The International Arbitration Review

Seventh Edition

Editor
James H Carter

Law Business Research

The International Arbitration Review

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EDITOR'S PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another. The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled by an analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world is consumed with debate over whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter
Wilmer Cutler Pickering Hale and Dorr LLP
New York
June 2016

Chapter 34

PORTUGAL

José Carlos Soares Machado and Mariana França Gouveia[1]

I INTRODUCTION

i Structure of the law

Portugal adopted the UNCITRAL Model Law (Model Law) through the Arbitration Act (Law No. 63/2011, 14 December, which entered into force in March 2012).

The former Arbitration Law (Law No. 31/86, 29 August) was silent on a number of issues, such as interim measures, multiparty arbitrations and the challenge of arbitrators. Scholarship and jurisprudence had resolved these issues in line with international standards, but there were still some difficult topics that were not addressed with consistency. With the adoption of the Arbitration Act the main problems were resolved, and Portuguese law now explicitly follows international standards.

This chapter aims to address some of the more important aspects of the Portuguese Arbitration Act.

Under the Arbitration Act, all persons may enter into arbitration agreements relating to disputes regarding economic interests. Given this, all commercial disputes can be subject to arbitration. Previous laws have also admitted arbitration in formerly unthinkable areas such as enforcement proceedings, and administrative and tax law. Nevertheless, the Law that admitted enforcement proceedings through institutionalised arbitration – a truly innovative feature of Portuguese legal framework – was revoked in 2013.

The arbitration agreement must be in writing, but Portuguese law adopts the broad definition of written form established in the New York Convention and in the Model Law. The law further adopted the incorporation theory, providing that a referral to an arbitration agreement included in a different document is enough to grant jurisdiction to the arbitral tribunal.

1 José Carlos Soares Machado is a partner and Mariana França Gouveia is of counsel at SRS Advogados – Sociedade Rebelo de Sousa e Associados, RL.

The arbitral tribunal is competent to rule as to its jurisdiction – the well-known principle of *Kompetenz-Kompetenz*. The law provides for the 'negative' effect of this rule, according to which national courts may not decide on the arbitral tribunal's competence before the tribunal issues its ruling. This disposition is applicable only in cases where the lack of jurisdiction is not obvious.

The Arbitration Act fully provides for interim measures, adopting the extended section of the UNCITRAL Model Law, as reviewed in 2006. The Act provides that an arbitral tribunal can grant interim measures it deems necessary in relation to the subject matter of the dispute. Three requirements must be fulfilled: a serious probability that the requesting party will succeed on the merits; sufficient evidence of the risk of harm of his or her rights; and that the harm resulting from the interim measure does not substantially outweigh the damage the requesting party wishes to avoid by the measure.

It is also admissible that the tribunal grants measures without hearing the opposite party. This is allowed through the request of a preliminary order, which the arbitral tribunal can grant if it considers that prior disclosure of the request for the interim measure may frustrate its purpose. The downside of this regime is that, as in the Model Law, a preliminary order cannot be enforced in a national court.

The Arbitration Act provides that the number of arbitrators may be chosen freely by the parties to the arbitration agreement, but must always be uneven. If the parties are silent about the number of arbitrators, the law establishes that there will be three: one appointed by each one of the parties and the third chosen by the two arbitrators appointed by the parties.

The arbitrator must be an individual – it is not possible under Portuguese law to appoint a legal entity. All arbitrators must be independent and impartial, and have the duty to disclose any circumstance likely to give rise to justifiable doubts as to their impartiality and independence.

The proceeding for challenging an arbitrator is provided by the Arbitration Act, but the parties can agree on different provisions or refer the case to an arbitration institution. When they do not set the rules, the challenge of an arbitrator is ruled by the arbitral tribunal, which will include the challenged arbitrator. The Act further provides that if the arbitral tribunal rules to uphold the challenged arbitrator, the challenging party may appeal to a national court on this issue. While such request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and render an award. If the arbitrator is, following a challenge, refused, the decision cannot be reverted to the national court. The reason behind the distinction is related to the protection of independence and impartiality. If the arbitrator steps down, there is no risk of lack of independence or impartiality.

If one party does not appoint its arbitrator or if the parties do not agree, when required (sole arbitrator or arbitrator nominated by both parties), they can apply to the national court to appoint the missing arbitrator. The competent national courts are the courts of appeal.

The Arbitration Act adopts the *Dutco* rule in multiparty arbitrations, but with a particularity. The state court shall only appoint all arbitrators if it becomes clear that the parties that failed to jointly appoint an arbitrator have conflicting interests regarding the merits of the dispute. The rationale behind this is to prevent the defendants from withdrawing the claimant's right to appoint an arbitrator when the equality principle does not force it. If the defendants do not have conflicting interests, there is no ground to give them the possibility to remove the claimant right to appoint its arbitrator – one of the most-liked arbitration features.

