Law differentiates whether or not the NYC applies. In the situation where the NYC applies, foreign awards are directly enforceable before a Court of First Instance. If the NYC does not apply to foreign awards, the CPC will apply, giving the Portuguese Court of Appeal competence to recognise and enforce the award in Portugal (art. 1094 and 1095 CPC).

If the award was rendered by a tribunal seated in Portugal, international or not, it does not need recognition and will be directly enforced before a Court of First Instance.

Regarding the proceedings for enforcement of the award in the competent court, the applicant must firstly file the initial legal brief, along with the document which contains the award to be reviewed, which will be served to the counter-party for reply within the term of 15 days. The applicant may respond within 10 days counting from the service of notice of the opponent’s reply.

After pleadings and all indispensable measures take place, parties and the Attorney General may present their submissions within 15 days.

Although the grounds for refusal to recognise or to enforce an arbitral award are not identical in the CPC and the NYC, they are nevertheless quite similar.

### 11.4 What is the effect of an arbitration award in terms of *res judicata* in Portugal? 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?

*Res judicata* within Portuguese law (art. 671 to 675 CPC) means

that, as a rule, a decision that decided on the merits of the dispute – and that has not been subject to appeal – is final and binding.

Thus, as a rule, a decision has *res judicata* effect in what concerns the parties, the claim and the reason for the claim (art. 498, *ex vi* art. 671 CPC).

According to art. 26.1 LAV, the arbitral award has *res judicata* effect as soon as it has been notified to the parties and deposited with the registry of the court of the place of arbitration. However, parties may agree to relieve the tribunal of the necessity of such deposit, and also the rules of the arbitration centre may provide another form of deposit (art. 25.2 LAV).

It is worth mentioning that any foreign arbitral award to be able to be enforced in Portugal must refer that it is a final and binding decision.

Finally, as previously referred to in question 10.1, parties may initiate procedures to set aside an award if any of the grounds for challenge of LAV are met.

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

Art. 5.2.b of the NYC states that the national court must refuse the recognition and enforcement of a foreign arbitral award if it appears that these effects would be contrary to public policy in the country of the forum. Although the NYC does not distinguish internal public policy of international public policy, it has been understood that the reference to public policy at the NYC refers to the international public policy of the State where you wish to have the foreign arbitral award recognised and enforced.

Art. 1096.f of the Portuguese Civil Procedure Code (CPC) expressly states that the only grounds for refusing to review and confirm foreign awards is that the recognition of the award would lead to a result clearly incompatible with the principles of international public policy of the Portuguese State. The offense of public policy may relate to the arbitration agreement (for instance because it is null and void), to the arbitration (e.g. partiality of the arbitrators, violation of the rights of defence), to the award or even to the enforcement itself.

In short, a foreign arbitral award may be refused if its enforcement deals with rights which, under Portuguese law, are not disposable or that violate international public policy principles of the Portuguese State.

## 12 Confidentiality

### 12.1 Are arbitral proceedings sited in Portugal confidential? What, if any, law governs confidentiality?

The LAV or the CPC do not include any provisions on confidentiality which may mean that there is no expressed duty of confidentiality in Portuguese law.

However, parties who resort to arbitration usually want the issues discussed and the information disclosed to remain confidential. Thus, they (should) expressly provide that the arbitral proceedings are confidential either in the arbitration agreement or in another document signed by the parties, unless already provided in the regulation of the chosen arbitral institution, like for the ICC Arbitration Rules for instance.

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

Yes, it can.

The reason lies on the fact that, as a rule, arbitral proceedings are not, *per se*, confidential, unless parties expressly establish that is the case. It depends, thus, on the chosen institution or *ad hoc* rules.

### 12.3 In what circumstances, if any, are proceedings not protected by confidentiality?

Proceedings are not confidential when parties do not express such intention in the arbitration agreement, in a subsequent document, or if a specific arbitral regulation does not establish any confidentiality rules.

## 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)?

The LAV does not refer to or limit the types of damages available in arbitration, which means that all the ones included in the CPC are applicable as long as they do not violate public policy.

Even though in a few other countries punitive damages are accepted, they are still considered as violating public policy in Portugal. Hence, courts are not allowed to grant them, meaning that arbitrators cannot either.

Nevertheless, if ever a Portuguese arbitration award grants punitive damages, it would not be enforceable in Portuguese courts, for public policy violation reasons.

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

There are no particular rules on interests in arbitration.

The civil rate in Portugal is 4% and the commercial rate is 8%.

### 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?

The LAV only establishes that the award shall contain a decision on the costs of the proceedings and their apportionment among the parties (art. 23.4 LAV).

