

# ARBITRATION IN PORTUGAL

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## 1. Historical background

- 1.1.1 A new Voluntary Portuguese Arbitration Act, Law 63/2011 (the **Portuguese Arbitration Act**), was published in the Portuguese Official Gazette on 14 December 2011 and entered into force on 14 March 2012.
- 1.1.2 The much-awaited Portuguese Arbitration Act revoked the long-lived Voluntary Arbitration Act of 1986 (**1986 Act**).<sup>1</sup> The approval of the new Portuguese Arbitration Act was a stipulation agreed between the Portuguese Government, the International Monetary Fund and the European Union's institutions in order to modernise the alternative dispute resolution mechanisms available in Portugal and perfect them as an alternative to the slow paced Portuguese judicial system. This agreement was reached in the wider context of the structural reforms imposed on Portugal in order to repay its external debt. The reform also reflected the concern of harmonising the previous 1986 Act with the most common practices adopted internationally.
- 1.1.3 The Portuguese Arbitration Act:
- follows the Model Law (1985) and (2006),<sup>2</sup> albeit with influences from other, more recent arbitration laws;
  - contains a more detailed set of procedural rules to be applied within the arbitral proceedings, if the parties fail to agree on those rules between themselves;
  - maintains the underlying idea that party autonomy constitutes the essential framework of arbitration; and
  - regulates matters formerly absent from the 1986 Act, such as multi-party issues, interim measures and preliminary orders which may be applied by the arbitral tribunal (and their enforcement), and the recognition and enforcement of foreign awards.

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<sup>1</sup> Law No. 31/86 of 29 August 1986 (in force since 29 November 1986), as amended by Decree-Law No. 38/2003 of 8 March 2003.

<sup>2</sup> CMS Guide to Arbitration, vol II, appendix 2.1.

## 2. Scope of application and general provisions of the Portuguese Arbitration Act

### 2.1 Subject matter

2.1.1 The Portuguese Arbitration Act governs all arbitrations held within Portugal.<sup>3</sup> Any claim involving an economic interest will be arbitrable. The Portuguese state and public law entities are able to enter into arbitration agreements whenever duly authorised by law,<sup>4</sup> or if the matters discussed refer only to private law. The Portuguese Arbitration Act constitutes a general law on the matter of arbitration and is, therefore, not applicable where there is a specific law concerning arbitration within a certain type of dispute (e.g. labour disputes and others set out at section 11 below).

### 2.2 Structure of the law

2.2.1 The Portuguese Arbitration Act is divided into twelve chapters, which are roughly organised according to the typical timeline of arbitral proceedings.

2.2.2 The first three chapters deal with aspects prior to the arbitral proceedings, namely the arbitration agreement, its mandatory content and its validity (Chapter I), the composition of the arbitral tribunal, the rules on the appointment of arbitrators and their substitution (Chapter II) and the competence of the arbitral tribunal (Chapter III).

2.2.3 The following two chapters deal with the essential procedural rules of arbitration, including interim measures and preliminary orders (Chapter IV) and the core of the arbitral procedure itself (Chapter V).

2.2.4 The subsequent chapters deal with aspects concerning the end of the arbitration, namely the issue of the award (Chapter VI), the terms to set aside an award (Chapter VII) and the enforcement of the award (Chapter VIII).

2.2.5 The final four chapters concern more specific matters, such as international arbitrations (Chapter IX), the recognition and enforcement of foreign awards (Chapter X), the competence of judicial courts as regards arbitration (Chapter XI) and final rules concerning the spatial scope of application of the Portuguese Arbitration Act and the creation of arbitral institutions (Chapter XII).

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<sup>3</sup> Portuguese Arbitration Act, art 61.

<sup>4</sup> The Portuguese Administrative Courts Procedure Code, art 180, allows the entering into of arbitration agreements on matters regarding administrative contracts, civil liability and administrative acts.

### 2.3 General principles

- 2.3.1 One of the main principles of the Portuguese Arbitration Act is party autonomy. The resolution of disputes through arbitration depends upon an agreement between the disputing parties to exclude their dispute from the jurisdiction of the state courts.
- 2.3.2 The Portuguese Arbitration Act upholds the will of the parties in several areas, from the constitution of the arbitral tribunal to the procedural rules to be applied. The Portuguese Arbitration Act also recognises the principle of *competence-competence*, which is discussed in section 5.1 below.<sup>5</sup>
- 2.3.3 Throughout the arbitration, there are also essential procedural principles which must be observed, such as the equality of the parties, due and fair process and the adversarial principle.

## 3. The arbitration agreement

### 3.1 Definitions

- 3.1.1 The Portuguese Arbitration Act defines the arbitration agreement as the means by which a dispute may be submitted to an arbitral tribunal (provided that the dispute does not concern inalienable rights or illegal transactions).<sup>6</sup>
- 3.1.2 This broad definition is divided into two different types of arbitration agreements, according to the criteria of the object of the arbitration agreement.<sup>7</sup> Hence, there are arbitration contracts which submit a present and specific dispute to arbitration, and arbitration clauses which define that certain future and potential types of disputes may be settled by arbitration.
- 3.1.3 This dual classification is relevant in defining the minimum content of the arbitration agreement required by law: the arbitration agreement must precisely determine the object of the dispute submitted to arbitration and must be sufficiently certain regarding the elements of the contract that can be settled by the arbitral tribunal.
- 3.1.4 It is also possible for the parties to agree to submit to arbitration other issues that may require the intervention of an impartial decision maker, for example, issues

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<sup>5</sup> Portuguese Arbitration Act, art 18(1), (8), (9) and (10).

