COUNTRY COMPARATIVE GUIDES 2021

The Legal 500 Country Comparative Guides

Portugal

INTERNATIONAL ARBITRATION

Contributing firm

Raposo Bernardo

Ana Cláudia Rangel

Managing Associate | acrangel@raposobernardo.com

Joana Andrade Correia

Partner | jacorreia@raposobernardo.com

Manuel Esteves de Albuquerque

Senior Associate | mealbuquerque@raposobernardo.com

This country-specific Q&A provides an overview of international arbitration laws and regulations applicable in Portugal.

For a full list of jurisdictional Q&As visit **legal500.com/guides**

PORTUGAL
INTERNATIONAL ARBITRATION

1. What legislation applies to arbitration in your country? Are there any mandatory laws?

In Portugal arbitration is governed by Law no. 63/2011 of December 14th the Voluntary Arbitration Law.

This Law didn't suffer any amendment since its enactment.

2. Is your country a signatory to the New York Convention? Are there any reservations to the general obligations of the Convention?

Yes, Portugal is a signatory of the New York Convention since 1994.

In its accession to the Convention Portugal made a reservation declaring that it will only apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.

3. What other arbitration-related treaties and conventions is your country a party to?

Portugal is also a party to the Washington Convention of 1965 on the Settlement of Investment Disputes Between States and Nationals of Other States; to the Inter-American Convention on international commercial arbitration, concluded in Panama on 1975 and to the Convention on Conciliation and Arbitration within the CSCE of 1992.

Portugal is also a party to numerous bilateral instruments namely regarding the protection of foreign investments.

4. Is the law governing international arbitration in your country based on the UNCITRAL Model Law? Are there significant differences between the two?

Yes, the law that governs arbitration in Portugal in based on the UNCITRAL model.

However the model has suffered some changes in order to adapt the text to the Portuguese legal tradition and culture.

For example the Portuguese law adopted some specific rules regarding multi-party claimants and respondents.

5. Are there any impending plans to reform the arbitration laws in your country?

There is no impending process to reform the Voluntary Arbitration Law.

6. What arbitral institutions (if any) exist in your country? When were their rules last amended? Are any amendments being considered?

The main arbitration institution acting in Portugal is the Arbitration Center of the Câmara de Comércio e Indústria Portuguesa.

This center is aimed at administering institutional arbitration proceedings and alternative dispute resolution proceedings in matters of a commercial nature, whether public or private, domestic or international and at to providing services related to the administration of arbitration proceedings.

Other relevant arbitration institutions are Concórdia – Centro de Conciliação, Mediação de Conflitos e Arbitragem, the Arbitration Center of the Instituto de Arbitragem Comercial da Associação Comercial do Porto or Abitratre which is competent in the areas of Industrial Property, PT Domain Names and Trade Names and Corporate Names.

The *ICC – International Chamber of Commerce* has a national committee in Portugal that acts assists the Court in the appointment of Portuguese arbitrators. The committee doesn't act as secretariat of the arbitration procedure.

7. Is there a specialist arbitration court in your country?

There isn't any specialist arbitration court of law in Portugal.

8. What are the validity requirements for an arbitration agreement under the laws of your country?

The main requirement regarding the arbitration agreement is that said agreement must be in writing. This may be achieved by means of a written document executed by the parties that includes the arbitration agreement, an exchange of written documents such as letters, faxes, telegrams or other communication means provided there is a written proof. Electronic communication means are also admitted.

It is also considered that the form requirement is met when the arbitration agreement is saved in an electronic, magnetic or optic support or any other type of support that provides the same reliability, intelligibility and conservation guarantees.

Subject to the General contractual terms and conditions legal regime is also valid as arbitration agreement the reference in any given agreement to a document that includes the arbitration clause, provided that such agreement is concluded in writing and the reference is made in order to include in the agreement the arbitration clause.

If in any arbitration procedure there is an exchange of claim and response and one of the parties claims that the arbitration agreement is in force without such claim being disputed by the other party, it is also considered that the written form requirement has been fulfilled.

Apart from being in writing the arbitration agreement must also specify the legal relationship the dispute concerns to.

