

Arbitration in Portugal

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This Note considers the framework for arbitration in Portugal, as set out by the Portuguese Voluntary Arbitration Law, taking into consideration some applicable provisions of the Civil Code of Procedure and case law. It deals with all aspects of arbitration by describing the main features of a Portuguese arbitral process, from the preparation of a valid arbitration agreement to the enforcement of arbitral awards.

Never before has arbitration in Portugal been so widely promoted by so many, including the Portuguese government, arbitral institutions, and practitioners. Arbitration has now been extended to areas of the law that are inaccessible in other jurisdictions. For example, an ordinary taxpayer may arbitrate its dispute against the Portuguese government concerning income taxes.

The new Portuguese Voluntary Arbitration Law, Law 63/2011 (the PAL) was published in the Portuguese Official Gazette on 14 December 2011 and entered into force on 14 March 2012. It revoked the former Portuguese arbitration law (*Law No. 31/86 of 29 August 1986, amended by Decree-Law No. 38/2003 of 8 March 2003*).

The PAL aims to introduce a more modern arbitration regime and promote Portugal as a seat for international arbitrations. Portuguese Arbitration Law has been adapted to accommodate new trends in arbitration. The general principles underlying the PAL are:

- Party autonomy.
- Kompetenz-kompetenz. The PAL confers jurisdiction on state courts to rule on the competence of arbitral tribunals only where the arbitration agreement is manifestly null and void, inoperative or incapable of being performed.
- Adhering to procedural principles, such as, equality of the parties, due and fair process and the adversarial principle.

The PAL was inspired by:

- The provisions and principles of the UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Law).

- The New York Convention on the Recognition and Enforcement of Arbitral Awards 1958 (New York Convention).
- Legal solutions of other European arbitration laws such as the arbitration laws of Germany, Switzerland and France.

This has made Portugal a more attractive arbitral venue for both national and foreign parties.

The main arbitration institutions are also devoted to promoting Lisbon and Portugal as an arbitration hub, connecting all Portuguese-speaking countries. However, in spite of all these efforts, arbitration in Portugal remains mostly ad hoc. Indeed, although the Portuguese Parliament enacted a new law providing for compulsory arbitration of disputes arising from reference medicines and generic medicines, it did not compel the litigants to use institutional arbitration.

SOURCE OF PORTUGUESE ARBITRATION LAW

The Constitution of the Portuguese Republic (CPR) clearly states that "arbitration tribunals" are considered jurisdictional bodies (*Art. 209(2) CPR*). The legal system of Portugal is composed of the "norms and principles of general or common international law," which "form an integral part of Portuguese law" (*Art. 8(1) CPR*). Moreover, "the norms contained in duly ratified or approved international conventions come into force in Portuguese internal law once they have been officially published, and remain so for as long as they are internationally binding on the Portuguese state." (*Art. 8(2) CPR*).

Under the CPR, the Civil Code of Procedure (CCP) and the New York Convention (applied in Portugal since 1995), awards rendered in a foreign country must be recognized by the Portuguese courts before they can be enforced in Portugal. Portugal is also a party to the ICSID Convention.

The PAL is the main source of arbitration law in Portugal and it has made significant changes to Portuguese arbitration. The main "arbitrability" criterion shifted from the "disposability" or "alienability" nature of the interests at stake to a "patrimony" criterion. This means that parties may settle through arbitration disputes related to patrimonial rights over which they may dispose. (*See Art. 1(1) PAL*.)

The PAL highlights the relevance of the "independence and impartiality" duties of all members of the arbitral panel, and not only of its Chair as was the case in the prior law (*see Art. 9(3) PAL*). The PAL also changed the parties' rights of appeal and provides that appeal

is allowable only if the parties expressly agree (Art. 39(4) PAL). There are also provisions applicable to interim measures and preliminary orders (see Arts. 20-29 PAL). The PAL clarifies the jurisdiction of the state courts on the recognition and the enforcement of both domestic and international awards.

The Code of Civil Procedure (CCP) sets forth the legal regime applicable to all judicial procedures related to arbitration, including appointment of arbitrators, determination of arbitrators' fees, challenge of arbitrators, appeal (where admissible), setting aside, enforcement (and opposition to enforcement) and recognition of foreign arbitral awards.

The CCP is also the basis of the legal regime applicable to compulsory arbitration (Book VI, Arts. 1082 to 1085).