<sup>6</sup> *Ibid*, art 1(1) and (2); Civil Code, art 1249.

<sup>7</sup> Portuguese Arbitration Act, art 1(3).

relating to the need to clarify, supplement and adapt long term contracts to new circumstances.<sup>8</sup>

### **3.2 Formal requirements**

- 3.2.1 The arbitration agreement must be in writing. This formal requirement is fulfilled whenever the agreement to arbitrate is inserted in a written document signed by both parties, or in an exchange of letters, telexes, telegrams or other means of communication of which there is a written record.<sup>9</sup>
- 3.2.2 This requirement is also satisfied if a contract refers to a separate document that contains an arbitration clause, provided that the reference is such as to incorporate that clause as part of the contract.<sup>10</sup>
- 3.2.3 The Portuguese Arbitration Act also considers this requirement to be fulfilled if there is an exchange of submissions in arbitral proceedings in which one of the parties alleges the existence of the arbitration agreement and this is not denied by the other party.<sup>11</sup>
- 3.2.4 An arbitration agreement which does not comply with the formalities required by law will be null and void.<sup>12</sup>

### **3.3 Special tests and requirements of the jurisdiction**

- 3.3.1 Not every dispute may be submitted to arbitration. All disputes that do not concern economic interests or alienable rights,<sup>13</sup> or which must be submitted legally to the state courts or mandatory arbitral tribunals are excluded from voluntary arbitration.

### **3.4 Separability**

- 3.4.1 The nullification of a contract does not necessarily determine the invalidity of an arbitration clause contained within it. The invalidity of part or of a certain clause of a contract does not imply the invalidity of the whole of the contract.<sup>14</sup> The only exception is where the contract would not have existed without the invalid part or clause. In every other case, the arbitration clause may be used to submit a dispute regarding the validity of the contract to arbitration.

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<sup>8</sup> *Ibid*, art 1(4).

<sup>9</sup> *Ibid*, art 2(1) and (2).

<sup>10</sup> *Ibid*, art 2(4).

<sup>11</sup> *Ibid*, art 2(5).

<sup>12</sup> *Ibid*, art 3.

<sup>13</sup> *Ibid*, art 1(2).

<sup>14</sup> *Ibid*, art 18(3); Civil Code, art 292.



### 3.5 Legal consequences of a binding arbitration agreement

- 3.5.1 A valid and effective arbitration agreement binds the parties to submit the disputes included in the agreement to arbitration and excludes those disputes from the jurisdiction of the state courts. Therefore, proceedings that are presented in the state courts concerning a dispute that the parties have agreed to submit to arbitration shall be, at the timely request of the respondent, declared void by the state courts on the grounds of lack of jurisdiction, except if the court determines that the arbitration agreement is patently (*manifestamente*) null, ineffective or unenforceable.<sup>15</sup> However, if the respondent in such a claim does not object to the court's jurisdiction while filing its statement of defence, the court will not undertake this action of its own volition and it will retain jurisdiction to adjudicate the claim.<sup>16</sup>

## 4. Composition of the arbitral tribunal

### 4.1 The constitution of the arbitral tribunal

- 4.1.1 The arbitral tribunal may be composed of a sole arbitrator or several arbitrators, provided that the number of arbitrators is odd.<sup>17</sup> Where the parties are silent on this matter, the arbitral tribunal shall be composed of three arbitrators.<sup>18</sup>
- 4.1.2 The parties shall appoint the arbitrator or arbitrators of their choice. This can be done within the arbitration agreement itself, or in a subsequent written document. The parties may define alternative methods of appointing the arbitrators, should they wish to do so.<sup>19</sup>
- 4.1.3 If the arbitral tribunal is composed of three (or more) arbitrators, each party shall appoint an equal number of arbitrators. The party-appointed arbitrators shall themselves appoint the final arbitrator, who will be the chair of the arbitral tribunal.<sup>20</sup>
- 4.1.4 Either party may request that the court appoints the relevant arbitrator(s) where:
- the parties have not expressly stated the arbitrator(s) to be appointed or determined a method of appointment, and the parties subsequently fail to reach agreement on this issue;

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<sup>15</sup> Portuguese Arbitration Act, art 5(1).

<sup>16</sup> *Ibid*, art 5(1); Portuguese Civil Procedure Code, art 494(j) and 495.

<sup>17</sup> Portuguese Arbitration Act, art 8(1).

<sup>18</sup> *Ibid*, art 8(2).

<sup>19</sup> *Ibid*, art 10(1).

<sup>20</sup> *Ibid*, art 10(3).

- one party does not appoint its arbitrator within 30 days of being requested to do so; or
- the party-appointed arbitrators fail to appoint the chair within 30 days of the latest party-appointed arbitrator being selected.<sup>21</sup>

4.1.5 Where the arbitral tribunal is to be composed of a sole arbitrator and the parties fail to agree upon the appointment of that arbitrator, either party may request that the court makes the appointment.<sup>22</sup>

4.1.6 There are some restrictions as to who may act as an arbitrator. An arbitrator must be a natural person, have full legal capacity and must be independent and impartial.<sup>23</sup> Other restrictions may also arise from the internal regulations of the arbitral institutions or other legal instruments. For example, an arbitrator may be restricted from acting where there is incompatibility between his or her functions as an arbitrator and other legal obligations.

