Arbitration World

Institutional & jurisdictional comparisons

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Portugal

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1. EXECUTIVE SUMMARY

1.1.1 What are the advantages and disadvantages relevant to arbitrating or bringing arbitration related proceedings in your jurisdiction?

Advantages

Speed of arbitration: arbitration is a faster form of dispute resolution compared to litigation in Portugal due to the current backlog of cases in the Portuguese courts. In Portugal it is therefore recommended to use arbitration for dispute resolution in the case of commercial disputes.

Less procedural formalities: Arbitrators are not bound to apply the Civil Procedure Code (CPC).

Limited judicial intervention: unless the parties have expressly agreed that the arbitration award may be subject to appeal on the merits of the case, as well as on procedural arbitration matters, the intervention of the Portuguese courts in respect of arbitration proceedings is very limited.

Support of courts: courts may provide support for arbitration by way of injunctive relief, where there is a need for the urgent production of evidence and in respect of the recognition and enforcement of foreign and domestic awards.

Location and neutrality: Portugal is well positioned as a centre for international arbitration, particularly in respect of disputes involving Portuguese and Spanish-speaking parties. Full neutrality is ensured.

Arbitration law: Portugal has a modern and comprehensive new arbitration law, which was enacted recently in March 2012 (Law No. 63/2011, dated 14 December 2011) (the '2012 Law'). In addition, the Portuguese courts are generally favourable to arbitration. Portugal is a signatory to the New York Convention and has a number of arbitrators and counsel with a great deal of experience in domestic and international arbitration.

Disadvantages

Public policy hindrances: courts have gradually defined the scope of the limited field of disputes which are non-arbitrable for public policy reasons, and the 2012 Law is decisive on this point. However, some appellate courts that are not particularly familiar with arbitration, primarily courts located outside the main city centres, still tend to be unclear about the limits and role of public policy in respect of arbitration matters.

Confidentiality: the duty to keep the arbitration confidential is only binding on the arbitrators, not the parties, unless the latter have agreed to keep the arbitration confidential. In this respect, arbitration proceedings in Portugal are considered to be only partially confidential.

1.1.2 How would you rate the supportiveness of your jurisdiction to arbitration on a scale of 1 to 5, with the number 5 being highly supportive towards arbitration and 1 being unsupportive of arbitration? Where your jurisdiction is in the process of reform, please add a + sign after the number
We believe that arbitration in Portugal should be ranked 4, and it may be ranked 5 in the future after the 2012 Law is fully assimilated by the judiciary.

2. GENERAL OVERVIEW AND NEW DEVELOPMENTS

2.1.1 How popular is arbitration as a method of settling disputes? What are the general trends and recent developments in arbitration in your jurisdiction?
The 2012 Law entered into force on 14 March 2012 and is based on the UNCITRAL Model Law (the 'Model Law'). With regard to aspects of the law not directly covered by the Model Law, the 2012 Law contains provisions which are very favourable to arbitration, and which provide some of the most modern solutions to arbitration issues.

The number of backlogged cases in Portuguese state courts has grown in recent decades. Consequently, government authorities have encouraged arbitration in order to help to improve this situation. The 2012 Law is also an indispensable tool to enable Portugal to become a centre for international arbitration, particularly in respect of disputes involving Portuguese and Spanish-speaking countries.

The 2012 Law is also a result of the significant development of arbitration in the last 15 years, which has led to the popularity of domestic arbitration, not only in respect of commercial arbitrations, but increasingly in respect of arbitrations involving administrative law matters and other specialised areas, such as road accidents, consumer law and disputes concerning intellectual property in the pharmaceutical industry.

2.1.2 Are there any unique jurisdictional attributes or particular aspects of the approach to arbitration in your jurisdiction that bear special mention?
Some labour law and tax law disputes are considered arbitrable by legal commentators, although no action has actually been taken in order to implement arbitration decisively in these fields.

2.1.3 Principle laws and institutions

2.1.3.1 What are the principal sources of law and regulation relating to international and domestic arbitration in your jurisdiction?
The principal sources of arbitration law in Portugal are the 2012 Law, the New York Convention, the Model Law, which substantially influenced the 2012 Law, the ICSID Convention, 42 bilateral investment treaties and 10 international treaties or agreements on conciliation, judicial settlement and arbitration entered into between Portugal and other countries.

Portugal is not party to the Geneva Convention (1961), but it is still a member of the old Geneva Convention on the Execution of Foreign Arbitral Awards 1927 and the Protocol on Arbitration Agreement of 1923, which are, however, superseded by the New York Convention under its Article VII(2) when the New York Convention is applicable.

2.1.3.2 What are the principal institutions that are commonly used and/or government agencies that assist in the administration or oversight of international and domestic arbitrations?

No government agency assists in the administration or oversight of arbitration in Portugal.

Only the courts may, in very limited cases, set aside an arbitration award, unless the parties have expressly agreed to allow for the appeal of the award on substantive and procedural issues.

Some well-qualified arbitration institutions may be nominated by the parties to administer arbitration cases.

3. ARBITRATING IN YOUR JURISDICTION – KEY FEATURES

3.1 The appointment of an arbitral tribunal

3.1.1 Are there any restrictions on the parties' freedom to choose arbitrators?

Parties have complete freedom to choose arbitrators. There are no restrictions on the parties' ability to choose arbitrators on the basis of their qualifications or the number of arbitrators or on other grounds. In addition, it is unconstitutional to discriminate against people on the basis of nationality, race, religious beliefs, sex, colour or political opinions.