Arbitration is considered international whenever international trade interests are at stake (Art. 49(1) PAL). In international arbitration, the arbitration agreement is considered valid if it is valid under any of the following:

- The law that governs the arbitration agreement.
- The law applicable to the merits of the dispute.
- Applicable Portuguese law.

(Art. 51(1) PAL.)

The parties may also choose the rules of law to be applied by the arbitral tribunal, if it is not authorized to decide according to *ex aequo et bono*. Without a choice of law, the arbitral tribunal applies the law of the state having the closest connection with the subject matter of the dispute (Art. 52(1) and (2) PAL).

Parties cannot agree to an appeal against the final award, but may agree to have another arbitral tribunal constituted to perform a full revision of the case, if they have agreed to the applicable procedures beforehand (Art. 53 PAL).

THE ROLE OF THE COURTS

Courts assist the arbitration process for both domestic and international disputes. Where the parties have not specified a procedure for the appointment of the tribunal, or if a dispute arises preventing the appointment of one or more arbitrators, the matter may be referred to the *juge d'appui* (Art. 10 (4) PAL). This is a judge charged with supporting the arbitral procedure (Art. 59 PAL). Unless the parties specify otherwise, the *juge d'appui* for an arbitration seated in Portugal or subject to Portuguese law will be the judge of the court of First Instance or the judge of the Court of Appeals, depending on the subject matter at stake (Art. 59 PAL). For example, the judge granting assistance in the taking of evidence is the judicial court of first instance in whose jurisdiction the place of arbitration is located (Art. 38 and Art. 59 PAL), but if the subject matter is the challenge of an arbitrator, then the Court of Appeal in whose district the place of arbitration is located is competent to decide the issue (Art. 59 PAL).

Where the dispute is to be referred to one or more arbitrators and no appointing authority has been named, the *juge d'appui* will appoint the sole arbitrator or the arbitrators constituting the panel if the parties do not agree on the composition of the arbitral tribunal (Art. 10(4) and Art. 59 PAL).

The appointment can be made by the *juge d'appui* where:

- Either party fails to name an arbitrator within 30 days of a request to do so.
- The two arbitrators are unable to agree on a third arbitrator within 30 days of their appointment.

(Art. 10(4) PAL.)

Similarly, the *juge d'appui* may also appoint a substitute arbitrator where the agreement is silent on the procedure for substituting an arbitrator (Art. 16(1) PAL).

Courts also exercise a "last resort" control power over the arbitration in issues such as appointment and challenge of arbitrators, correction of decisions on arbitrators' fees and set aside procedures (Art. 59 PAL). Despite the extent of the court's powers, the general attitude of courts towards arbitration is to interfere less than previously.

The state court before which an action is brought in an arbitrable matter must dismiss the case on request by the respondent (submitted no later than when the respondent submits its first statement on the substance of the dispute), unless the court finds that the arbitration agreement:

- Is clearly null and void.
- Is or became inoperative.
- Is incapable of being performed.

(Art. 5(1) PAL.)

JURISDICTIONAL ISSUES

ARBITRABILITY

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

However, the following kinds of disputes are subject to mandatory arbitration, whether or not they involve patrimonial interests:

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

PORTUGUESE APPROACH TO THE PRINCIPLE OF KOMPETENZ-KOMPETENZ

Under the PAL, an arbitrator is competent to decide, *ex officio* (that is, of his own motion) or at a party's request, matters relating to the existence, validity and effectiveness of the arbitration agreement and the contract in which the arbitration clause is inserted (Art. 18(1) PAL). This provision embodies the *kompetenz-kompetenz* principle that arbitrability is a jurisdiction-related subject and, therefore, arbitrators have the competence to decide in the first instance whether a dispute is arbitrable. However, Article 5(1) of the PAL states that (in line with the New York Convention): "the state court before which an action is brought in a matter which is the object of an arbitration agreement shall, if the respondent so requests not later than when submitting its first statement on the substance of the dispute, dismiss the case, unless it finds that the arbitration agreement is clearly null and void, is or became inoperative or is incapable of being performed." However, parties cannot resort to anti-suit injunctions to prevent the constitution or functioning of an arbitral tribunal (Art. 5(4) PAL).

The arbitral tribunal may rule on its own jurisdiction either in the final award or in an interim decision. In the latter case, a party may challenge the arbitral decision before the state courts within thirty days (Art. 18(9) and (10) PAL). If the arbitral tribunal rules on the jurisdictional issue for the first time in the final award, the decision by which the tribunal finds itself competent will only be open for challenge in set-aside proceedings (Art. 46(3) PAL).