4.1.7 An arbitrator must accept his or her appointment in writing, unless otherwise agreed by the parties.<sup>24</sup>

## 4.2 Procedure for challenging and substituting arbitrators

### *Challenge of arbitrators*

4.2.1 The appointment of an arbitrator may be challenged if there are justifiable doubts as to the impartiality or independence of the arbitrator or if the arbitrator does not possess the qualifications agreed upon by the parties.<sup>25</sup>

4.2.2 An arbitrator has a duty to inform the parties (and the other arbitrators if that is the case) of any subsequent circumstances that arise or that have been brought to his or her attention after accepting the appointment that would constitute a justifiable reason to doubt that arbitrator's impartiality or independence.

4.2.3 The parties may agree on the procedure for challenging an arbitrator.<sup>26</sup> However, a party may not challenge its own appointed arbitrator other than for reasons of which it becomes aware following the appointment. This restriction is also applicable when an arbitrator is appointed by the mutual agreement of the parties.<sup>27</sup>

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<sup>21</sup> *Ibid*, art 10(4) and 59(1).

<sup>22</sup> *Ibid*, art 10(2) and 59(4).

<sup>23</sup> *Ibid*, art 9(1) and (3).

<sup>24</sup> *Ibid*, art 12(2).

<sup>25</sup> *Ibid*, art 13(3).

<sup>26</sup> *Ibid*, art 14(1).

<sup>27</sup> *Ibid*, art 13(3).

*Procedure for challenging an arbitrator*

- 4.2.4 The parties are at liberty to agree on the procedure for challenging an arbitrator.<sup>28</sup> In the absence of a specific agreed procedure, a party that intends to challenge an arbitrator should submit a written statement to the arbitral tribunal setting out the grounds for the challenge. This request should be filed within 15 days from the date on which the challenging party became aware of the constitution of the arbitral tribunal or acquired knowledge of the grounds for the challenge. If the challenged arbitrator resists the challenge and remains in office, the full arbitral tribunal – including the challenged arbitrator – will decide on the challenge.<sup>29</sup> If the challenge is not successful, the challenging party may present the request to the court within 15 days of receiving notice of the decision of the arbitral tribunal. The decision of the court on the challenge will be final.<sup>30</sup>

*Procedure for appointing a substitute arbitrator*

- 4.2.5 Unless the parties have agreed to an alternative procedure, substitute arbitrators shall be appointed in the same manner as the arbitrator who was replaced. Taking into consideration the stage of the arbitral proceedings, the arbitral tribunal shall determine whether any additional procedural matters need to be addressed or repeated.<sup>31</sup>

**4.3 Arbitration fees**

- 4.3.1 The Portuguese Arbitration Act establishes that if the parties have not previously agreed upon the arbitral tribunal's fees, a written agreement between the parties and the arbitral tribunal shall be completed before the final arbitrator has accepted his or her appointment.<sup>32</sup>
- 4.3.2 If the parties and the arbitral tribunal fail to agree on fees, the arbitral tribunal shall determine its fees and expenses by taking into account the complexity of the dispute, the amount of the claim and the time spent by the arbitral tribunal on the dispute.<sup>33</sup> In this case, any dissatisfied party may request a reduction of the arbitral tribunal's fees and/or expenses before the court.<sup>34</sup>

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<sup>28</sup> *Ibid*, art 14(1).

<sup>29</sup> *Ibid*, art 14(2).

<sup>30</sup> *Ibid*, art 14(3).

<sup>31</sup> *Ibid*, art 16.

<sup>32</sup> *Ibid*, art 17(1).

<sup>33</sup> *Ibid*, art 17(2).

<sup>34</sup> *Ibid*, art 17(3).

4.3.3 There are not substantial differences in fee rates between arbitral institutions in Portugal. The tables below detail the fees determined by the Arbitration Centre of the Portuguese Chamber of Commerce and Industry (**ACL**), the most representative Portuguese arbitral institution, including arbitrator’s fees and administrative expenses.<sup>35</sup>

**Table 1 – Fees due to each arbitrator**

Value of the dispute	Fees
Lower or equal to EUR 50.000,00	EUR 1.250,00
EUR 50.001,00 to EUR 100.000,00	EUR 1.250,00 + 3,00 % of what exceeds EUR 50.000,00
EUR 100.001,00 to EUR 250.000,00	EUR 2.750,00 + 2,00 % of what exceeds EUR 100.000,00
EUR 250.001,00 to EUR 500.000,00	EUR 5.750,00 + 1,00 % of what exceeds EUR 250.000,00
EUR 500.001,00 to EUR 1.000.000,00	EUR 8.250,00 + 0,60 % of what exceeds EUR 500.000,00
EUR 1.000.001,00 to EUR 2.500.000,00	EUR 11.250,00 + 0,55 % of what exceeds EUR 1.000.000,00
EUR 2.500.001,00 to EUR 5.000.000,00	EUR 19.500,00 + 0,45 % of what exceeds EUR 2.500.000,00
EUR 5.000.001,00 to EUR 10.000.000,00	EUR 30.750,00 + 0,30 % of what exceeds EUR 5.000.000,00
EUR 10.000.001,00 to EUR 20.000.000,00	EUR 45.750,00 + 0,15 % of what exceeds EUR 10.000.000,00
EUR 20.000.001,00 to EUR 40.000.000,00	EUR 60.750,00 + 0,12 % of what exceeds EUR 20.000.000,00
More than EUR 40.000.000,00	EUR 84.750,00 + 0,10 % of what exceeds EUR 40.000.000,00

<sup>35</sup> [[http://www.port-chambers.com/Files/Documents/Regulamento%20de%20Arbitragem%20\(2008\).pdf](http://www.port-chambers.com/Files/Documents/Regulamento%20de%20Arbitragem%20(2008).pdf)] (accessed 17 January 2012)