9. Are arbitration clauses considered separable from the main contract?

The Voluntary Arbitration Law specifically recognizes in art. 18, par. 2 the principle of separability when it foresees that an arbitration agreement that is part of a contract is considered as an independent agreement from the remaining clauses of the same.

10. Do the courts of your country apply a validation principle under which an arbitration agreement should be considered valid and enforceable if it would be so considered under at least one of the national laws potentially applicable to it?

Under the Portuguese law it is considered that the arbitration agreement is valid regarding the substance and the litigation thereto is susceptible of being subject to arbitration if the requirements under at least one of the national laws potentially applicable to it are met.

Portuguese courts apply this validation principle.

11. Is there anything particular to note in your jurisdiction with regard to multi-party or multi-contract arbitration?

Article 11 of the VAL determines that in multi-party arbitration in the absence of an agreement regarding the appointment of arbitrators the competent state court will make their appointment.

In certain cases of conflict of interests the state court can also intervene in the arbitrators' appointment.

12. In what instances can third parties or non-signatories be bound by an arbitration agreement? Are there any recent court decisions on these issues?

According to the VAL only third parties bound by the arbitration agreement are entitled to join ongoing arbitral proceedings. Such adhesion requires the consent of all parties to the arbitration agreement and must not improperly disrupt the normal development of the arbitration and must be justified by relevant reasons.

Considering the principal of contractual freedom the parties to the arbitration agreement can agree in different terms.

13. Are any types of dispute considered non-arbitrable? Has there been any

evolution in this regard in recent years?

The criminal matters, the insolvency matters and some labour matters cannot be subject to arbitration.

There was no recent evolution in this regard in recent years.

14. Are there any recent court decisions in your country concerning the choice of law applicable to an arbitration agreement where no such law has been specified by the Parties?

There weren't any recent court decisions, namely from superior courts, concerning this subject matter.

15. How is the law applicable to the substance determined? Is there a specific set of choice of law rules in your country?

The VAL determines that arbitrators shall decide according to the law, unless the parties agree that they shall decide *ex aequo et bono*.

The applicable law shall be determined under the Rome I and Rome II regulations, if applicable, or under the Portuguese Civil Code.

In International arbitration the parties can agree on the applicable law. If the parties didn't made that choice the court shall decide under the law of the country with which the dispute has closest connection.

16. Have the courts in your country applied the UNIDROIT or any other transnational principles as the substantive law? If so, in what circumstances have such principles been applied?

Although the choice by the parties of application of the *lex mercatoria* namely the UNIDROIT principles is admitted this is not common in Portugal.

17. In your country, are there any restrictions in the appointment of arbitrators?

There are very few limitations regarding the appointment of arbitrators by the parties.

The arbitrators must be physical persons and have full legal capacity.

Arbitrators must also be independent and impartial.

The number of arbitrators must be uneven and if that number wasn't agreed between the parties the court shall have three arbitrators.

18. Are there any default requirements as to the selection of a tribunal?

The default rule is that the court shall have 3 arbitrators if the parties didn't choose the number of arbitrators.

19. Can the local courts intervene in the selection of arbitrators? If so, how?

Yes. In certain case foreseen in the Law the state court can intervene in the appointment of arbitrators.

This will happen in cases were the parties failed to reach an agreement regarding the appointment of a single arbitrator or if they didn't met the deadlines to appoint the arbitrators, for example.

The appointment shall be made following the request of one or more of the parties and the state court shall consider the qualifications required by the agreement of the parties or other relevant requirements in order to make such appointment.

20. Can the appointment of an arbitrator be challenged? What are the grounds for such challenge? What is the procedure for such challenge?

As a rule the appointment of an arbitrator cannot be challenged.

An arbitrator can only be challenged if there are justified doubts as to the arbitrator's impartiality or independence, or if the arbitrator does not have the qualifications agreed between parties.

The challenging procedure can be agreed between the parties. If the parties fail to agree in the procedure the challenge shall be referred to the arbitration court.

I finally the arbitrator is not removed the challenging party may resource to the state court. However the arbitration court shall proceed with the arbitration procedure and may inclusively issue the award.

21. Have there been any recent developments concerning the duty of independence and impartiality of the arbitrators

Arbitrators must be independent and impartial, which is a requirement expressly required for someone who assumes the status of arbitrator, according to Article 9, paragraph 3 of the LAV.