ARBITRATION AGREEMENTS

FORMAL REQUIREMENTS

Arbitration agreements must be in writing. This requirement applies whether the agreement takes the form of a stand-alone submission agreement or an arbitration clause in a contract (Art. 2(1) PAL). An arbitration agreement is binding even when it is merely incorporated by reference into the contract giving rise to the dispute (Art. 2(4) PAL).

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

The Portuguese superior courts have upheld arbitration clauses inserted in a standard form contract. For instance, in a matter related to a swap contract, governed by the ISDA Master Agreement, the Guimarães Court of Appeal, the Lisbon Court of Appeal and the Oporto Court of Appeal enforced the arbitration clause (see *decisions of 24 September 2014, 25 February 2015, and 13 April 2015*).

SUBSTANTIVE REQUIREMENTS

The PAL does not contain specific provisions on the substantive requirements of an arbitration agreement. The agreement to arbitrate is subject to substantive requirements arising from the general

principles of law, in particular to the general principles and provisions of private law that stem from the Portuguese Civil Code, and most notably from the law of obligations. Issues such as consent, validity and efficacy of transactional declarations and capacity apply to arbitration agreements.

The PAL enables the parties to resort to arbitration not only to solve "pure dispute issues" but also "any other issues that require the intervention of an impartial decision maker, including those related to the need to specify, complete and adapt contracts with long-lasting obligations to new circumstances" (Art. 1(4) PAL).

SEPARABILITY

The PAL recognizes the principle of separability of the arbitration clause. Under Article 18, the arbitration clause is autonomous from the contract in which it is inserted. A finding of nullity or unenforceability of the contract does not affect the validity of the arbitration clause.

EXTENSION TO NON-SIGNATORIES

Article 36(1) of the PAL provides that "only third parties bound by the arbitration agreement, whether from the date of that agreement or by having later adhered to it, are allowed to join ongoing arbitral proceedings. This adhesion requires the consent of all parties to the arbitration agreement and may only take place regarding the arbitration in question." At least two Portuguese courts have recognized that arbitration agreements can be extended to bind non-signatories in exceptional circumstances. However, both courts declined to bind the non-signatory in the circumstances presented (see *decisions of the Lisbon Court of Appeal on 24 March 2015 and 11 January 2011*). The Portuguese Supreme Court affirmed the January 11 decision on 8 September 2011.

Regarding procedure, the PAL provides:

- If the arbitral tribunal has already been constituted, a party may only request the joinder of a third party if the third party declares that it accepts the current composition of the tribunal. When the third party itself requests the joinder, the third party's acceptance of the tribunal is presumed. (Art. 36(2) PAL.)
- The arbitral tribunal enjoys reasonable discretion and may refuse the joinder where it would unduly disrupt the normal flow of the arbitral proceeding, or if there are no relevant reasons to uphold joinder. The following are considered to be good reasons for joinder:
 - the third party has an interest in the subject-matter of the dispute equal to that of the claimant or respondent;
 - the third party wishes to present a claim against the respondent with the same object as that of the claimant, but which is incompatible with that claim;
 - the respondent wants the other possible joint and several creditors to be bound by the final award; or
 - the respondent seeks to join a non-party who is or may be liable to the respondent for all or part of the claim asserted by the claimant.

(Art. 36(3) PAL.)

If the arbitral tribunal has not yet been constituted, non-parties may

be joined by an arbitral institution if permitted by the institution's rules (*Art. 36(6) PAL*). Where there are multiple parties entitled to appoint arbitrators, the court may appoint all the arbitrators and indicate which one of them shall be the chairperson (*Art. 11(3) PAL*).

ARBITRAL TRIBUNAL

NUMBER OF ARBITRATORS

The parties are free to agree on the number of arbitrators. However, the panel must comprise an uneven number of arbitrators and, if the parties fail to agree on the number, the tribunal will have three arbitrators (*Art. 8(1) and (2) PAL*).

NECESSARY QUALIFICATIONS

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

A number of arbitral institutions, including the Commercial Arbitration Centre of the Chamber of Commerce and Industry of Portugal, have directly or indirectly incorporated the IBA Guidelines on Conflicts of Interest in International Arbitration. The "Code of Ethics" of the Portuguese Arbitration Association, applicable to all its members by virtue of their membership, has also incorporated the IBA Guidelines.

APPOINTMENT

Under Article 10(1) of the PAL, the parties may jointly appoint arbitrators or may agree on a procedure for appointing them, including entrusting the appointment of all or some of the arbitrators to a third party. The Commercial Arbitration Centre of the Chamber of Commerce and Industry of Portugal recently enacted a set of rules applicable to the appointment of arbitrators.