An arbitrator does not have to be a Bar member. Any person, whether a lawyer or not, may be appointed as an arbitrator.

3.1.2 Are there specific provisions of law regulating the appointment of arbitrators?

Arbitrators must be:

- individuals who are fully capable of exercising their rights and fulfilling their legal duties; and
- independent and impartial.

The parties are free to appoint one or more than one of an odd number of arbitrators. If they fail to appoint an arbitrator, in the case of a sole arbitrator, or their party-appointed arbitrators or the presiding arbitrator, the arbitration institution will appoint the arbitrator(s), in cases where such institution may intervene.

Where the parties have not elected to have their disputes administered by an institution, the above procedure will not be available if allowed by the regulations. In such cases if the party who has received a notice for arbitration fails to appoint its arbitrator within 30 days, the nomination is made by the court. The same 30-day period applies when the parties fail to agree on the nomination of the third arbitrator (usually the chairman of the tribunal). If they have not agreed on the number of arbitrators, the statutory number is three arbitrators.

There is no appeal from the appellate court's decision.

3.1.3 Are there alternative procedures for appointing an arbitral tribunal in the absence of agreement by the parties?

The alternative procedures for appointing an arbitral tribunal in the absence of agreement by the parties are described in 3.1.2 above.

3.1.4 Are there requirements (including disclosure) for 'impartiality' and/or 'independence', and do such requirements differ as between domestic and international arbitrations?

Arbitrators are subject to disclosure requirements regarding their impartiality and independence.

When accepting or refusing an appointment, an arbitrator must disclose to the party or parties who nominated him or her any circumstances that could cast doubts on his or her impartiality or independence. These disclosure obligations continue throughout the proceedings in respect of any supervening circumstances.

There is no difference between domestic and international arbitration in this regard.

3.1.5 Are there provisions of law governing the challenge or removal of arbitrators?

An arbitrator may only be removed if there are circumstances which give rise to justified doubts as to his or her impartiality or independence, or if he or she does not meet the required qualifications that the parties had agreed on.

A party cannot challenge an arbitrator that it appointed on the basis of something it already knew before the nomination.

The parties are free to agree on the challenge procedure which will apply until the first arbitrator has accepted his or her nomination. After that, the party that wishes to file a challenge must submit it to the arbitration tribunal within 15 days of the date that he or she became aware of the arbitrator's nomination and/or his or her lack of proper qualifications. The same requirements are applied if there is a sole arbitrator.

If the arbitrator does not withdraw from the arbitration, the tribunal shall decide on the matter with the participation of the challenged arbitrator. If the proceedings described above are unsuccessful, the challenge application must be presented to the appellate court within 15 days.

3.1.6 What role do national courts have in any such challenges?

The role of national courts in such matters is described in 3.1.5.

3.1.7 What principles of law apply to determine the liability of arbitrators for acts related to their decision-making function?

Arbitrators are not liable for acts related to the elaboration and adjudication of the dispute and the award's contents, that is, how they have judged the dispute, which falls under the same exclusion of liability as for judges.

However, arbitrators may be found liable for breach of the agreement entered into with the parties to form the tribunal which they are deemed to have entered into upon acceptance of their appointment as arbitrator (which could include liability for breach of express or implied duties to render the award within the statutory or contractual time limit, to be impartial and independent, absence of corruption, duties of confidentiality, etc).

3.2 Confidentiality of arbitration proceedings

3.2.1 Is arbitration seated in your jurisdiction confidential? What are the relevant legal or institutional rules which apply?

Arbitrators are bound to keep the arbitration proceedings and the award confidential, unless the parties waive this obligation. This is an essential component of arbitration.

If an arbitrator breaches such duties of confidentiality, he or she may be held responsible.

The duty of confidentiality of arbitrators arises from the contract entered into between the parties and the arbitrators, even when executed orally and/or impliedly by the acceptance of the appointment by the arbitrators. As a result, any damages which are caused by a breach of confidentiality are a matter of contractual liability and would not fall within the arbitrators' immunity in respect of the exercise of their powers to adjudicate the dispute.

The duties of confidentiality of the parties are limited, in our opinion, to those matters related to the parties themselves. Matters concerning the counter-party should be maintained as confidential.

Both the arbitrators and the parties are bound by a duty of confidentiality (Article 30(5) of the 2012 Law) regarding all information and documents they have obtained during the arbitration proceedings. However, the parties are entitled to make public any part of the proceedings to the extent necessary to protect/defend their rights, and also where they are bound by a mandatory duty to disclose them to the authorities. In addition, the award can be published without reference to the parties' names, unless any party opposes the publication.

3.2.2 To what matters does any duty of confidentiality extend (eg does it cover the existence of the arbitration, pleadings, documents produced, the hearing and/or the award)?

All aspects of an arbitration are covered by the duty of confidentiality (pleadings, documents produced, the hearing and the contents of the award).

3.2.3 Can documents or evidence disclosed in arbitration be used in other proceedings or contexts?

Documents or evidence disclosed in arbitration may be used in other proceedings or contexts.