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

No, an award in Portugal is not subject to any tax.

## 14 Investor State Arbitrations

### 14.1 Has Portugal signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965)?

Portugal has ratified the ICSID Convention in 1984.

### 14.2 Is Portugal party to a significant number of Bilateral Investment Treaties (BITs) or Multilateral Investment treaties (such as the Energy Charter Treaty) that allow for recourse to arbitration under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID)?

Portugal has signed 45 bilateral investment treaties (BIT) with the following countries:

Cape Verde, Chile, China, Arab Republic of Egypt, Latvia, Mauritius, Mexico, Morocco, Mozambique, Pakistan, Paraguay, Peru, Czech Republic, Croatia, Germany, Guinea Bissau, Romania, Slovenia, Turkey, Albania, Angola, Argentina, Bosnia and Herzegovina, Brazil, Bulgaria, Cuba, Gabon, Hungary, India, Lithuania, Macau, Philippines, Poland, Russian Federation, Slovakia, Timor-Leste, Ukraine, Uruguay, Venezuela, Zimbabwe, Sao Tome and Principe, Algeria, Tunisia, Libyan Arab Jamahiriya and Korea.

Moreover, Portugal signed the Energy Charter Treaty in Lisbon on 17 December 1994, having deposited its instruments of accession and ratification on December 16 1997. The treaty entered into force on 16 April 1998.

### 14.3 Does Portugal have standard terms or model language that it uses in its investment treaties and, if so, what is the intended significance of that language?

Portugal does not have a Model BIT.

However, Portugal uses general terms in its bilateral investment treaties, such as: (i) “*fair and equitable treatment*”; (ii) “*full protection and security*”; and (iii) “*national and Most-Favoured-Nation treatment*”, along with provisions for compensation for expropriation, transfers of capital, access to settlement of disputes by diplomatic channels, *ad hoc* arbitration and ICSID conciliation/arbitration.

The purpose of such language is to intensify economic cooperation by creating favourable conditions for investments made by one contracting party in the territory of the other.

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

Portugal has ratified the United Nations Convention on Jurisdictional Immunities of States and their Property (the Convention) in 2005, according to which:

- (a) A State cannot invoke immunity from jurisdiction in commercial transactions with a foreign natural or juridical person which led to differences that fall within the jurisdiction of a court of another State, save for commercial transactions between States or when there is an expressed agreement otherwise by the parties (arts. 10, 1 and 2).
- (b) A State cannot invoke immunity from jurisdiction before a competent court of another State in case it enters into an arbitration agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction and if such proceedings relate to the validity, interpretation or application of the arbitration agreement, to the arbitration procedure or to the confirmation or the setting aside of the award, unless the arbitration agreement otherwise provides (art. 17 of the Convention).

Thus, as a rule, Portuguese courts consider that a State can invoke immunity from jurisdiction from acts that are *jus imperii*, and immunity from execution from assets that are used within such *jus*

*imperii*. It can not, however, invoke immunity from jurisdiction where the acts have a *juri gestionis* nature.

## 15 General

### 15.1 Are there noteworthy trends in the use of arbitration or arbitration institutions in Portugal? Are certain disputes commonly being referred to arbitration?

Resorting to commercial arbitration, whether through institutional arbitration or *ad hoc* arbitration, has increased significantly in the past years.

Regarding institutional arbitration, despite the existence of several arbitration centres in Portugal which provide arbitration, mediation and conciliation services, the most common one for commercial arbitration is the Arbitration Centre of the Portuguese Chamber of Commerce and Industry (ACL – *Associação Comercial de Lisboa*) in Lisbon.

For international commercial disputes, it is common in Portugal to apply the 2008 arbitration rules of the above-mentioned arbitration centre (ACL), as well as the ICC rules of arbitration.

### 15.2 Are there any other noteworthy current issues affecting the use of arbitration in Portugal, such as pending or proposed legislation that may substantially change the law applicable to arbitration?

The LAV dates from 1986 and it was reviewed solely in 2003 regarding the object of the dispute. Though being a rather simple but well drafted instrument, it has been criticised for not following the modern trends of international commercial arbitration. For instance, regarding the actual approach for considering a dispute to be arbitrable solely based on disposable rights; for not expressly governing several matters such as interim measures or the arbitrator's duty of independence and impartiality; for not including certain grounds for setting aside an award when this violates international public policy rules of the Portuguese State; or in cases of decision-making by equity when arbitrators have not been expressly granted such power.

For further information on this, please see par. 3-4 of question 2.1 above.

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