In Portugal this issue was rarely addressed by case law, however the Judgment of the Lisbon Court of Appeal of 29/09/2015, which ruled that *"No doubt arises as to the need for the holders of the power to judge, even in an arbitral instance, to have to meet the attributes of impartiality and independence. These are, in both cases, requirements inherent to the exercise of an authentically jurisdictional function, which the new LAV enshrined in Article 9(3), certainly with a view to giving credibility to arbitration as an ad hoc means of dispute resolution".*

22. Have there been any recent decisions in your concerning arbitrators' duties of disclosure, e.g., similar to the UK Supreme Court Judgment in Halliburton v Chubb?

The Judgment of the Lisbon Court of Appeal of 24.03.2015 decided on the impartiality and independence of an arbitrator who was appointed and had participated in more than fifty cases by the same lawyers.

The Arbitration Court, before the incident of refusal, ruled that there were no grounds for refusal. This rejection led the Defendant to refer the matter to the Lisbon Court of Appeal, claiming, in short, that the arbitrator in question had failed to comply with the duty of disclosure and that this fact, together with the circumstances in question, could cause doubts as to the existence of economic compensation and the expectation of new appointments, in addition to the advantage of a more in-depth knowledge of the disputed facts.

The Lisbon Court of Appeal handed down a judgment upholding the request for refusal. The Court pointed out that, in addition to the arbitrators' duty of impartiality and independence, the duty of disclosure enshrined in the law (Article 13(1) of the LAV) is an ethical duty of the arbitrator based on trust and the transparency of the arbitrators' actions.

23. What happens in the case of a truncated tribunal? Is the tribunal able to continue with the proceedings?

In the event of the absence of an arbitrator, the LAV provides the solution in its Article 15. When an arbitrator becomes unable, in law or in fact, to perform his functions, these latter shall cease.

Article 16 of the LAV provides that in all cases when an arbitrator ceases to perform his functions, a replacement arbitrator shall be appointed. The court must decide whether any procedural act should be repeated in light of the new composition of the court.

24. Are arbitrators immune from liability?

No, arbitrators can be held liable. Their liability is provided for in articles 12, 15, 43 of the Voluntary Arbitration Law. Article 9 makes the provision that arbitrators cannot be held liable for damages arising from the decisions they render (except in cases where judicial magistrates can be held liable).

The same Article 9, paragraph 5 of the LAV provides that arbitrators are only liable towards the parties.

25. Is the principle of competence-competence recognized in your country?

Yes, the principle of competence-competence is provided in Article 18 of the LAV, stating that:

"*The arbitral tribunal may rule on its own jurisdiction, even if for that purpose it is necessary to assess the existence, validity or effectiveness of the arbitration agreement or the contract in which it is inserted, or the enforceability of said agreement."*

Thus, the arbitral tribunal may and must verify its jurisdiction to hear any dispute submitted to it.

26. What is the approach of local courts towards a party commencing litigation in apparent breach of an arbitration agreement?

In the case where the parties agree to an arbitration agreement and the claim is brought before the ordinary courts, there is a breach of this clause and the pre-emption of the voluntary arbitral tribunal, which has consequently the absolute lack of jurisdiction of the court, according to article 96, paragraph b) of the CPC (Processual Code). This irregularity is a dilatory exception, resulting from article 577, paragraph a).

27. How are arbitral proceedings commenced in your country? Are there any key provisions under the arbitration laws relating to limitation periods or time bars of which the parties should be aware?

The arbitral proceedings commence on the date on which the request for submission of the dispute to arbitration is received by the respondent, pursuant to Article 33 of the LAV. According to Article 33(2) of the LAV, the time-limits to be complied with are those agreed upon by the parties or fixed by the arbitral tribunal.

28. In what circumstances is it possible for a state or state entity to invoke state immunity in connection with the commencement of arbitration proceedings?

If a State agrees to submit a dispute to arbitration, its immunity from jurisdiction is waived under Article 17 of the United Nations Convention on Jurisdictional Immunities.