Such documents are the property of the disclosing party, and therefore their owner cannot be prevented from using them in other proceedings or contexts, unless the parties have agreed otherwise. The party to whom those documents were disclosed (ie not the owner of the documents) is, in our opinion, limited in its use of those documents other than in the arbitration, unless if agreed or allowed by the owner of the documents.

3.2.4 When is confidentiality not available or lost?

In our opinion, any party may apply to a court to order the counter-party to disclose a confidential document (notwithstanding that the parties may have agreed duties of confidentiality). The party from whom disclosure is sought is

entitled to oppose it based on the confidentiality of the document. The court will decide the issue, taking into consideration both the interests of the applicant, the position of the party owning the document and the nature and contents of the document (Article 575 of the Civil Code). In such case the court shall attempt to deal with the application in a confidential manner as far as possible.

3.3 Role of (and interference by) the national courts and/or other authorities

3.3.1 Will national courts stay or dismiss court actions in favour of arbitration?

National courts will stay court proceedings in the circumstances described below in 3.3.3.

3.3.2 Are there any grounds on which the national courts will order a stay of arbitral proceedings?

No, in our view there are no grounds on which national courts will stay arbitral proceedings in particular, the courts are not permitted to grant anti-suit arbitration injunctions in order to respect the principle of competence-competence. The courts may, however, grant relief in support of arbitration.

3.3.3 What is the approach of national courts to parties who commence court proceedings in your jurisdiction or elsewhere in breach of an agreement to arbitrate?

National courts must stay court proceedings and remit the case to arbitration, if and when a party to an arbitration agreement invokes the agreement in the court proceedings.

However, if a party fails to invoke the arbitration agreement and the counterparty does the same, the court will deem that the parties have waived their agreement to submit the dispute to arbitration.

Therefore, any party wishing to retain the jurisdiction of the arbitral tribunal must invoke the agreement in the first instance it appears in the court proceedings following a summons or by its own initiative. In such case, the court will defer to the jurisdiction of the arbitral tribunal unless, in response to a request for a determination from the defendant, the judge concludes that the arbitration agreement is non-existent, manifestly null and void, or unenforceable. The defendant must challenge the validity of the arbitration agreement at the first instance it appears in the court proceedings as explained above.

The non-existence of the arbitration agreement will be found if there is no evidence that the parties agreed on arbitrating their dispute; or, if agreed, the subject matter is not arbitrable; or, even if agreed or theoretically arbitrable, it will not be possible to enforce any award, because there is no dispute at all following what the parties have disclosed to the court.

Apart from this, the courts will always defer the case to the arbitral tribunal.

The courts will not grant anti-suit injunctions restraining court proceedings in breach of an agreement to arbitrate. Therefore, there is

not much room to discuss the consequences of breaching an arbitration agreement. Either the court defers the case to the arbitral tribunal or decides that there is no breach of the arbitration agreement because this does not exist, it is manifestly null and void, or unenforceable. Of course, a party who has caused the arbitration agreement to be null and void or unenforceable may be found liable for damages under the general civil liability statutory regime.

3.3.4 Is there a presumption of arbitrability or policy in support of arbitration? Have national courts shown a willingness to interfere with arbitration proceedings on any other basis?

There is no presumption of arbitrability or policy in support of arbitration. Under Portuguese law the following matters are defined as being arbitrable:

(i) any disputes which, are not required to be settled exclusively by mandatory arbitration or under the state court jurisdiction by reason of any special law; and
(ii) the issue under dispute concerns alienable assets or rights or [should this be 'and/or'] it is a dispute in respect of which a settlement agreement is legally enforceable [confirm edits].

3.3.5 Are there any other legal requirements for arbitral proceedings to be recognisable and enforceable?

There are no other legal requirements affecting the validity of an arbitration award, nor is there a mandatory obligation for counsel to represent the parties, but a power-of-attorney is required for any person representing the parties.

3.4 Procedural flexibility and control

3.4.1 Are specific procedures mandated in particular cases, or in general, which govern the procedure of arbitrations or the conduct of an arbitration hearing? To what extent can the parties determine the applicable procedures?

The procedure of an arbitration and/or the conduct of an arbitration hearing are matters to be agreed upon by the parties in the first instance and/or as provided for in the rules of the relevant institution where applicable. If no agreement exists or no institutional rules apply regarding the procedure to be followed the arbitrators themselves can decide this.

In general, the law gives the arbitrators the freedom to conduct the proceedings, including the hearings, as they deem fit, unless an agreement of the parties on such matters exists or is contemplated or, alternatively, the conduct of the proceedings is regulated by the rules of any relevant institution.

The powers granted to the arbitrators include the power to admit and evaluate evidence and decide on evidentiary questions.

The arbitrators must render the award within 12 months of the date that the last arbitrator accepted his or her appointment. This deadline may be freely extended by the parties or by the tribunal one or more times. The tribunal must justify any extension of the initial term sought, and any party is entitled to challenge this.

The arbitrators may be liable for damages if they do not render the award

within the relevant deadline without justification.

3.4.2 Are there any requirements governing the place or seat of arbitration, or any requirement for arbitral hearings to be held at the seat?

The seat of arbitration remains important in order to determine the statute which will apply to the arbitration. Although there has been some criticism from certain legal commentators of the significance attached to the seat of arbitration, including regarding the lack of a clear definition of the 'seat of arbitration'. But this has not affected the importance of the concept.