As soon as the sole, or the third, arbitrator is appointed, the tribunal must grant the award within 12 months. This limit can be extended by agreement of the parties or, as an alternative, by decision of the arbitral tribunal, one or more times, for successive periods of 12 months. The parties may nevertheless agree on a different time limit in the arbitration agreement or in the procedural rules.

The Arbitration Act offers great flexibility on procedural matters. Nevertheless, some provisions address important framework issues, such as due process principles, place of arbitration, language of the proceedings, initial phase of the proceedings (statements of claim and defence), and cooperation of national courts when third parties or any of the parties do not voluntarily cooperate in the taking of evidence and experts appointed by the tribunal.

Parties and arbitrators thus have a great amount of power to create a 'tailor-made' procedure. Parties may create the rules in the arbitration agreement, which is relatively uncommon, or before the appointment of the first arbitrator. As soon as the first arbitrator is appointed, the competence to create rules is exclusively assigned to the arbitral tribunal.

Under Article 30 of the Arbitration Act, procedural rules shall ensure the procedural equality of the parties, the right to defence and a fair opportunity to respond to all points of law and facts. Basic and fundamental principles of law are the equality of treatment between parties and the mandatory prior summons of the defendant.

Where authorised by the arbitral tribunal, a party may request assistance in the taking of evidence from national courts. In such case, evidence is taken and weighed up by national courts and sent to the arbitral tribunal, which shall analyse it together with the rest of the evidence.

One important innovation of the Portuguese Arbitration Act is the provision about third-party participation. Both joinder and intervention are widely admitted. The arbitral tribunal can grant the request whenever the parties (old and new) are bound by an arbitration agreement, the intervention does not unduly disrupt the normal course of the arbitral proceedings and there are serious reasons that justify the new party's addition. The arbitral tribunal then has a discretionary power to decide whether to accept the intervention of the third party. The rules do not prevent different provisions created by the parties or set forth by an arbitral institution.

The award must be approved by a majority of the arbitrators and shall include the grounds upon which it has been based. The parties can, however, waive their right to have a substantiated decision. In such case, the lack of grounds cannot lead to the setting aside of the award.

The arbitral tribunal shall decide in accordance with the law, unless the parties determine otherwise in an agreement, that the arbitrators shall decide *ex aequo et bono*. The arbitrators may also decide the dispute by reverting to the composition of the parties on the basis of the balance of interests at hand. Portuguese scholarship shares some doubts about the exact meaning of this decision criterion, mainly on how to distinguish it from *ex aequo et bono*.

The arbitral award has the same status as a judicial award – *res judicata* effect and immediate enforceability. Under Portuguese law, there is no need to recognise the arbitral award for domestic purposes, and so it may be enforced the day it has been granted. The enforcement proceedings are presented to a national court, and start with immediate seizure of the debtors' assets. The entire proceeding is conducted by a private clerk, and is nowadays a quick and effective process that is fully computerised.

A court of appeal can set aside the arbitration award when one of the grounds established in Article 46 is fulfilled. This provision is inspired in the similar article of the Model Law (and the New York Convention), with a few specific rules.

Article 46 of the Arbitration Law establishes the following grounds for setting aside the arbitral award:

a one of the parties to the arbitration agreement was under some incapacity or the arbitration agreement is not valid under the applicable law;

b there has been a violation in the proceedings of some of the fundamental due process principles with a decisive influence on the award;

c the award was made in relation to a dispute that was not contemplated by the arbitration agreement or contains decisions that surpass the scope thereof;

d the composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement of the parties or the applicable law;

e the arbitral tribunal has given an award in an amount in excess of, or in relation to a matter different to the matter that was requested, or has dealt with issues that it should not have dealt with it or has failed to decide issues that it should have decided;

f the award did not comply with formal requirements established by the law, such as the signature of the arbitrators and grounds (when not waived by the parties);

g the award was rendered after the arbitration time limit;

h the subject matter of the dispute cannot be decided by arbitration under the terms of Portuguese law; and

i the content of the award is in breach of the principles of international public policy of Portugal.

The last two grounds (arbitrability and public policy) can lead to an annulment of the award, even when not invoked by the parties; the other grounds must be raised by them.

ii Distinctions between international and domestic arbitration law

The Arbitration Act is to be applied to any arbitration that is held in Portugal. Arbitration is considered international whenever international parties or issues are at stake.

However, the distinctions between international and domestic arbitration law are few. The majority of the applicable provisions are the same as the ones that rule domestic arbitration.

Parties may choose the law applied by arbitrators. Where such choice is not made, the tribunal shall apply the most appropriate law to the dispute.