29. What happens when a respondent fails to participate in the arbitration? Can the local courts compel participation?

If the respondent fails to file an objection, the arbitration court shall continue the arbitration proceedings, without considering the omission as an acceptance of the claimant's allegations, whereas if a party fails to appear at a hearing, the court may continue the proceedings and render a decision.

30. Can third parties voluntarily join arbitration proceedings? If all parties agree to the intervention, is the tribunal bound by this agreement? If all parties do not agree to the intervention, can the tribunal allow for it?

The intervention of third parties in the arbitral proceedings is foreseen in article 36 of the LAV. According to this article, only third parties bound by the arbitration agreement on which the arbitration is based may be admitted to intervene in an arbitration proceeding in progress.

This adherence requires the consent of all parties to the arbitration agreement and may be made only for the purposes of the arbitration in question.

The admission of the intervention always depends on the court's decision, after hearing the original parties to the arbitration and the third party in question.

31. Can local courts order third parties to participate in arbitration proceedings in your country?

It is not possible for the state court to compel third parties to intervene in arbitration proceedings.

32. What interim measures are available? Will local courts issue interim measures pending the constitution of the tribunal?

The LAV gives the arbitration court the power to grant such interim measures and preliminary orders as the arbitration court considers necessary, provided that the adversarial principle of the arbitration proceedings is ensured. Arbitration courts are therefore precluded from issuing ex parte injunctions.

The arbitration courts may modify, suspend or terminate an interim measure at the request of either party or, in exceptional circumstances and upon prior notice to the parties, on the arbitration court's own initiative.

Pursuant to the Model Law (2006), and unless otherwise agreed by the parties, simultaneously with the application for an interim measure, a party may, without notice to any other party, request the arbitration court to make an interim and consequential preliminary order directing a party not to frustrate the purpose of the requested interim measure.

33. Are anti-suit and/or anti-arbitration injunctions available and enforceable in your country?

An anti-arbitration clause and Anti-suit clauses are not specifically regulated in the Portuguese legal system, but in order to resort to arbitration the consent of both parties is required, and the parties may agree that any dispute be resolved before the state courts.

34. Are there particular rules governing evidentiary matters in arbitration? Will the local courts in your jurisdiction play any role in the obtaining of evidence? Can local courts compel witnesses to participate in arbitration proceedings?

Article 38 of the LAV provides that where evidence depends on the will of a party or a third party, and the third party refuses to cooperate, the arbitration court may authorise a party to request the competent state court to produce the evidence before it, with the results being referred to the arbitration court.

35. What ethical codes and other professional standards, if any, apply to counsel and arbitrators conducting proceedings in your country?

Arbitrators must follow the Code of Ethics of the Portuguese Arbitration Association.

36. In your country, are there any rules with respect to the confidentiality of arbitration proceedings?

Article 30 paragraph 5 of the LAV provides that the arbitrators, the parties and the entities promoting the arbitration have the duty to keep confidential all the information they obtain and documents they become aware of through the arbitration process.

37. Are there any recent decisions in your country regarding the use of evidence acquired illegally in arbitration proceedings (e.g. 'hacked evidence' obtained through unauthorized access to an electronic system)?

There have been no recent arbitral decisions on the use of illicitly obtained evidence in the arbitral process.

38. How are the costs of arbitration proceedings estimated and allocated?

The LAV provides that if the parties have not previously agreed on the costs of the arbitration court, a written agreement must be made between the parties and the arbitration court before the arbitrator accepts its appointment.

If the parties and the arbitration court cannot reach an agreement, the arbitration court shall determine the costs, taking into account the complexity of the dispute, the value of the claim and the time spent by the court on the dispute. It is always possible for the parties, should they disagree with the amount, to apply to the arbitration court for a reduction of the amount.

39. Can pre- and post-award interest be included on the principal claim and costs incurred?

In Portugal it is possible to make a legal claim for interest from the time the payment should have been made until it is paid. This amount must be added to the value of the claim.

40. What legal requirements are there in your country for the recognition and enforcement of an award? Is there a requirement that the award be reasoned, i.e. substantiated and motivated?

In Portugal, the award shall be made in writing and shall be signed by the arbitrator(s).