Under Portuguese law, the parties have the right to select the seat of arbitration and, if they fail to do so, the arbitrators are entitled to determine the seat of the arbitration. However, the tribunal may meet or conduct any exercise in relation to evidence, or even hold deliberations in a different location to the seat of arbitration.

The concept of the seat of arbitration is, therefore, material, due to its practical importance to determine the state courts which will have jurisdiction to support the arbitration (through injunctions, examination of witnesses, appointment of arbitrators, etc) or decide on the validity of the award, or, if agreed upon by all parties, hear any appeal. The concept is also of importance to define the origin of a foreign award, including under the New York Convention.

There are no restrictions under Portuguese law regarding the choice of seat or where the hearings may take place. However, when the arbitrators decide on the seat of arbitration, ie, whenever the parties have not made such choice, the arbitrators should choose taking into account the circumstances of the case and the parties' convenience.

3.4.3 What procedural powers and obligations does national law give or impose on an arbitral tribunal?

The following are the primary obligations that the law imposes on an arbitration tribunal and which must always be respected:

- the respondent shall be summoned to answer the statement of claim;
- the parties shall be treated equally and be given a reasonable opportunity to exercise their rights, in writing or orally, before the award is rendered; and
- the parties shall be heard in response to any petition made by the opposing party or parties throughout the proceedings.

Within this legal framework and subject to the comments above, the tribunal enjoys the same procedural powers as state courts, but not the same ability to enforce its decisions as is well-known.

3.4.4 Evidence

3.4.4.1 What is the general approach to the gathering and tendering of written evidence at the pleading stage and at the hearing stage?

The approach to the gathering and tendering of evidence may be determined in the first instance by agreement of the parties or any applicable rules of an arbitral institution. In the absence of such agreement or applicable rules, the

arbitrators can determine the method to produce evidence, but discovery is not generally ordered and the English or US approach is not commonly used.

The production of evidence by way of documents, witness evidence, expert evidence, as well as direct inspection of the same by the arbitrators is the generally accepted method of gathering evidence.

Usually, witness evidence is provided orally at a hearing and expert evidence is submitted in writing with or without further oral evidence at the hearing stage. Written witness statements may be required by the arbitrators, or as agreed by the parties, or as provided for in any applicable institutional rules. In the absence of such agreement or applicable rules, witness evidence will be provided orally.

In the absence of agreement otherwise, documents and any witness/expert evidence must, in principle, be filed only with the pleadings, but the tribunal may authorise filing documents at a later stage if deemed justified.

3.4.4.2 Can parties agree the rules on disclosure? How does the disclosure in arbitration typically differ to that in litigation?

The parties may agree the rules on disclosure.

Although in arbitration proceedings the parties and arbitrators are given a great deal of freedom to decide on the approach to disclosure (including in respect of any applicable institutional rules), the similar discovery procedures which are used in state courts are to some extent more relaxed than the discovery process in arbitration, where timeliness is more valuable than it is in court proceedings.

The IBA Rules on Evidence are only applied if agreed by the parties or, failing the parties' agreement on this, the arbitrators.

3.4.4.3 What are the rules on oral (factual or expert witness) evidence? Is cross-examination used?

Cross-examination is used, reflecting the principles of the right to be heard and the equality principle.

3.4.4.4 If there is no express agreement, what powers of compulsion are there for arbitrators to require attendance of witnesses (factual or expert) or production of documents, either prior to or at the substantive hearing? To what extent are national courts willing or able to assist? Are there differences between domestic and international arbitrations or as between orders sought against parties and non-parties?

Arbitrators are fully empowered to require the parties to cooperate in the production of evidence, especially documentary evidence.

If a party refuses to cooperate, the arbitrators may take this into consideration in their deliberations. There is no statutory rule regarding this, but it is generally accepted as common practice.

A party may also request that the court grant a preliminary order which is similar to (and based on) the Model Law provisions. The preliminary order and the subsequent injunction may relate to the production of documentary evidence or any other injunctive relief.

An arbitration tribunal has no power to compel a third party to provide evidence or to appear before the tribunal to produce a statement, but a party, after notifying the arbitrators of its intention, may apply to a state court to request that it grant such relief in support of the arbitration proceedings.

There is no difference between domestic and international arbitrations in this respect.

Notably, the 2012 Law provides, following the UNCITRAL Model Law, for the possibility of Portuguese courts to grant injunctive relief in support of an arbitration seated outside Portugal.

This power is exercised by state courts with regard to the enforcement of final or partial awards and any injunctions granted by the arbitration tribunal (see section 4.1.2), or in other ways in order to support the tribunal as prescribed by law, including in respect of gathering evidence (for instance, examining witnesses who refuse to appear *vis-à-vis* the arbitrators or compelling the production of documents by third parties who do not wish to cooperate with the arbitration tribunal).

3.4.4.5 Do special provisions exist for arbitrators appointed pursuant to international treaties (ie bilateral or multilateral investment treaties)?

There are no particular provisions under Portuguese law regarding arbitrators appointed pursuant to international treaty arbitrations. There is no particular experience of treaty arbitration in Portugal to date.

3.4.5 Are there particular qualification requirements for representatives appearing on behalf of the parties in your jurisdiction?

There are no particular qualifications that representatives must have to appear on behalf of the parties to an arbitration. The parties are entitled to determine themselves whether a lawyer or non-lawyer would be best qualified to represent them in the arbitral proceedings.

