THE INTERNATIONAL ARBITRATION REVIEW

Thirteenth Edition

Editor
James H Carter

THE LAWREVIEWS

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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 often debates 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 2022

Chapter 27

PORTUGAL

José Carlos Soares Machado and Rita Lynce de Faria[1]

I INTRODUCTION

i Structure of the law

Portugal adopted the UNCITRAL Model Law (Model Law) through the Arbitration Act.[2]

The former Arbitration Law[3] 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 in force, these main problems were resolved, and Portuguese law now explicitly follows international standards.

This chapter addresses some of the more important aspects of the 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.

Arbitration agreements 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 an arbitral tribunal.

The arbitral tribunal is competent to rule as to its jurisdiction under 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 an 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 a dispute. Three requirements must be fulfilled: a serious probability that the requesting party

1 José Carlos Soares Machado is a partner and Rita Lynce de Faria is a consultant at SRS Advogados, Sociedade Rebelo de Sousa & Advogados Associados, SP, RL.

2 Arbitration Act (Law No. 63/2011, 14 December, which entered into force in March 2012).

3 Law No. 31/86, 29 August.

will succeed on the merits; sufficient evidence of the risk of harm of his or her rights; and sufficient evidence that the harm resulting from an interim measure does not substantially outweigh the damage the requesting party wishes to avoid by the measure.

It is also admissible that a tribunal grants measures without hearing the opposite party. This is allowed through a 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: two 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 a 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 national court. The reason behind this distinction is related to the protection of independence and impartiality. If the arbitrator steps down, there is no risk of a 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 court is the court 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 a dispute. The ratio 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 an award within 12 months. This limit can be extended by agreement of the parties or, as an alternative, by a decision of the arbitral tribunal, one or more times, within 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:

a due process principles;
b the place of arbitration;
c the language of the proceedings;
d the initial phase of the proceedings (statements of claim and defence);

e the cooperation of national courts when third parties or any of the parties do not voluntarily cooperate in the taking of evidence; and

f the 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 a 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 Arbitration Act is the provision about third-party participation. Both joinder and intervention are widely admitted. Arbitral tribunals can grant such 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 an 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*.

An 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 an 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 debtor's assets. The entire proceeding is conducted by a private clerk, and nowadays is a quick and effective process that is fully computerised.

The court of appeal can set aside an 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 an 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 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 the international public policy of the state.

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 for international arbitration are the same as the ones that rule domestic arbitration.

Parties may choose the law applied by the 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 decided by the court of appeal. Nevertheless, this difference has little meaning, taking into consideration the fact that the regime adopted by Portuguese law is equal to the New York Convention. The practical result is the waiver of the reciprocity reservation. Nowadays, independent of where an award is rendered, it will be recognised and enforced in Portugal under 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 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 Portugal.

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 of 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.[4]

iii Structure of the courts

The Portuguese judicial system is a three-tier system of district courts, courts of appeal and a 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:

a the appointment of a missing arbitrator;
b an appeal for the refusal of a challenge;
c an immediate challenge of a preliminary decision on jurisdiction;
d the setting aside of an arbitral award; and
e the recognition of a foreign arbitral award.

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

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

iv Local institutions

The most important arbitration institution is based at the Portuguese Chamber of Commerce and Industry, which was established in 1986 to facilitate and promote domestic and international arbitration. Its current rules entered into force in March 2014. They were updated according to the modern trends of arbitration, including the adoption of an emergency arbitrator. Those rules were updated at the beginning of 2021 and came into force on 1 April 2021.

4 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 Príncipe, in 1976, in force since 1979.

In 2016, the Chamber further adopted fast-track arbitration rules, a set of rules that aims to tackle slow arbitration proceedings, especially, but not exclusively, in cases involving small amounts. Those rules were also updated at the beginning of 2021 and came into force on 1 April 2021.

Also on 1 April 2021, in the Portuguese Chamber of Commerce and Industry, a corporate arbitration regulation and a pre-contractual administrative arbitration regulation came into force.

The Oporto Commercial Association also has an important arbitration centre and has in 2015 approved new arbitration rules following international best practices.