Furthermore, the award has to contain:

a. the reasons upon which it is based, unless the parties agreed that no reasons are to be given or the award is an award on agreed terms;
b. its date and the place of arbitration; and
c. unless otherwise agreed by the parties, the distribution among the parties of the costs directly resulting from the arbitration

41. What is the estimated timeframe for the recognition and enforcement of an award? May a party bring a motion for the recognition and enforcement of an award on an ex parte basis?

The length of time that enforcement proceedings take depends on the circumstances and the competent court, however it is intended to be a relatively quick process.

An application for leave to enforce an award is made by ex parte originating summons and supported by affidavit evidence.

42. Does the arbitration law of your country provide a different standard of review for recognition and enforcement of a foreign award compared with a domestic award?

The enforcement procedure in Portugal depends on whether the award is domestic award or foreign award.

A domestic award may be enforced before the judicial

courts of first instance. The applicant party shall supply the original award or a certified copy thereof.

Foreign awards made in the territory of other Contracting States to the New York Convention are subject to the enforcement procedure provided for under the Convention.

43. Does the law impose limits on the available remedies? Are some remedies not enforceable by the local courts

The Law does not contain any restrictions on the types of remedies that can be awarded by an arbitral court. However, the awards made in Portugal may be set aside if the court finds that the content of the award is in conflict with the principles of international public policy of the Portuguese State, and also if such award is to be enforced or produce any effects in national territory, whenever such enforcement would lead to a result that is clearly incompatible with the principles of international public policy.

44. Can arbitration awards be appealed or challenged in local courts? What are the grounds and procedure?

Unless the parties expressly agree on the possibility of appealing to State courts or to another arbitral tribunal, the parties cannot have their case reviewed on the merits.

Hence, unless otherwise agreed by the parties, recourse to a State court against an arbitral award (rendered in an international arbitration seated in Portugal) can only be made by an application for setting aside if the party making the application provides proof that:

a. one of the parties to the arbitration agreement was under some incapacity, or the agreement is not valid;
b. there has been a violation within the proceedings;
c. the award dealt with a dispute not contemplated by the arbitration agreement or contains decisions beyond the scope of the arbitration;
d. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
e. the arbitral tribunal condemned in an amount in excess of what was claimed or on a different claim from that which was presented;
f. the award was made in violation of the requirements set out in the Law; or
g. the award was notified to the parties after the lapse of the maximum time limit set; or the State court finds that:
    i. the dispute cannot be decided by arbitration under Portuguese law; or
    ii. the content of the award is in conflict with the principles of international public policy of the Portuguese State.

45. Can the parties waive any rights of appeal or challenge to an award by agreement before the dispute arises (such as in the arbitration clause)?

The parties can expressly agree on the possibility of appealing to State courts in the arbitration agreement. The parties can also agree that an award made by the arbitral tribunal can be appealed to another arbitral tribunal, provided that they regulate the terms of such appeal.

46. To what extent might a state or state entity successfully raise a defence of state or sovereign immunity at the enforcement stage?

State courts tend to recognize the general principle of sovereign immunity of foreign states, insofar as the actions carried out by sovereign states are comprised within their sovereign authority.

47. In what instances can third parties or non-signatories be bound by an award? To what extent might a third party challenge the recognition of an award?

The Law contains specific provisions on the joinder of third parties. However, the parties may regulate this question differently in the arbitration agreement, either directly or by reference to the rules of an arbitral institution.

The general rule contained that only third parties bound by the arbitration agreement can join in pending arbitral proceedings and bound by an award.

The joinder is subject to the consent of all parties to the arbitration agreement and, if the arbitral tribunal has already been constituted, to the third party’s acceptance

of the composition of the arbitral tribunal. The arbitral tribunal shall only allow the joinder if it does not unduly disrupt the normal course of the arbitral proceedings and if there are relevant reasons that justify it, particularly in those situations set out in the Law.

48. Have there been any recent court decisions in your jurisdiction considering third party funding in connection with arbitration proceedings?

No.

49. Is emergency arbitrator relief available in your country? Are decisions made by emergency arbitrators readily enforceable?

The Law does not specifically address emergency arbitrator proceedings, including the effect of the decisions of emergency arbitrators, so the exact position of Portuguese law regarding the use of emergency arbitrator proceedings is still uncertain.