3.5 The award

3.5.1 Are there provisions governing an arbitral tribunal's ability to determine the controversy in the absence of a party who, on appropriate notice, fails to appear at the arbitral proceedings?

If a party which has applied for arbitration fails to submit its statement of claim within a given time period, the tribunal must terminate the arbitration. The applicable period is the one agreed by the parties or provided for in the regulations of an arbitration institution, or, finally, the one established by the arbitrators.

If the respondent fails to submit the statement of defence, the tribunal shall proceed with the arbitration without considering the lack of response to constitute an acceptance of the facts alleged by the claimant.

If a party fails to appear at a hearing or fails to produce evidence within the relevant time limit, the tribunal may proceed with the arbitration and decide the award on the basis of the evidence which has been produced.

The tribunal may, however, determine that any such failure by a party is excusable and allow that party to serve its statement or evidence within a

new, extended time limit.

However, the parties are free to agree a different approach to the above rules.

The law does not contain any provisions regarding a last minute adjournment of the hearing. Arbitrators are thus free to decide to postpone the hearing or to proceed after having heard the counterparty.

3.5.2 Are there limits on arbitrators' powers to fashion appropriate remedies, eg punitive or exemplary damages, specific performance, rectification, injunctions, interest and costs?

The arbitrators have the power to fashion appropriate remedies, for instance, specific performance, injunctions, interest and costs, etc, if the parties have not agreed otherwise and the applicable substantive law allows such remedies in general.

Punitive and exemplary damages are unknown in Portuguese law. It is our opinion that if punitive/exemplary damages were available under the applicable substantive law, in principle the Portuguese court would not set aside the award, despite the controversy about this matter in countries out of the United States. However, this point would need to be considered on a case-by-case basis.

3.5.3 Must an award take any particular form or are there any other legal requirements, eg in writing, signed, dated, place stipulated, the need for reasons, method of delivery, etc?

The arbitral award must be in writing and signed by the arbitrator or arbitrators. In an arbitration tribunal composed of more than one arbitrator, the signatures of the majority of the arbitrators, or otherwise that of just the chairman if the award was adjudicated by him or her alone, are sufficient provided that an explanation is given in the award as to why it was not signed by all the arbitrators.

The date on which the award was rendered must also be noted in writing as well as the seat of arbitration.

An award must include the tribunal's reasons, unless the parties have agreed to dispense with the requirement to include reasons in the award. An award that simply formalises a settlement agreement reached by the parties does not need to include reasons.

3.5.4 Can an arbitral tribunal order the unsuccessful party to pay some or all of the costs of the dispute? Is an arbitral tribunal bound by any prior agreement by the parties as to costs?

The tribunal must decide on the issue of costs and issue any adverse costs award against the party or parties who are held liable to pay them. Costs of the arbitration include the arbitrators' fees and costs (fees of the secretariat, witnesses' costs, if any, experts' fees, administration costs, etc). If the tribunal considers that it is fair and reasonable, it may order the unsuccessful party to compensate the successful party for the full or partial costs which were reasonably incurred by it during the arbitration.

The parties and tribunal may enter into an agreement on costs. If no such

agreement is reached, any applicable rules of the relevant arbitral institution will govern the matter, or if there is no agreement or applicable rules, the tribunal will determine the issue of costs.

The arbitrators are bound by any agreement of the parties on which party should pay the costs and in what amounts, but the arbitrators are not bound by any other party agreements in respect of, for instance, the arbitrators fees, unless the arbitrators have agreed the fee amount with the parties. Before the arbitrators' nomination however, the parties are entitled to agree on the arbitrators' fees. In addition, the parties are entitled to agree, before or after the nomination of the arbitrators, on any other matters about the arbitration costs other than the arbitrators' fees.

If the parties do not agree on the tribunal's decision and assessment regarding costs, they may file an action in a state court to dispute the arbitrators' decision.

3.5.5 What matters are included in the costs of the arbitration?

See section 3.5.4 above regarding what matters are included in the costs of the arbitration.

If the tribunal concludes that it is fair and reasonable, the costs of corporate counsel, external counsel and business executives (which can include amounts charged in respect of their time and costs), may be included in the costs award described in the second paragraph of section 3.5.4 above.

3.5.6 Are there any practical or legal limitations on the recovery of costs in arbitration?

Costs which are recoverable in an arbitration (may be limited by any applicable arbitral rules or by agreement of the parties with the arbitrators, or may be limited on the basis of what is considered 'fair and reasonable' as described above in section 3.5.4. 'Fair and reasonable costs' are those considered so by the arbitrators (or, finally, by the courts) on a case-by-case basis.

3.5.7 Are there any rules relating to the payment of taxes (including VAT) by foreign and domestic arbitrators? If taxes are payable, can these be included in the costs of arbitration?

There are no specific rules about the payment of taxes, including VAT, and so general tax legislation applies to the arbitrators.

The parties and the arbitrators and/or the arbitration institution may agree that the parties should bear the amount of VAT on the arbitrators' fees. It is usually agreed upon in the terms of reference if the parties are going to be charged VAT directly on the arbitrators' fees or costs of arbitration, which will usually be treated as costs of the arbitration.

3.6 Arbitration agreements and jurisdiction

3.6.1 Are there form and/or content or other legal requirements for an enforceable agreement to arbitrate? How may they be satisfied? What additional elements is it advisable to include in an arbitration agreement?