**Table 2 – Administrative expenses**

Value of the dispute	Fees
Lower or equal to EUR 50.000,00	EUR 1.250,00
EUR 50.001,00 to EUR 100.000,00	EUR 1.250,00 + 2,00 % of what exceeds EUR 50.000,00
EUR 100.001,00 to EUR 250.000,00	EUR 2.250,00 + 1,80 % of what exceeds EUR 100.000,00
EUR 250.001,00 to EUR 500.000,00	EUR 4.950,00 + 0,50 % of what exceeds EUR 250.000,00
EUR 500.001,00 to EUR 1.000.000,00	EUR 6.200,00 + 0,25 % of what exceeds EUR 500.000,00
EUR 1.000.001,00 to EUR 2.500.000,00	EUR 7.450,00 + 0,10 % of what exceeds EUR 1.000.000,00
EUR 2.500.001,00 to EUR 5.000.000,00	EUR 8.950,00 + 0,09 % of what exceeds EUR 2.500.000,00
EUR 5.000.001,00 to EUR 10.000.000,00	EUR 11.200,00 + 0,08 % of what exceeds EUR 5.000.000,00
EUR 10.000.001,00 to EUR 20.000.000,00	EUR 15.200,00 + 0,07 % of what exceeds EUR 10.000.000,00
EUR 20.000.001,00 to EUR 40.000.000,00	EUR 22.200,00 + 0,06 % of what exceeds EUR 20.000.000,00
More than EUR 40.000.000,00	EUR 34.200,00 + 0,05 % of what exceeds EUR 40.000.000,00

#### 4.4 Arbitrator immunity

- 4.4.1 Once an arbitrator has accepted his or her appointment, that arbitrator will not be held liable for any damage caused by decisions or judgments that they make, except in the same circumstances in which judges can be held liable.<sup>36</sup> Judges and prosecutors are only liable for damage caused by their rulings if they acted intentionally or with gross negligence.<sup>37</sup> In any case, an arbitrator can only be liable to the parties to the dispute.

<sup>36</sup> Portuguese Arbitration Act, art 9(4).

<sup>37</sup> Law 67/2007 of 31 December 2007, art 12 to 14.

- 4.4.2 Arbitrators are also liable for damage caused to the parties by an unjustified delay in deciding a dispute that has been submitted to the arbitral tribunal. The direct accountability of the arbitrator to the parties incentivises a swift outcome to the arbitration, which complements the duty to decide the dispute within the legal or agreed timeframe.<sup>38</sup>

## 5. Jurisdiction of the arbitral tribunal

### 5.1 Competence to rule on jurisdiction

- 5.1.1 The principle of *competence-competence* is adopted in the Portuguese Arbitration Act and states that the arbitral tribunal has the power to decide on its own jurisdiction, either as a preliminary question or in an award on the merits. In the event of an action to set aside a partial award concerning jurisdiction, the arbitral tribunal may continue the arbitral proceedings and issue a final award.<sup>39</sup>

- 5.1.2 A respondent may argue that the arbitral tribunal lacks jurisdiction until the moment that the defence must be presented or within its defence.<sup>40</sup>

- 5.1.3 The parties may object to the decision of the arbitral tribunal regarding its jurisdiction by means of appeal, if admissible, or may commence an action to set aside the award.<sup>41</sup> In the event of an action to set aside or appeal a partial award concerning jurisdiction being made, the arbitral tribunal may continue the arbitral proceedings and issue a final award.<sup>42</sup>

### 5.2 Power to order interim measures

- 5.2.1 Unless otherwise agreed by the parties, the Portuguese Arbitration Act gives the arbitral tribunal the power to grant such interim measures as the arbitral tribunal considers necessary, provided that the adversarial principle of the arbitral proceedings is assured.<sup>43</sup> That is to say, arbitral tribunals are legally prevented from issuing *ex parte* injunctions.

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<sup>38</sup> Portuguese Arbitration, art 43(4).

<sup>39</sup> *Ibid*, art 18(1), (8), (9) and (10).

<sup>40</sup> *Ibid*, art 18(2).

<sup>41</sup> *Ibid*, art 18(9).

<sup>42</sup> *Ibid*, art 18(10).

<sup>43</sup> *Ibid*, art 20(1).

- 5.2.2 The arbitral tribunal may modify, suspend or terminate an interim measure upon the application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.<sup>44</sup>
- 5.2.3 The decision to grant an interim measure binds the parties and, unless otherwise decided by the arbitral tribunal, it is subject to enforcement before the state courts.<sup>45</sup>
- 5.2.4 In accordance with the Model Law (2006),<sup>46</sup> and unless otherwise agreed by the parties, simultaneously with the request for an interim measure a party may, without notice to any other party, request the arbitral tribunal to make a preliminary order directing a party not to frustrate the purpose of the interim measure requested.<sup>47</sup>
- 5.2.5 The preliminary order may be granted by the arbitral tribunal if it is considered that a prior disclosure of the request for the interim measure to the party against whom it is directed would risk frustrating the purpose of the measure requested. The arbitral tribunal may also require the party requesting a preliminary order to provide appropriate security, unless the arbitral tribunal considers it inappropriate or unnecessary to do so.<sup>48</sup>
- 5.2.6 After the arbitral tribunal has made a determination in respect of an application for a preliminary order, all parties shall be given notice of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications. In addition, any party against whom a preliminary order is directed shall be given the opportunity to present its case at the earliest practicable time.<sup>49</sup>
- 5.2.7 The preliminary order is only valid for 20 days.<sup>50</sup> Although the parties are bound by the determination made by the arbitral tribunal, the preliminary order cannot be enforced by the courts.<sup>51</sup>

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<sup>44</sup> *Ibid*, art 24(1).