Considering that that the Law does not expressly prevent or limit the possibility of appointing an emergency arbitrator prior to the constitution of the arbitral tribunal (if the parties agreed on that) and that an emergency arbitrator can generally be regarded as an arbitrator empowered to issue interim measures, it may be argued that the provisions of the Law on interim measures shall also be applicable to emergency arbitrator proceedings.

50. Are there arbitral laws or arbitration institutional rules in your country providing for simplified or expedited procedures for claims under a certain value? Are they often used?

Yes this is possible. In fact, this type of process that allows the resolution of cases faster has been increasing.

51. Is diversity in the choice of arbitrators and counsel (e.g. gender, age, origin) actively promoted in your country? If so, how?

No it isn't actively promoted.

The Law only states that arbitrators must be individuals (not legal entities) with full legal capacity. Pursuant the arbitrators must also be independent and impartial.

52. Have there been any recent court decisions in your country considering the setting aside of an award that has been enforced in another jurisdiction or vice versa?

No.

53. Have there been any recent court decisions in your country considering the issue of corruption? What standard do local courts apply for proving of corruption? Which party bears the burden of proving corruption?

Yes there are recent court decisions related to corruption. In Portugal, the Public Ministry (MP) is the organ of the national judicial system responsible for representing the State, prosecuting and defending legality. Thus, in criminal proceedings it is up to the Public Ministry to prove the facts, namely corruption.

54. Have there been any recent court decisions in your country considering the judgment of the Court of Justice of the European Union in Slovak Republic v Achmea BV (Case C-284/16) with respect to intra-European Union bilateral investment treaties or the Energy Charter Treaty? Are there any pending decisions?

No.

55. Have there are been any recent decisions in your country considering the General Court of the European Union's decision Micula & Ors (Joined Cases T-624/15, T-694/15 and T-694.15), ECLI:EU:T:2019:423, dated 18 June 2019? Are there any pending decisions?

No.

56. What measures, if any, have arbitral institutions in your country taken in response to the COVID-19 pandemic?

Taking into account the disease COVID-19, guidelines and procedural measures were published to be adopted

by the arbitral tribunals and by the parties (or their representatives) in order to mitigate any negative effects of the current pandemic, the main measure being the possibility of holding hearings through remote means of communication, including videoconferencing systems.

57. Have arbitral institutions in your country implemented reforms towards greater use of technology and a more cost-effective conduct of arbitrations? Have there been any recent developments regarding virtual hearings?

The use of so-called “new information and communication technologies” is nothing new in arbitration.

Although there is not, generally, in this domain, a computer application as in the Courts, it is very common the practice of non-presential acts through e-mail. It is also quite frequent, especially in the context of international arbitrations the holding of meetings or conferences on the procedure via teleconference or videoconference.

With the exception of the COVID-19 period, the same is not true with regard to most hearings aimed at discussing the merits of the case and/or producing evidence.

However, despite the fact that the pandemic has caused some evolution in the application of technologies, it cannot be said that there have been significant developments in this area.

58. In your country, does the insolvency of a party affect the enforceability of an arbitration agreement?

Portuguese law recognizes the negative dimension of the principle of competence-competence.

National courts tend to give effect to this provision, and therefore tend to dismiss court proceedings started in breach of an arbitration agreement, unless the arbitration agreement is manifestly invalid, inoperative or incapable of being performed.

In recent years, there have been a number of cases brought before state courts where claimants invoke the lack of financial resources to resort to arbitration. However, Portuguese courts have asserted that, in principle, this is not a valid justification for not complying with the arbitration agreement.

59. Is your country a Contracting Party to the Energy Charter Treaty? If so, has it expressed any specific views as to the current negotiations on the modernization of the Treaty?

Yes, however didn’t express any specific views concerning the current negotiations on the modernization of the Treaty.

60. Have there been any recent developments in your jurisdiction with regard to disputes on climate change and/or human rights?

No.

61. Has your country expressed any specific views concerning the work of the UNCITRAL Working Group III on the future of ISDS?

In an official way, no.

Contributors

Ana Cláudia Rangel
Managing Associate
acrangel@raposobernardo.com

Joana Andrade Correia
Partner
jacorreia@raposobernardo.com

Manuel Esteves de Albuquerque
Senior Associate
mealbuquerque@raposobernardo.com