An arbitration agreement must be entered into in writing. An arbitration agreement will be considered to be in writing if the agreement is executed in a written document that is signed by the parties or through an exchange of letters or telegrams, or by fax or other means of communication, including email or other electronic messages, provided that written evidence is available.

All electronic, magnetic, optical and other forms of documentation suffice to prove the existence of an arbitration agreement, provided that they are sufficiently reliable, intelligible and in a suitable condition of preservation.

Arbitration by reference is admitted.

In addition, the mere exchange of a statement of claim and a statement of defence submitted to an arbitration institution or tribunal is sufficient evidence of the parties' agreement to enter into an arbitration, if one party has alleged the existence of an arbitration agreement and the counterparty has not disputed it.

Otherwise, if the above conditions are not met, the putative arbitration agreement will be considered null and void or non-existent as applicable.

Useful elements to be included in an arbitration agreement other than the parties' consent to settle their dispute by arbitration, include *inter alia*:

- the number of arbitrators;
- the seat of arbitration;
- arbitration costs;
- the possibility of appeal (if the parties expressly agree on this; if not, the award is not appealable);
- certain procedural rules, such as the time limits for filing the statement of claim and the statement of defence, rules regarding the admission of expert evidence and third party participation in the arbitration procedure; and
- in the case of multi-contract transactions arbitration by reference to other contracts which do not include any arbitration clauses.

3.6.2 Can an arbitral clause be considered valid even if the rest of the contract in which it is included is determined to be invalid?

The severability of arbitration clauses is a fundamental principle of modern arbitration. Under Portuguese law an arbitration clause is considered to be autonomous and independent of the rest of the contract; accordingly, the arbitration clause will remain valid even if the rest of the contract in which it is included is determined to be invalid.

There is no difference if the agreement was procured by fraud or misrepresentation. The arbitrators retain their jurisdiction even in such cases, including deciding on the consequences of such actions.

3.6.3 Can an arbitral tribunal determine its own jurisdiction ('competence–competence')? When will the national courts deal with the issue of jurisdiction of an arbitral tribunal? Need an arbitral tribunal suspend its proceedings if a party seeks to resolve the issue of jurisdiction before the national courts?

Competence-competence is another fundamental principle recognised in Portuguese arbitration law.

Portuguese state courts are not permitted to grant anti-suit injunctions or

to prevent or interfere with the arbitration procedure and may only do so at the end of the arbitration procedure through an action to set aside the award or an appeal (if the parties have agreed that the award can be appealed).

Although anti-suit injunctions are valid in some Common Law jurisdictions, they are not available in Portugal, particularly in respect of EU Member States following recent case law of the European Court of Justice.

A state court may, however, prevent an arbitration from proceeding if the defendant, in accordance with the procedure outlined in section 3.3.3, files an application with the court to challenge the existence, the validity, or the enforceability of the arbitration agreement before its statement of defence is due in the arbitral proceedings and, the judge concludes that the arbitration agreement is non-existent, manifestly null and void or unenforceable. Otherwise, the judge must defer the question of jurisdiction to the tribunal.

If a tribunal has already decided the question concerning the existence, validity, or enforceability of the arbitration agreement either by a partial award or has deferred the matter to a later stage, the court should not interfere with the arbitrators' decision and the issue may not be heard until after the award is rendered upon the application of any party.

The arbitration tribunal cannot suspend the arbitration proceedings whilst the issue of jurisdiction is pending before the courts.

3.6.4 Is arbitration mandated/prohibited for certain types of dispute?

Non-arbitral matters include disputes relating to inalienable personal rights, such as family law rights and certain labour rights.

Intellectual property rights are arbitrable subject to certain conditions, including the use of a specific institutional arbitration body, the '*Arbitrare*'. Competition law disputes are also arbitrable subject to limited conditions. Arbitration is compulsory for some limited matters, such as disputes involving intellectual property law relating to pharmaceutical reference and generic products, and the determination of damages in the case of expropriation of assets.

3.6.5 What, if any, are the rules which prescribe the limitation periods for the commencement of arbitration proceedings and what are such periods?

Under Portuguese law, there is no statute of limitation or similar regarding the limitation periods in the case of initiating an arbitration. The substantive causes of action underlying the dispute may be subject to a statue of limitation, but the right to commence arbitral proceedings is not, unless where the parties have agreed otherwise. If once the arbitration has been initiated, the substantive right has elapsed, this, has no impact on the right to commence arbitration nor the arbitrators' power to adjudicate an award regarding the substantive right and its validity or enforceability.

3.6.6 Does national law enable an arbitral tribunal to assume jurisdiction over persons who are not party to the arbitration agreement?

Portuguese arbitration law only allows third parties to participate in a pre-existing arbitration if the original parties to the arbitration and the tribunal allow it and provided that the third party consents to the pre-existing

arbitration agreement.

In a recent judgment of the Lisbon Court of Appeal dated 2011, January 11, the Court restricted the availability of arbitration to a company, or a member of a group of companies, which has signed the arbitration agreement. As to piercing the corporate veil the matter has not yet been considered in any judgment of the Portuguese state courts.

3.7 Applicable law

3.7.1 How is the substantive law governing the issues in dispute determined?

The parties are free to agree on the substantive applicable law. If they fail to do so, the arbitrators in international arbitration may determine the applicable law and, in such cases, may apply the law they consider most appropriate, or otherwise they may rely on a particular conflicts of law rule for the specific purpose of determining the applicable law. The substantive law will be deemed not to include the conflict of law rules of that jurisdiction.