<sup>45</sup> *Ibid*, art 27(1) and 59(4).

<sup>46</sup> CMS Guide to Arbitration, vol II, appendix 2.1.

<sup>47</sup> Portuguese Arbitration Act, art 22.

<sup>48</sup> *Ibid*, art 24(2).

<sup>49</sup> *Ibid*, art 23(3).

<sup>50</sup> *Ibid*, art 23(4).

<sup>51</sup> *Ibid*, art 23(5).

## 6. Conduct of proceedings

### 6.1 Commencement of arbitration

6.1.1 Unless otherwise agreed by the parties, the arbitral proceedings commence when a party receives the request of another party to submit the dispute to arbitration.<sup>52</sup>

### 6.2 General procedural principles

6.2.1 The Portuguese Arbitration Act defines some fundamental principles to be observed throughout the arbitral procedure, which prevail over the will of the parties.

6.2.2 Both parties must be treated in conditions of absolute equality and opportunity, with a strict observance of an adversarial system, the right of the parties to present their case before the final award is given and the participation of the respondent in the arbitral proceedings.<sup>53</sup>

### 6.3 Seat, place of hearings and language of arbitration

6.3.1 The parties are free to agree on the seat of arbitration<sup>54</sup> and the language to be used in the arbitral proceedings.<sup>55</sup> It is common for the parties to include a description of where the arbitration shall take place and the language to be adopted throughout the procedure in the arbitration agreement. If parties fail to agree on those issues, such decisions shall be made by the arbitral tribunal.

6.3.2 Regardless of the legal seat, the parties may agree to hold the hearings in any place they choose. If the parties have not agreed otherwise, the place of the hearings, evidence taking or decision making may be determined by the arbitral tribunal.<sup>56</sup>

### 6.4 Multi-party issues

6.4.1 Unlike the 1986 Act, the Portuguese Arbitration Act contains provisions regarding multi-party issues.

6.4.2 Only third parties bound by the arbitration agreement are admitted to join the arbitral proceedings. If a third party subsequently adheres to the arbitration agreement after the constitution of the arbitral tribunal (adhesion is presumed in a

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<sup>52</sup> *Ibid*, art 33(1).

<sup>53</sup> *Ibid*, art 30(1).

<sup>54</sup> *Ibid*, art 31(1).

<sup>55</sup> *Ibid*, art 32(1).

<sup>56</sup> *Ibid*, art 31(2).



case where a third party intervenes with the consent of the other parties),<sup>57</sup> it should make a declaration that it accepts the existing composition of the arbitral tribunal.

- 6.4.3 The arbitral tribunal should only permit the intervention or joinder of a third party if doing so would not unjustifiably hinder the arbitral proceedings and if there are relevant reasons to allow it, notably when there is an equivalence of interests with any of the parties regarding the object of the dispute (*litisconsórcio voluntário ou necessário*), compatibility of identity of claims, the interest of the respondent to have third party co-creditors (*solidariedade de credores*) bound by the award and the exercise of a right of recourse (*direito de regresso*) arising to the respondent.<sup>58</sup>
- 6.4.4 The intervention of third parties is only allowed in institutional arbitrations if the relevant rules of the arbitral institution ensure an equal participation of the parties in the appointment of the arbitrators.<sup>59</sup> In ad hoc proceedings, the intervention of third parties is only permitted if the arbitration agreement covers such subject matter, either directly or by reference to a set of arbitral rules.<sup>60</sup>

## 6.5 Oral hearings and written proceedings

- 6.5.1 Except if the parties agree otherwise, the arbitral tribunal has discretion as to whether there should be oral hearings or if the arbitral proceedings are to be conducted by reference to written documents and evidence only. However, the arbitral tribunal is required to conduct oral hearings for the examination of evidence whenever a party applies for such a hearing to take place, unless that party has previously waived this right.<sup>61</sup>

## 6.6 Default by one of the parties

- 6.6.1 Unless otherwise agreed by the parties or defined in the relevant institutional rules, if the claimant does not file its statement of claim within the time limits set forth in the arbitration agreement or decided by the arbitral tribunal, the arbitral tribunal should terminate the arbitral proceedings.<sup>62</sup> Conversely, if the respondent fails to submit its statement of defence within the designated time limit, the arbitral tribunal shall continue with the arbitral proceedings without viewing the respondent's default as acceptance of the claimant's allegations.<sup>63</sup>

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<sup>57</sup> *Ibid*, art 36(2).

<sup>58</sup> *Ibid*, art 36.

<sup>59</sup> *Ibid*, art 36(6).

<sup>60</sup> *Ibid*, art 36(7).

<sup>61</sup> *Ibid*, art 34.

<sup>62</sup> *Ibid*, art 33(2) and 35(1).

<sup>63</sup> *Ibid*, art 35(2).

- 6.6.2 If one of the parties fails to appear in the hearings or to submit evidence within the designated time limit, the arbitral tribunal shall continue with the arbitral proceedings and make the award after taking into consideration the evidence presented before it.<sup>64</sup>
- 6.6.3 The arbitral tribunal may, in any case, consider that the default of one of the parties is justifiable and allow the defaulting party to file the defaulted plea or evidence requested.<sup>65</sup>

## **6.7 Evidence generally**

- 6.7.1 Although the parties are free to determine the rules of evidence, there is a clear trend of parties using the same types of evidence as those used in judicial proceedings, such as documents, witnesses, experts, party evidence and so on. The parties also tend to soften the strict judicial procedural rules concerning evidence when producing the same types of evidence within the arbitral proceedings. The use of written statements is increasing.