In arbitrations with a sole arbitrator, if the parties are unable to agree on the appointment of the arbitrator or on institutional appointment, the arbitrator shall be appointed, upon request of any party, by the state court (Court of Appeal) (*Art. 10(2) PAL*). In arbitrations with three or more arbitrators, each party appoints an equal number of arbitrators and the arbitrators appointed appoint the chairperson (*Art. 10(3) PAL*). If the party-appointed arbitrators do not choose a chairperson, any party may seek the appointment from the Court of Appeal.

CHALLENGE

The parties are free to agree on a procedure for challenging an arbitrator (*Art. 14(1) PAL*). Absent an agreed-upon procedure, a challenging party must submit its challenge directly to the arbitral tribunal within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of the facts forming the basis for the challenge. The arbitral tribunal, including the challenged arbitrator, shall decide on the challenge. (See *Art. 13 and 14(2) PAL*.)

If the challenge is not successful, the challenging party may request the competent state court to decide the challenge within 15 days after receiving notice of the decision rejecting the challenge. The court's decision on the challenge shall not be subject to any appeal. While the request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

REPLACEMENT

An arbitrator must be replaced if he:

- Withdraws.
- Dies.
- Is successfully challenged.
- Becomes incapable to carry out his duties

Replacement of arbitrators normally follows the applicable arbitral rules. In the absence of any provision in the arbitration agreement or the applicable rules, and if the parties fail to agree on the appointment of the substitute arbitrator, the interested party must request a court to appoint a replacement under Article 10 of the PAL.

(*Arts. 15 and 16 PAL*.)

ARBITRATORS' DUTIES AND POWERS

DUTIES OF INDEPENDENCE, IMPARTIALITY AND DISCLOSURE

Arbitrators have a duty to be impartial and independent (*Art. 9(3) PAL*). Arbitrators are also subject to the rules of suspicion and impediment that apply to judges (*Art. 9(4) PAL*).

Therefore, before accepting appointment, arbitrators have a duty to disclose any facts that might give rise to justified doubts about their impartiality or independence (*Art. 13(1) PAL*). The rules of most arbitration institutions also require the arbitrator to sign a statement of independence when accepting an appointment.

PROCEDURAL POWERS

In the absence of any provision or party agreement to the contrary, the arbitral tribunal:

- Will conduct the proceedings in a manner it considers appropriate and according to the procedural rules it considers adequate (*Art. 30(3) PAL*).
- May determine the place of the arbitration (*Art. 31(1) PAL*) and the language applicable to the proceedings (*Art. 32(1) PAL*).
- Determines the evidence to be presented, its relevance and weight (*Art. 30(4) PAL*).

ARBITRATION PROCEEDINGS

COMMENCING ARBITRATION

Arbitration is formally commenced when the respondent receives a request to submit a dispute to arbitration, unless the parties have agreed otherwise (*Art. 33(1) PAL*). The law does not provide for the minimum contents of that request.

In drafting a request for arbitration, parties should follow the institutional rules that apply. When commencing an ad hoc arbitration, a claimant should follow a procedure that is consistent with the old legal provisions (*Art. 11(1) Old PAL*) and the general practice by including the following in its request to arbitrate:

- Identify the disputing parties.
- Specify the arbitration agreement.
- Briefly describe the dispute.
- Identify the arbitrator or arbitrators to be appointed by the requesting party and invite the counterparty to do the same.
- If the arbitration is to be conducted by a sole-arbitrator, name the proposed arbitrator.

CONDUCT OF PROCEEDINGS

In the absence of party agreement or applicable institutional rules, the arbitral tribunal may conduct the arbitration in the manner it considers appropriate, defining the procedural rules it deems adequate.

Arbitration procedures are bound by the following principles:

- The respondent must be given notice of the proceedings and an opportunity to present its defense.
- Equal treatment of the parties.
- Adversarial process.

(Art. 30 (1) PAL)

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

CONFIDENTIALITY

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

STATE COURTS' POWERS IN SUPPORT OF ARBITRATION

GENERAL POWERS

As a general rule, courts cannot intervene in the arbitration. However, state courts can exercise their powers in support of an arbitration, including to:

- Appoint arbitrators where the parties have failed to do so (Art. 10(4) PAL).
- Grant interim or urgent measures (Art. 29 PAL).
- Compel testimony or production of evidence from non-parties (Art. 38 PAL).
- Remove an arbitrator (Art. 15(3) PAL).
- Recognize and enforce foreign arbitral awards (Art. 55 PAL).