3.7.2 Are there any mandatory laws (of the seat or elsewhere) which will apply?

There are some limited mandatory international private law rules which must be applied by the arbitrators in Portugal irrespective of any conflict of law rules. They are called *normas de aplicação imediata*.

The most significant to commercial arbitration relates to the termination of commercial agency contracts (which case law has extended to distribution contracts). Portuguese law shall be mandatorily applied in such cases, unless any other applicable foreign law is more favourable to the agent (and by extension to the distributor) than Portuguese law.

The 2012 Law defined in a more limited and clear way the concept of public policy and the scope of its application by the tribunal in adjudicating the dispute, but there is not yet any case law applying those provisions of the 2012 Law. The new limited concept of public law set out in the 2012 Law will apply going forward.

4. SEEKING INTERIM MEASURES IN SUPPORT OF ARBITRATION CLAIMS

4.1.1 Can an arbitral tribunal order interim relief? What forms of interim relief are available and what are the legal tests for qualifying for such relief?

Arbitral tribunals may order interim relief. Before determining whether to grant such relief, the tribunal must allow the party against whom the measure is sought to be heard.

The tribunal may order interim relief in the following circumstances:

(a) to maintain or restore the status quo *ex ante* whilst the dispute is pending;
(b) when the defendant takes any action or refrains from taking any action, which may cause damage in relation to the interests at stake in the arbitration;
(c) to ensure the preservation or freezing of assets; and
(d) to preserve evidence which may be of importance in the dispute.

Freezing injunctions and orders for security for costs and the preservation

of evidence, etc are available.

The arbitrators are empowered either to decide any matter and, in particular, procedural matters at any stage of the arbitration procedure or at the award stage.

In an application for interim relief before the tribunal, the applicant must prove the following:

- the serious possibility that an alleged right exists and is in danger of being breached; and
- any damage to the defendant which might be caused by the injunction would not significantly exceed the damage which the applicant wishes to prevent.

A party may, simultaneously with its application for the injunctive measure, also request the tribunal to order that the defendant should maintain the status quo, so as not to frustrate the purpose of the injunctive relief requested (preliminary order introduced in the last review by the Model Law).

4.1.2 Have national courts recognised and/or limited any power of an arbitral tribunal to grant interim relief?

State courts do not have the power to prevent or limit the tribunals' power to grant interim relief.

It should be noted that the arbitrators' powers as regards to injunctive relief are limited in the sense that the tribunal is entitled to award interim relief, but it is not empowered to enforce it. Only the state courts are empowered to enforce such interim measures.

Therefore, if an applicant has any concerns that the respondent may not obey any order for interim relief granted by the tribunal, it may be more efficient to apply directly to a state court for interim relief in support of the arbitration.

4.1.3 Will national courts grant interim relief in support of arbitration proceedings and, if so, in what circumstances?

National Courts have been willing to grant injunctive relief in support of arbitrations, even when the arbitration tribunal is already established. Moreover, the new arbitration law provides expressly for such duty and power of the courts.

4.1.4 Are national courts willing to grant interim relief in support of arbitration proceedings seated elsewhere?

Portuguese courts may grant interim relief in support of arbitration proceedings seated elsewhere (in Portugal or abroad).

5. CHALLENGING ARBITRATION AWARDS

5.1.1 Can an award be appealed to, challenged in or set aside by the national courts? If so, on what grounds?

Courts may only interfere to set aside an award in very limited circumstances which relate mainly to procedural matters, such as the violation of the equality of the parties principle and the principle of contradictory proceedings. The only ground for the court to set aside an award based on

substantive law is in respect of public policy (*ordre public*). If a decision contained in an award is contrary to public policy, it will be set aside. If only parts of the award contrary to public policy, only those parts of the award will be set aside.

Defining public policy has proved particularly difficult. The 2012 Law provides that in domestic arbitrations, an award may only be set aside if it is contrary to Portuguese international public policy principles.

For international awards, it appears that there is an even further limited application of Portuguese international public policy principles in respect of which the courts may only refuse recognition of an international award if the award manifestly breaches such principles.

Portuguese international public policy principles are those principles which the Portuguese state may not derogate from by way of any legislation, because such principles are intrinsic to the Portuguese culture and are fundamental to and characteristic of the Portuguese legal system.

Therefore, international public policy under Portuguese law does not include the entire body of mandatory provisions of Portuguese law. Most of such norms do not form part of Portuguese international public policy, only those falling within the particular and narrow definition set out above.