## **6.8 Appointment of experts**

- 6.8.1 As mentioned at paragraph 2.3.2 above, the parties are entitled to determine the applicable procedural rules for the arbitral proceedings. This is also the case for evidence generally and the appointment of experts specifically.
- 6.8.2 Therefore, unless otherwise agreed by the parties, the Portuguese Arbitration Act provides that the arbitral tribunal may appoint one or more experts, on its own initiative or upon request by the parties,<sup>66</sup> and may require a party to give the expert any relevant information or to provide access to any relevant documents or goods for the expert's inspection.<sup>67</sup>

## **6.9 Confidentiality**

- 6.9.1 The Portuguese Arbitration Act is silent on the matter of the confidentiality of the arbitral proceedings. In order to compensate for this, it is common for the parties to include a confidentiality provision in the arbitration agreement or to set it out as a rule of procedure.
- 6.9.2 Many arbitral institutions set out rules of confidentiality in their arbitral rules.<sup>68</sup>

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<sup>64</sup> *Ibid*, art 35(3).

<sup>65</sup> *Ibid*, art 35(4).

<sup>66</sup> *Ibid*, art 37(1).

<sup>67</sup> *Ibid*, art 37(2).

<sup>68</sup> LCIA Arbitration Rules, art 30 (see CMS Guide to Arbitration, vol II, appendix 3.12).

## 6.10 Court assistance in taking evidence

- 6.10.1 If the disclosure of evidence is subject to the will of one of the parties, or of a third party who refuses to collaborate in providing it, the interested party may require the evidence to be produced before the relevant state court.<sup>69</sup>
- 6.10.2 In order to apply for the court's assistance, the interested party must first seek the authorisation of the arbitral tribunal. In addition, the evidence produced before the state court has to be communicated to the arbitral tribunal.
- 6.10.3 This requirement is also applicable to requests made to the relevant state court relating to arbitral proceedings that are located outside of Portugal.<sup>70</sup>

## 7. Making of the award and termination of proceedings

### 7.1 Choice of law

- 7.1.1 The arbitral tribunal will commonly apply Portuguese substantive law, or any other substantive law chosen by the parties in the arbitration agreement.
- 7.1.2 However, the parties may authorise the arbitral tribunal to reach a decision based on equitable terms, instead of binding its decision within the limits of any substantive law.<sup>71</sup>
- 7.1.3 In the case of an international arbitration, and if the parties have not agreed upon the applicable law, the arbitral tribunal shall apply the law with which the object of the dispute is most closely connected.<sup>72</sup>

### 7.2 Timing, form, content and notification of award

- 7.2.1 Unless otherwise agreed by the parties, an award must be rendered within twelve months from the date on which the final arbitrator accepted his or her appointment.<sup>73</sup>
- 7.2.2 The deadline may be extended one or more times, for successive periods of twelve months each, provided that either the parties agree or the arbitral tribunal so decides. In the latter case, the arbitral tribunal must justify its decision properly and the parties may oppose this decision by mutual agreement.<sup>74</sup>

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<sup>69</sup> Portuguese Arbitration Act, art 38(1).

<sup>70</sup> *Ibid*, art 38(2).

<sup>71</sup> *Ibid*, art 39(1).

<sup>72</sup> *Ibid*, art 52(2).

<sup>73</sup> *Ibid*, art 43(1).

<sup>74</sup> *Ibid*, art 43(2).

- 7.2.3 Failure to notify the parties of the final award within the time limit (or if the parties jointly oppose a decision of the arbitral tribunal to extend the time limit) will terminate the arbitral proceedings and the mandate of the arbitral tribunal.<sup>75</sup>
- 7.2.4 The award must be made in writing, signed by all or a majority of the arbitrators,<sup>76</sup> mention the seat of the arbitration and contain the date of the award.<sup>77</sup> In addition, the award must be sufficiently justified, unless the parties have agreed otherwise or the award results from a court settlement.<sup>78</sup>
- 7.2.5 The award should also contain a determination on the amount and allocation of the costs of the arbitral proceedings, unless otherwise agreed by the parties.<sup>79</sup>
- 7.2.6 After the award is rendered, a copy of the award that has been signed by all or a majority of the arbitral tribunal shall be delivered to each party.<sup>80</sup>

### **7.3 Settlement**

- 7.3.1 If, during the course of the arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the arbitral proceedings. If requested by the parties and provided that the settlement does not violate any principles of public order, the arbitral tribunal shall record the settlement in the form of an award.<sup>81</sup>

### **7.4 Power to award interest and costs**

- 7.4.1 If interest is claimed by a party, the arbitral tribunal may order the other party to pay the requested sum in accordance with the contractual or legal interest rates applicable to the case.
- 7.4.2 As mentioned in paragraph 7.2.5 above, the award should contain details of the costs of the arbitral proceedings and the liability of each party for payment, unless otherwise agreed by the parties.<sup>82</sup>

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<sup>75</sup> *Ibid*, art 43(3). The arbitration agreement will remain valid and a new arbitration may be commenced with a new arbitral tribunal.

<sup>76</sup> Portuguese Arbitration Act, art 42(1).

<sup>77</sup> *Ibid*, art 42(4).

<sup>78</sup> *Ibid*, art 42(3). See further section 7.3 below.