On rare occasions, courts may grant anti-arbitration injunctions barring a party from commencing or continuing arbitration proceedings (Art 5.4 PAL) whenever the arbitration agreement is clearly null and void, is or became inoperative, or is incapable of being performed (Art 5.1 PAL).

INTERIM MEASURES

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

Once constituted, the arbitral tribunal may also grant interim measures (Art. 20 PAL) and modify, suspend or terminate an interim measure or a preliminary order it has granted or issued, upon application of any party or, in exceptional circumstances and after hearing the parties, on the arbitral tribunal's own initiative (Art. 24(1) PAL). An interim measure issued by an arbitral tribunal shall be binding on the parties and,

unless otherwise provided by the arbitral tribunal, shall be enforced upon application to the competent state court, irrespective of the arbitration in which it was issued being seated abroad (Art. 27(1) PAL).

AWARDS

FORMAL REQUIREMENTS

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

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The arbitrators decide the dispute under the law, unless the parties agree that they shall decide *ex aequo et bono* or as *amiable compositeur* (Art. 39 PAL).

Unless otherwise agreed by the parties, the arbitrators may issue a single award or as many partial awards as they deem necessary (Art. 42 PAL). The award should apportion the costs directly resulting from the arbitration, and if the arbitrators deem it fair and appropriate, they should decide in the award that one or some of the parties shall compensate the other party or parties for all or part of the reasonable costs and expenses that they can prove to have incurred due to their participation in the arbitration (Art. 42 PAL).

CORRECTION AND INTERPRETATION; ADDITIONAL AWARD

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

- Computation, clerical or typographical error.
- Obscurity or ambiguity.

(Art. 45(1) and (2) PAL.)

The arbitral tribunal may exercise these powers on its own initiative within 30 days of the notice of the award (Art. 45(4) PAL).

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

CHALLENGES TO AWARDS

Parties may only request annulment of awards by means of a set aside motion under Article 46 of the PAL.

The Portuguese law, like the New York Convention, sets narrow grounds to set aside the award. The New York Convention lists seven grounds for refusing to enforce an arbitral award:

- The award was rendered under an arbitration agreement that was invalid or where the parties lacked capacity to make the agreement.
- The losing party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present its case.
- The award deals with a difference not yet contemplated by or falling within the terms of the arbitration agreement.

- The composition of the arbitral tribunal or arbitral procedure violated the parties' agreement or (absent any agreement) the law of the arbitral seat.
- The award is either not yet binding or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.
- The subject matter of the parties' dispute is non-arbitral (not capable of settlement by arbitration) under the law of the enforcing state.
- Recognition or enforcement of the arbitral award would be contrary to the public policy of the enforcing state.

(*Art. V New York Convention.*)

The first five of these grounds must be raised by the party opposing enforcement of the arbitral award, who has the burden of proof. The last two grounds may be raised by a court *sua sponte*.

Similarly, the PAL provides that an arbitral award may be set aside by the competent state court only if:

- The party making the application furnishes proof that:
 - one of the parties to the arbitration agreement was under some incapacity or the agreement is not valid under the applicable law;
 - there has been a violation within the proceedings of some of the fundamental due process principles of Article 30 (1) with a decisive influence on the outcome of the dispute;
 - the award dealt with a dispute not contemplated by the arbitration agreement, or contains decisions beyond the scope of the arbitration agreement;
 - the composition of the arbitral tribunal or the arbitral procedure did not adhere to the agreement of the parties, unless the agreement was in conflict with a provision of the PAL from which the parties cannot derogate or (failing the agreement) did not adhere to the PAL, and the inconformity had a decisive influence on the decision of the dispute;
 - the arbitral tribunal awarded an amount in excess of what was claimed or on a different claim from that that was presented, or has dealt with issues that it should not have addressed, or failed to decide issues that it should have decided;
 - the award does not conform to the formal requirements set out in Article 42(1) and (3) of the PAL; or
 - the award was notified to the parties after the deadline contained in Article 43 of the PAL.
- The court finds that:
 - the subject-matter of the dispute cannot be decided by arbitration under Portuguese law; or
 - the content of the award is in conflict with the principles of international public policy of the Portugal.