Portugal is a party to the New York Convention, but with the reciprocity reservation, which means that only awards rendered in states that are parties to the New York Convention follow this regime. Accordingly, foreign arbitral awards rendered in countries that are not signatories to the New York Convention must follow a recognition procedure governed by the Arbitration Act and are decided by a court of appeal. Nevertheless, this difference has little meaning, taking into consideration that the regime adopted by Portuguese law is equal to the New York Convention. The practical result is the waiver of the reciprocity reservation. As such, nowadays, independently of where an award is rendered, it will be recognised and enforced in Portugal by a set of rules identical to the New York Convention.

According to the applicable rules, the recognition of an arbitral award may be refused if:

a one of the parties to the arbitration agreement was in some way incapacitated; or if the agreement is not valid under the law to which the parties have subjected it or, failing any indication thereof, under the law of the country where the award was made;

b the party against whom the award is made was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present his or her case;

c the award deals with a dispute not contemplated by the arbitration agreement or contains decisions beyond the scope of the arbitration agreement. If, however, the decisions in the award on matters submitted to arbitration can be separated from those not so submitted, only the part of the award that contains decisions on matters submitted to arbitration may be recognised and enforced;

d the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;

e the award has not yet become binding on the parties, or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made;

f the subject matter of the dispute cannot be subject to arbitration under Portuguese law; or

g the recognition or enforcement of the award would lead to a result incompatible with the international public policy of the state.

Only the two last grounds can be raised by the court, even when the parties have not done so. The others can only be addressed by the court if one the parties raises it.

Portugal is also a party to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965 (ratified in 1984) and to the Inter-American Convention on International Commercial Arbitration signed in Panama in 1975.

Portugal has also entered into bilateral treaties on international judiciary cooperation with the PALOP (Portuguese-speaking African) countries.[2]

iii Structure of the courts

The Portuguese judicial system is a three-tier system of district courts, courts of appeal and one Supreme Court. There are no specialised courts for arbitration matters. The courts of appeal decide the majority of issues related to arbitration. This is the case for the appointment of a missing arbitrator, an appeal for the refusal of a challenge, the immediate challenge of a preliminary decision on jurisdiction, the setting aside of the arbitral award and the recognition of a foreign arbitral award.

However, there are still some judicial decisions that are taken by the district courts, such as cooperation in the taking of evidence.

Under the Arbitration Law, anti-suit injunctions are not admissible.

2 With Angola in 1995, in force since 2006; with Cape Verde in 2003, in force since 2005; with Guinea-Bissau in 1988, in force since 1994; with Mozambique in 1990, in force since 1996; and with São Tomé and Principe, in 1976, in force since 1979.

iv Local institutions

The most important arbitration institution is based at the Portuguese Chamber of Commerce and Industry, and was established in 1986 to facilitate and promote domestic and international arbitration. Its rules were recently changed and entered into force in March 2014. They were updated according to the modern trends of arbitration, including the adoption of the emergency arbitrator. Even more recently, in 2016, the Chamber adopted fast-track arbitration rules that aim to tackle slow arbitration proceedings, especially but not exclusively in small-amount cases.

The Oporto Commercial Association also has an important arbitration centre, and has recently approved new arbitration rules following best world practices.

Further to a public initiative, several arbitration centres were recently created in different and, until now, highly improbable fields, such as consumer conflicts, administrative and tax disputes. These are centres with strong state support and very strict procedural rules. Only the people that are listed by the respective centre can be appointed as arbitrators.

v Trends relating to arbitration

There has been huge growth in arbitration in Portugal in the past 10 years. This increase is mainly due to the constant investment by public authorities that acknowledge that arbitration and other alternative methods of dispute resolution are a way to resolve problems relating to the national justice system, such as the excessive number of lawsuits. This highly favourable trend is followed by jurisprudence as well as scholars, which increasingly support the more modern approaches. Following this trend, law schools and universities have started to offer courses, and have been promoting arbitration and other alternative methods of dispute resolution.

The recent approval of a new and modern Arbitration Act is a strong step towards the credibility of arbitration in Portugal.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

Legislation

In 2015, Law No. 144/2015 transposed the Consumer ADR Directive into Portuguese legislation. This Law imposed a duty on all professionals to inform consumers of alternative dispute resolution (ADR) mechanisms. Following the entering in force of the Act, companies started changing their contracts and sharing information about mediation and arbitration on consumer disputes. This will probably increase not only the use of alternative dispute mechanisms, but also raise social awareness of ADR, which we think can have a positive effect on commercial arbitration.

ii Arbitration developments in local courts

The Portuguese judiciary has given constant support to the autonomy of arbitral tribunals. Judges of the superior courts continue to show an attitude of understanding of the arbitral phenomenon, and their very positive attitude towards arbitration can be seen from their decisions, which demonstrate deep knowledge of national doctrine and jurisprudence, and even foreign scholarship and jurisprudence.