<sup>79</sup> *Ibid*, art 42(5).

<sup>80</sup> *Ibid*, art 42(6).

<sup>81</sup> *Ibid*, art 41(1).

<sup>82</sup> *Ibid*, art 42(5).

## 7.5 Termination of the proceedings

- 7.5.1 There are several causes of termination of the arbitral proceedings, the most common being the issuance of the award. In addition, the arbitral proceedings may be terminated if:
- the parties enter into a settlement;
  - the arbitration agreement is revoked by the parties, thereby reinstating their right to submit the dispute to the state courts;
  - the claimant withdraws its claim, unless the respondent objects and the arbitral tribunal recognises a legitimate interest for the respondent to obtain final settlement of the dispute;
  - the parties agree on the termination of the arbitral proceedings;
  - the arbitral tribunal finds that the continuation of the arbitral proceedings has for any other reason become unnecessary or impossible;<sup>83</sup> or
  - an award is not made before the end of the legal or agreed deadline.<sup>84</sup>

## 7.6 Effect of the award

- 7.6.1 Following the expiry of the period in which a party may challenge the award,<sup>85</sup> the award will have the same effect as a decision of the state courts of the lowest rank in the judicial hierarchy, and would therefore be directly enforceable.<sup>86</sup>

## 7.7 Correction, clarification and issue of a supplemental award

- 7.7.1 Within 30 days of the award being rendered and received by the parties, the arbitral tribunal can correct any material or typographical errors, or any errors of a similar nature, on its own initiative or upon the application of a party.<sup>87</sup>
- 7.7.2 Either party may also request the arbitral tribunal to clarify any obscurity or ambiguity in the award within this time frame.<sup>88</sup>
- 7.7.3 Unless otherwise agreed by the parties, either party may request the arbitral tribunal to make an additional award within 30 days of receiving the rendered award as to claims presented in the arbitral proceedings but omitted therein.<sup>89</sup>

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<sup>83</sup> *Ibid*, art 44(1) and (2).

<sup>84</sup> Portuguese Arbitration Act, art 45(3); see paragraph 7.2.3 above.

<sup>85</sup> On which see further sections 9.2 and 9.3 below.

<sup>86</sup> Portuguese Arbitration Act, art 42(7).

<sup>87</sup> *Ibid*, art 45(1) and (4).

<sup>88</sup> *Ibid*, art 45(2).

<sup>89</sup> *Ibid*, art 45(5).

## 8. Role of the courts

### 8.1 Jurisdiction of the courts

8.1.1 As discussed in paragraph 3.5.1 above, if an arbitration agreement is valid and effective, the parties are unable to submit a dispute that may arise under that agreement to the state courts. Where this occurs, the state court will order the end of the court proceedings, recognising that the matter is not within its jurisdiction.

### 8.2 Stay of court proceedings

8.2.1 The invocation of an arbitration agreement while proceedings are pending in a state court will not automatically cause those proceedings to be suspended. However, the Portuguese Civil Procedure Code allows for the suspension of court proceedings where there is a reasonable justification.<sup>90</sup> Therefore, even if the facts in dispute are not identical, the state court may suspend the court proceedings based on the grounds of reasonable justification.

### 8.3 Preliminary rulings on jurisdiction

8.3.1 The preliminary rulings on jurisdictions are not prescribed by the Civil Procedure Code. However, the respondent must argue the lack of competence of the state court as part of its defence. A ruling will be delivered by the state court at the curative act or alternatively at the final judgment.

### 8.4 Interim protective measures

8.4.1 A court may, at any time, issue interim orders for the purposes of:

- maintaining or restoring the status quo;
- preventing or restraining a party from taking actions that are likely to cause harm or prejudice to the arbitral proceedings;
- providing means for preserving assets out of which a subsequent award may be satisfied; and
- preserving evidence that may be relevant and important to the resolution of the dispute.<sup>91</sup>

8.4.2 The conditions for granting interim measures are:

- (i) the petitioner holds, with reasonable probability, the entitlement or right which the requested interim measure is intended to protect; and
- (ii) the detriment resulting to the petitioner if relief is not granted could not be easily remedied.<sup>92</sup>

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<sup>90</sup> Portuguese Civil Procedure Code, art 287(1).

<sup>91</sup> Portuguese Arbitration Act, art 20(2).

<sup>92</sup> *Ibid*, art 21(1).

## 8.5 Obtaining evidence and other court assistance

- 8.5.1 One of the few situations where the state courts may be involved in arbitral proceedings, without stepping into the arbitral tribunal's sphere of jurisdiction, is when obtaining evidence from uncooperative parties or third parties to the arbitration.<sup>93</sup>
- 8.5.2 This is not an intervention of the judicial courts in the arbitral procedure, but rather the provision of assistance by the judicial courts, which are empowered with *jus imperii* and may order unwilling parties to co-operate with the arbitral tribunal in providing evidence. The arbitral tribunals have no similar power, as their jurisdiction is limited to the terms of the arbitration agreement and its signatories.

## 9. Challenging and appealing an award through the courts

### 9.1 Jurisdiction of the courts

- 9.1.1 As mentioned above, the Portuguese Arbitration Act gives the same effect to an award as a state court decision at first instance. As described in detail below, the Portuguese courts will not entertain an appeal to an arbitral award unless explicitly agreed to by the parties. In this regard, the jurisdiction of the courts is therefore limited to applications to set aside, recognise and enforce awards.