(*Art. 46(3) PAL.*)

The Portuguese courts have developed a restrictive approach to the public policy exception. For example in a decision issued on 29 November 2007, the Lisbon Court of Appeal rejected the challenging party's argument that an arbitral award violated public policy because it

- Ordered the respondent to pay the claimant an amount arising from a contractual "penalty clause."
- Did not contain sufficient reasoning.

On 10 July 2008, the Portuguese Supreme Court of Justice affirmed this ruling on the same grounds.

A violation of the so-called "domestic" public policy is not grounds for the annulment of the award. The court may only set aside an award on public policy grounds where the award violates the "international" public policy of Portugal. There does not appear to be any decision annulling an arbitral award on public policy grounds after the enactment of the PAL.

COMPETENT COURTS

The Court of Appeal in the district at the place of arbitration is competent to decide on the setting aside of the final award (*Art. 59(1)(f)*).

TIME LIMITS

The motion to set aside an award must be filed within 60 days from either:

- The date on which the challenging party received notification of the award.
- The date on which the parties were notified of a decision on a motion to clarify the award.

(*Art. 46(6) PAL.*)

The setting aside proceedings are conducted under the Portuguese Code of Civil Procedure. Usually, it will take no more than a year to be decided.

EFFECTS OF A SUCCESSFUL CHALLENGE

The court that sets aside an arbitral award may not address the merits of the issue or issues decided in the award. If the award is set aside, a party seeking relief may commence a new arbitration. (*Art. 46 (9) PAL.*)

ENFORCEMENT OF AWARDS

DOMESTIC ARBITRAL AWARDS

The PAL provides that the party seeking to enforce an arbitral award must supply the original of or a certified copy of the award and, if the award was not made in Portuguese, a certified translation thereof into Portuguese (*Art. 47(1) PAL*).

The arbitral award may be enforced even if it has been subject to a setting aside procedure. In that event, the party against whom enforcement is sought may request a stay of the enforcement procedures, if the resisting party offers to provide security and does so within the time limit set by the court. (*Art. 47(3) PAL.*)

FOREIGN ARBITRAL AWARDS

The Court of Appeal in whose district the domicile of the person against whom the decision to be invoked is located is competent to decide the recognition of the foreign arbitral award. Subsequently, the enforcement of the arbitral award shall take place in the competent state court of first instance, under the applicable procedural law. Once the award is recognized, enforcement proceedings must be brought in the competent court of first instance. A party may challenge the enforcement on the grounds listed in the Portuguese Civil Procedural Code. However, the grounds for refusal of recognition cannot be reiterated in the enforcement proceedings. (*Art. 59(1)(h) PAL.*)

Although one decision of the Portuguese Supreme Court of Justice allowed immediate enforcement of a foreign arbitral award without a previous recognition procedure (see *decision of Supreme Court of Justice of 19 March 2009*), this decision is subject to severe criticism by some commentators. The Supreme Court in a later case held that a foreign arbitral award requires prior recognition (see *decision of 18 February 2014 of the Portuguese Supreme Court of Justice*).

GROUNDINGS FOR RESISTING ENFORCEMENT

The party against whom enforcement of the arbitral award is sought may oppose the enforcement on any of the grounds which may be used for the setting aside of the award, provided that, on the date when the opposition is submitted, the court has not already rejected an application for setting aside on the same grounds by a final and binding judgment (*Art. 48(1) PAL*).

Foreign Awards

The Portuguese law is consistent with Art. V of the New York Convention (see *Challenges to Awards*).

At the time of writing, there is no legal authority in Portugal on the enforceability of foreign awards set aside at the seat of the arbitration.

KEY INSTITUTIONS AND ARBITRATION RULES

CATÓLICA CENTRO DE ARBITRAGEM

The Arbitration Centre of the Faculdade de Direito da Universidade Católica Portuguesa (Católica Centro de Arbitragem) is dedicated to commercial arbitration.

LISBON CENTRO DE ARBITRAGEM

The Arbitration Centre of the Instituto dos Valores Mobiliários of the Lisbon Faculty of Law (Lisbon Centro de Arbitragem) is dedicated to financial disputes involving capital markets.

ARBITRARE

ARBITRARE is an institutionalized arbitration centre, with national scope, created in 2009 and a part of the network of Portuguese Arbitration Centres supported by the Portuguese government, dedicated to disputes arising out of industrial property rights, .pt domain names, patents, trade names and corporate names.

CAAD

The Centro de Arbitragem Administrativa (CAAD) is dedicated to arbitration in administrative and tax disputes.

CAC

The Arbitration Centre of the Portuguese Chamber of Commerce and Industry (CAC) is dedicated to commercial disputes.

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