The main matters addressed by Portuguese state courts are jurisdiction issues.

In two 2015 decisions, the superior courts dealt with complex issues related to the extension of an arbitration agreement in multiple contracts. The analysis was thorough and exhaustive in both cases, concluding that there was no consent of the third party to the arbitral agreement that could sustain the jurisdiction of the arbitral tribunal.

Several judgments addressed the *Kompetenz-Kompetenz* principle, and in every one of them the ruling was made according to Portuguese law, which follows international standards: when one of the parties argues an arbitration agreement, the national court immediately dismisses the case. The only exception is when the arbitration agreement is clearly invalid, which did not occur in any of these cases.

Finally, there were some cases seeking the setting aside of an arbitral award. In these cases, the grounds for setting aside were several, including non-compliance with the award deadline, a lack of reasoning and a missing signature of one of the arbitrators. In all these cases, the national courts consistently applied the Arbitration Act, sustaining the validity of the awards and, in one case, referring the case to the arbitral tribunal to correct the error.

Without doubt, their analysis of the jurisprudence is a sign of the national courts' actual and deep knowledge of arbitration, which provides support and security to arbitration in Portugal.

iii Investor–state disputes

Portugal is a signatory to the Washington Convention but has never been party to an ICSID case. On the other hand, 2015 was the first year that two Portuguese companies sued two states through investment arbitration proceedings. The first case was filed by Dan Cake against Hungary, and the second by PT against Cape Vert. The first case has been already decided, with the Portuguese company winning on the ground of a denial of justice. The second case is still pending.

Clearly, the Portuguese legal community is growing in its knowledge and sophistication in arbitration matters.

III OUTLOOK AND CONCLUSIONS

Today arbitration is well established and commonly used in Portugal. As previous cases brought before courts have demonstrated, arbitration is well understood and its rules are solidly implemented within the Portuguese legal community.

An important step was taken with the approval of a new Arbitration Act based on the Model Law. Some essential issues will need further discussion, especially multiparty arbitration, interim measures and public policy as grounds for setting aside the award.

An issue that has created some controversy is preliminary orders. We think that the international controversy on these interim measures has had echoes in Portugal. The problem refers to *ex parte* measures and their violation of the adversarial principle and, in consequence, due process. A procedure for preliminary orders has been fully adopted by the Act, but its practical application will surely raise doubts and difficulties. For now, there are already a few cases that have applied these rules and granted a preliminary order. In the known cases, the party voluntarily complied with the order.

The next few years will certainly bring great progress to arbitration in Portugal. The discussion about the new law and the constant legal education in this field in law schools is expected to bring extensive debate in the arbitration legal community and will constantly raise awareness of international developments in this area.

Appendix 1

ABOUT THE AUTHORS

JOSÉ CARLOS SOARES MACHADO

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José Carlos Soares Machado graduated from the faculty of law of Lisbon University in 1976 and has practised law for more than 35 years. He has been consistently recognised as a leading civil and commercial litigation lawyer. Since 2011, he has been a partner and head of the litigation and arbitration department at SRS Advogados, one of the most important law firms based in Lisbon. He is the current chair of the recently created Litigation Lawyers Circle.

He is a professor at the law faculty of Nova University of Lisbon and a member of the ILA international commercial arbitration committee. Mr Soares Machado is a former president of the Lisbon Bar Council, as well as a member of the Portuguese Bar Association national board of directors and of its National Supreme Council. He is the author of several published works on constitutional law, corporate law, real estate law and professional ethics.

He is a member of the practice council of the Portuguese Arbitration Association and has been an arbitrator in numerous cases. He has also represented clients in numerous arbitrations before *ad hoc* and arbitration centre tribunals.

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Mariana França Gouveia has a PhD in civil procedure law from the Law Faculty of Nova University of Lisbon and her undergraduate law degree is from Lisbon University. She has been of counsel at SRS Advogados' litigation and arbitration department since 2010 and an associate professor at the Law Faculty of Nova University of Lisbon since 2003.

Since 2009, Mariana França Gouveia has been a member of the arbitration practice council of the Portuguese Arbitration Association and an arbitrator of the arbitration centre at the Lisbon Commercial Association. She is also the coordinator of a graduate programme in arbitration organised by the faculty of law of the Nova University of Lisbon. In 2012, she

became a member of the ICC National Committee (Portugal) and in 2015 the vice-president of the arbitration centre at the Portuguese Chamber of Commerce and Industry. She is frequently appointed as an arbitrator.

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