### 9.2 Appeals

- 9.2.1 The award is final. However, parties may stipulate otherwise in their arbitration agreement.<sup>94</sup>
- 9.2.2 However, where the parties authorise the arbitral tribunal to adjudicate the case on equitable terms, the award may not be appealed in any circumstances.<sup>95</sup>
- 9.2.3 In an international arbitration, the parties are also unable to appeal an award, unless the parties have expressly agreed to the possibility of appeal to another arbitral tribunal and have regulated its terms and conditions.<sup>96</sup>
- 9.2.4 The rules of most arbitral institutions in Portugal envisage the finality of the award.<sup>97</sup>

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<sup>93</sup> *Ibid*, art 38(1).

<sup>94</sup> *Ibid*, art 39(4) and 59(1)(e).

<sup>95</sup> *Ibid*, art 39(4).

<sup>96</sup> *Ibid*, art 53.

<sup>97</sup> See Portuguese Chamber of Commerce Rules of Arbitration, art 31 [see <http://en.acl.org.pt/Files/Documents/ArbitralTribunal.pdf>] (accessed 17 January 2012).

### 9.3 Applications to set aside an award

9.3.1 Apart from appealing against the award, the parties may bring a legal action for the annulment or setting aside of the award, provided that this is justified by one of the following situations:

- a party to the arbitration agreement was under some incapacity;
- the arbitration agreement is not valid under the law to which the parties have subjected it or, failing an indication thereon, under the Portuguese Arbitration Act;
- a mandatory principle of the procedure has been breached;
- the award deals with a dispute not contemplated by or not falling within the terms of submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
- the subject matter of the dispute is not capable of settlement by arbitration under Portuguese law;
- the award is in conflict with the public policy of Portugal; or
- the award does not include the necessary signatures of the arbitral tribunal, or is insufficiently reasoned.<sup>98</sup>

9.3.2 The legal action of annulment must be filed within 60 days of the notice of the award to the parties or, if a request has been made to the arbitral tribunal to clarify any obscurity or ambiguity of the award, from the date on which the arbitral tribunal has decided on that request.<sup>99</sup>

9.3.3 The right to present a legal action for the annulment of the award is a mandatory provision of the Portuguese Arbitration Act that cannot be excluded by agreement between the parties and will prevail over any clause of the arbitration agreement that determines otherwise.<sup>100</sup>

## 10. Recognition and enforcement of awards

### 10.1 Domestic awards

10.1.1 Awards made in domestic arbitrations are enforced on the same terms as the awards of the state courts. Therefore, the enforcement takes place within the state courts of first instance, without the need for any recognition or confirmation procedure.

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<sup>98</sup> Portuguese Arbitration Act, art 46(2).

<sup>99</sup> *Ibid*, art 46(6).

<sup>100</sup> *Ibid*, art 46(5).



## 10.2 Foreign awards

- 10.2.1 The recognition and enforcement of foreign awards follows the New York Convention<sup>101</sup> rules if the country of origin is a signatory, resulting in fewer opportunities to refuse to recognise and enforce the award.
- 10.2.2 Where a country is not a signatory to the New York Convention,<sup>102</sup> or any other treaties, conventions or European Union regulations that bind Portugal, these awards must undergo an internal procedure within the Portuguese state courts in order to be recognised and confirmed. Only after this procedure may such awards be enforced in Portugal.<sup>103</sup> The grounds for refusal of recognition and confirmation are more ample but a review of the merits is not admissible in any case.
- 10.2.3 However, the recognition and enforcement of a foreign award must not lead to a result which is noticeably conflicting with international public policy.<sup>104</sup>

## 11. Special provisions and considerations

- 11.1.1 Apart from the general scope of the Portuguese Arbitration Act, there are some specific arbitration regimes in different areas. These include mandatory and necessary arbitration in certain labour matters;<sup>105</sup> matters concerning the consumers of essential public services;<sup>106</sup> arbitration in tax matters;<sup>107</sup> and arbitration in expropriation procedures, where the parties fail to reach agreement on the amount of the indemnity due to the expropriated party.<sup>108</sup>
- 11.1.2 There are many arbitral institutions in Portugal, dealing with various issues. However, the largest and most relevant to international commercial arbitration remains the ACL. Its contacts details are as follows:

Rua das Portas de Santo Antão No. 89  
 1169-022 Lisboa, Portugal  
[www.port-chambers.com](http://www.port-chambers.com)

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<sup>101</sup> CMS Guide to Arbitration, vol II, appendix 1.1.

<sup>102</sup> *Ibid.*

<sup>103</sup> Portuguese Arbitration Act, art 55; Civil Procedure Code, art 1094(1).

<sup>104</sup> Portuguese Arbitration Act, art 54.

<sup>105</sup> Decree-Law no 259/2009, published on 25 September 2009.

<sup>106</sup> Law no 23/96, published on 26 July 1996, art 15.

<sup>107</sup> Decree-Law no 10/2011, published on 20 January 2011.

<sup>108</sup> Expropriation Code, art 38 to 53.

## 12. Concluding thoughts and themes

- 12.1.1 The new Portuguese Arbitration Act has yet to show its true value, given that it only entered into force on 14 March 2012. However, since it embodies many of the long-awaited aspirations of the Portuguese arbitration experts, there is hope of its ultimate success.
- 12.1.2 The main advantage of the new regime is undoubtedly its approach to follow the Model Law (2006),<sup>109</sup> thereby harmonising the Portuguese Arbitration Act with the arbitration legislation of more economically developed countries and erasing some traits of the past which are now regarded as having been surpassed by modern international practices.

## 13. Contacts

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<sup>109</sup> CMS Guide to Arbitration, vol II, appendix 2.1.