If an action is filed in the state court (second instance court – *Tribunal da Relação*) within 60 days from the date of notification of the award, state courts may set aside an award on the basis of the following grounds:

- one of the parties to the agreement lacked capacity (which, in the case of individuals, is generally, depending on the applicable law, determined by the law of the place of their residence or nationality, and in the case of corporations, by the law of their place of incorporation or centre of incorporation or centre of management). The matter of capacity is always determined by the substantive law applicable to the dispute.
- the arbitration agreement is not valid under the law the parties have chosen to govern the dispute or, where such law is not identifiable, in accordance with Portuguese arbitration law;
- if any of the fundamental principles of arbitration procedure (see section 3.4.3 above) have been infringed and it is shown that this had a material impact on the arbitration;
- the award is determined in respect of a dispute which falls outside the scope of the arbitration agreement or contains decisions on matters beyond the scope of the submission to arbitration;
- the composition of the tribunal or the procedure followed was not in accordance with the parties' agreement (unless such agreement was in conflict with any mandatory provision of Portuguese arbitration law) or, if there was no such agreement by the parties, the composition of the tribunal or the procedure followed were not in accordance with Portuguese arbitration law provided that, in either case, such conflict or discrepancy had a material impact on the resolution of the dispute;
- the tribunal has decided on matters which it was not requested to determine; or it has failed to decide on questions which were submitted to the tribunal;

- the award was granted outside the time limits determined by the parties, the law, or fixed by the arbitrators, or the parties were not notified within those time limits (the arbitral procedure elapses automatically and *ipso jure* in such circumstances);
- the award was not made in writing and signed by the arbitrator or the majority of the arbitrators; or the award does not provide reasons (unless the parties have waived the requirement for reasons or the award simply gives effect to a settlement agreement entered into by the parties); and
- the tribunal has concluded that the dispute is not arbitrable under Portuguese law or the award is contrary to the principles of Portuguese international public policy (*ordre public*).

An appeal to a state court against an award on its merits is only admissible if the parties have expressly agreed to provide for the possibility of an appeal.

Appeals in international arbitration are excluded, unless the parties have expressly agreed on such a possibility and have also agreed on an appeal to another arbitration tribunal and ruled on the respective procedural terms, including on the grounds allowing the appeal, time to appeal, etc.

5.1.2 Can the parties exclude rights of appeal or challenge?

The parties are allowed to exclude the right of appeal as explained at the end of section 5.1.1 above.

However, in principle, the parties cannot exclude the right to apply to a state court to set aside an award.

The state court is not entitled, under any circumstances, to review the merits of the award or reconsider any further question decided upon by the arbitration tribunal in an action to set aside the award. It may, however, review the merits with regards to public policy issues but only to determine whether such public policy laws were violated. Naturally the Court may review the merits of the tribunal's decision in the case of an appeal.

5.1.3 What are the provisions governing modification, clarification or correction of an award (if any)?

The arbitrators are entitled to modify, clarify or correct an award after it has been granted if a petition by any of the parties is filed within 30 days (unless a different term has been agreed upon by the parties) of the date the award was notified.

The arbitrators may also proceed accordingly *ex officio* and within the same 30 days term.

A party is entitled to ask the tribunal to provide an additional award after the modification, correction or clarification of the main award.

Finally, any state court which has jurisdiction to determine an application to set aside an award may stay the court proceedings and refer the case back to the tribunal to review the award.

6. ENFORCEMENT

6.1.1 Has your jurisdiction ratified the New York Convention or any other regional conventions concerning the enforcement of arbitration awards? Has it made any reservations?

Portugal has ratified the New York Convention.

A reservation was made to limit the recognition and enforcement of awards under the Convention to those given in member states.

6.1.2 What are the procedures and standards for enforcing an award in your jurisdiction?

In the case of domestic awards, a successful party wishing to enforce an award must file an application to enforce the award at the state court (first instance) of the district (*comarca*) in which the seat of arbitration is located.

If such application is successful, the award will have the same effect as a judgment of a state court at first instance.

The action for enforcement is exclusively a matter for the state courts and is governed in part by the 2012 Law and the CPC.

The unsuccessful party may challenge any application for enforcement, but only on limited grounds, including the grounds for setting aside an award described in section 5.1.1.

However, the unsuccessful party is not entitled to allege any of the grounds described in section 5.1.1 unless a party has filed an action to set aside the award within the 60-day limit, and such application has not been rejected.

In addition, the court may always decide to refuse enforcement on the basis of the non-arbitrability of the dispute or breach of Portuguese international public policy (*ordre public*) principles.

The state court in which the action for enforcement is sought may not, under any circumstances, review the merits of the dispute or on any other question decided by the tribunal.

The opposing party may also challenge the enforcement of the award on the basis of any of the grounds provided for in the CPC with regard to applications to challenge court judgments.

6.1.3 Is there a difference between the rules for enforcement of 'domestic' awards and those for 'non-domestic' awards?

Enforcement of a foreign award must be preceded by its recognition in a *Tribunal da Relação* (a second instance state court).

The grounds on which recognition of a foreign award may be refused are essentially the same as those provided for in Article V of the New York Convention and the Model Law.

Therefore, Article VII of the New York Convention has limited application in Portugal.

There is, however, a provision in Portuguese arbitration law that clarifies the meaning of public policy, which was not defined specifically in the New York Convention and the Model Law.

Portuguese law is favourable towards the recognition of foreign awards in this respect, because it limits the circumstances in which public policy laws

can prevent the recognition of a foreign award to the breach of the narrow category of Portuguese international public policy principles (as described in section 3.3.4).

After recognition is obtained (*exequatur*), the applicant must file an action for enforcement. Enforcement may take between six months and one year or more depending on the extent to which the unsuccessful party seeks to oppose the enforcement proceedings.

It is important to note that immediately after the action for enforcement is commenced, an execution officer (*solicitador de execução*) will attach the debtor's assets without notice.

The same applies to the enforcement of a foreign award.

The costs of enforcement depend on the value of the claims. Instructing local counsel is of course advisable.