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

v Trends or statistics relating to arbitration

There has been a huge growth in arbitration in Portugal in the past 20 years. This increase is mainly as a result of 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 about, and have been promoting, arbitration and other alternative methods of dispute resolution.

The approval of a modern Arbitration Act in 2011 was a strong step towards the credibility of arbitration in Portugal.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

Although a proposal for a new law regarding corporate arbitration, which provides for special rules applicable to arbitrations involving litigation between companies and partners, has been presented by the Portuguese Arbitration Association in 2016, that proposal hasn't been yet approved by the Portuguese state. The future approval of this law could improve the resolution of corporate disputes.

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 that they understand the arbitral phenomenon; their very positive attitude regarding arbitration can be seen in most analysed decisions, which demonstrate deep knowledge of national doctrine and jurisprudence, and even of foreign scholarship and jurisprudence.

The main matters addressed by the state courts are jurisdictional issues. There are increasing numbers of decisions of the state courts over arbitration.

However, in the last year, all the jugdments concerning arbitration have addressed the *Kompetenz-Kompetenz* principle. In every one, the ruling went according to Portuguese law,

which follows international standards: when one party argues an arbitration agreement, the national court immediately dismisses the case. The only exception is the clear invalidity of an arbitration agreement, which did not occur in any of the cases judged.

iii Investor–state disputes

Portugal is a signatory to the Washington Convention, but has never been party to an ICSID case.

However, different Portuguese companies have sued states through investment arbitration proceedings. The first cases were filed by Talta-Trading e Marketing Sociedade Unipessoal Lda, a Portuguese company, and Tenaris SA, a Luxembourg company, together against the Bolivarian Republic of Venezuela. The first was filed in September 2011 and the second in August 2012. Both were concluded in 2018, following an annulment procedure.

In April 2012, Dan Cake (Portugal), SA filed a case against Hungary, which was decided in 2017, with the Portuguese company winning on a denial of justice as ground. An annulment proceeding was initiated in March 2018 by Hungary and was decided, against Hungary, in January 2019. A revision procedure of the award, requested by Hungary, is currently pending.

In April 2015, PT Ventures, SGPS, SA filed a case against Cape Vert, which ended in May 2019 as a result of the parties' agreement.

In August 2015, a case was filed by Cavalum SGPS, SA against Spain, which is still pending.

Finally, in 2017, a case was filed by Sastre and others against Mexico, which is also still pending.

Although in recent years there have been no new cases, this represents an unequivocal indication that the Portuguese legal community's knowledge and sophistication are growing regarding arbitration matters.

III OUTLOOK AND CONCLUSIONS

Today, arbitration is well established and commonly used in Portugal. As previous cases brought before court 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 an 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 an award.

One issue that has created some controversy is preliminary orders. We think that the international controversy about 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 Arbitration Act, but its practical application will surely raise doubts and difficulties. For now, there have already been 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 see greater progress in arbitration in Portugal. Discussions about the new legal projects in arbitration and constant legal education in this field in law schools is expected to bring extensive debate in the arbitration legal community and will continue to raise awareness of international developments in this area.

Appendix 1

ABOUT THE AUTHORS

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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 40 years. He has been consistently recognised as a leading civil and commercial litigation and arbitration 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 has been 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 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.

RITA LYNCE DE FARIA

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Rita is a consultant in the litigation and arbitration department at SRS Advogados. Researcher at the Catholic Research Center for the Future of Law, Rita has been a professor at the Faculty of Law of the Catholic University of Portugal since 1996, where she has taught, among others, Civil Procedural Law, Executive Process and Civil Appeals.

Rita has developed her academic career in the field of Civil Legal Sciences and has concluded both her master's degree and her PhD with a thesis about preventive and interlocutory injunctions in Portuguese civil cases.

Rita is also the author of numerous publications and a speaker at several conferences. Between 2002 and 2005, and since 2022, Rita has been a member of the board of directors of the Faculty of Law of Catholic University of Portugal and since 2016, has been the executive coordinator of the Arbitration Center of the Catholic University of Portugal. She is also a member at the Ethics Committee of the Portuguese Association of Arbitration.

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