



Arbitration Guide
IBA Arbitration Committee

PORTUGAL

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I. Background

(i) How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?

There are no official statistics regarding the number of arbitrations in Portugal. Nevertheless, arbitration as a dispute resolution method has become more common in recent times and has been increasingly used in both international and domestic disputes involving both private and public law.

The main advantages ascribed to arbitration are the possibility of the parties to tailor the proceedings to the specifics of the case, the opportunity to choose (or to influence the choice of) the arbitrator(s), the arbitrators' expertise in the relevant subject matter and the arbitrators' availability to deal with the case.

Costs are sometimes seen as a disadvantage. However, the comparative expediency of arbitral proceedings and the default rule that awards are not subject to appeal continue to make arbitral proceedings generally more attractive than court proceedings with multiple appeals. Moreover, given that State court costs have become quite burdensome, notably for high value cases, recourse to arbitration can be less costly above certain amounts.

(ii) Is most arbitration institutional or ad hoc? Domestic or international? Which institutions and/or rules are most commonly used?

Again, although there are no official statistics available, both institutional and ad hoc arbitrations are frequently used.

Anecdotal evidence shows that most of the international arbitration proceedings involving Portuguese parties are institutional. In domestic arbitration, both institutional and ad hoc proceedings are common. However, the feeling within the market is that *ad hoc* arbitration appears to be widely used, in detriment of institutional arbitration. For domestic matters, the prevalent rules are the Rules of the Arbitration Centre of the Portuguese Chamber of Commerce and Industry (Commercial Arbitration Centre) (rules in force as of 1 March 2014, available in English). For international matters, the ICC Rules are the most commonly used.

(iii) What types of disputes are typically arbitrated?

Generally, arbitrations concern disputes involving economic interests. The Portuguese Arbitration Law (PAL) allows arbitration agreements regarding disputes that do not involve economic interests provided that the parties are entitled to settle their dispute.

Notably, under Portuguese law public law matters are also arbitrable (eg, tax law, administrative law or public procurement law).

The most common types of disputes revolve around construction matters, M&A transactions, shareholders' agreements, concession agreements and commercial contracts, in general.

There are also many arbitrations relating to tax matters under a specific tax arbitration regime.

(iv) How long do arbitral proceedings usually last in your country?

According to the PAL, parties are free to agree on the duration of the proceedings. However, there is a default rule establishing that the final award must be delivered to the parties within 12 months from the date of acceptance of the last arbitrator. This time-limit may be freely extended upon agreement by the parties or by decision of the arbitral tribunal, one or more times for successive periods of 12 months.

The actual duration of arbitral proceedings depends on their complexity and the conduct of the parties and the arbitral tribunal. However, it could be reasonably asserted that arbitration proceedings usually last one to two years.

According to the latest statistics provided by the Arbitration Centre of the Portuguese Chamber of Commerce and Industry (Commercial Arbitration Centre), the average duration of proceedings was of around 15 months.

(v) Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?

No. However, it is important to mention that if the parties seek any court assistance related to an arbitration (eg, appointment of arbitrators, evidence production, challenge of arbitrators, judicial interim measures or setting-aside the award) parties will need to be represented by Portuguese counsel.

II. Arbitration Laws

(i) What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?

Arbitration proceedings with their seat in Portugal are governed by Law 63/2011, of 14 December (PAL).

This law, which is based on the UNCITRAL Model Law and recent arbitration laws from arbitration-friendly jurisdictions, governs both domestic and international arbitrations seated in Portugal. Save for Chapter IX of the PAL, which is specifically dedicated to international arbitration proceedings, the provisions that govern domestic arbitration proceedings are applicable to international arbitration proceedings.

(ii) Is there a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?

Under the PAL, an arbitration is considered international when international trade interests are at stake.

Save for Chapter IX of the PAL (which governs the enforceability of pleas based on the domestic law of a party, the validity of the arbitration agreement, the rules of law applicable to the merits of the dispute, the impossibility of appeal of the award and international public policy), the provisions that govern domestic arbitration proceedings are applicable *mutatis mutandis* to international arbitration proceedings.

(iii) What international treaties relating to arbitration have been adopted (eg New York Convention, Geneva Convention, Washington Convention, Panama Convention)?

The New York Convention was ratified by Portugal in 1994 and Portugal made the so-called 'first reservation', whereby the New York Convention is only applicable vis-à-vis arbitral awards made in another Contracting State.

The Geneva Protocol of 1923 was ratified in 1931, the Geneva Convention of 1927 was ratified in 1930, the Washington Convention was ratified in 1984 and the Panama Convention was ratified in 2002.

Portugal is also a party to the MIGA Convention and to some bilateral treaties with Angola (30 August 1995), Cape Verde (16 February 1976), Guinea Bissau (5 July 1988), Mozambique (12 April 1990) and Sao Tome and Principe (23 March 1976).

(iv) Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

The parties may choose the law to be applied by the arbitrators, if they have not authorised the arbitrators to decide *ex aequo et bono*.

Any designation of the law or legal system of a given state shall be construed, unless expressly agreed, as directly referring to the substantive law of that state and not to its conflict of laws rules.

Failing any designation by the parties, the arbitral tribunal shall apply the law of the state to which the subject matter of dispute has the closest connection.

In both cases, the arbitral tribunal shall consider the contractual terms agreed by the parties and the relevant trade usages.

III. Arbitration Agreements

- (i) **Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?**

An arbitration agreement is valid and enforceable if it is made in writing and refers to an arbitrable dispute (see Section IV(i) below).

The arbitration agreement may concern an existing dispute, even if it has been brought before a state court (submission agreement), or possible disputes which may arise in respect of a defined legal relationship, contractual or not (arbitration clause).

A submission agreement must determine the subject matter of the dispute, whereas an arbitration clause must specify the legal relationship to which the disputes relate.

Notably, in addition to matters of a contentious nature in the strict sense, parties may agree to submit to arbitration other issues that require the intervention of an impartial decision maker, such as those related to the need to specify, complete and adapt contracts with long-lasting obligations to new circumstances.

The PAL expressly allows reference to arbitration rules, establishing that the arbitration agreement includes not only what the parties have directly agreed, but also the provisions of arbitration rules to which the parties have referred.

In an international arbitration, an arbitration agreement is valid and the dispute it governs may be submitted to arbitration if the requirements – as set out by the law chosen by the parties or the otherwise applicable law – are met.

- (ii) **What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an arbitration agreement will not be enforced?**

Portuguese courts have shown a significant arbitration-friendly attitude.

Even before the PAL – which now clearly establishes this rule – the rule commonly observed by the courts was that an agreement to arbitrate would be enforced unless the court found, in a *prima facie* analysis, that the arbitration agreement was manifestly null and void, or had become inoperative or incapable of being performed.

- (iii) Are multi-tier clauses (eg arbitration clauses that require negotiation, mediation and/or adjudication as steps before an arbitration can be commenced) common? Are they enforceable? If so, what are the consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?**

There is no legal provision governing this matter. However, in accordance with the principle of party autonomy, these clauses are likely to be enforceable. As with any other agreements under Portuguese law, they have to be executed in good faith and they must contain specific, determinable obligations. Therefore, if the requirements of negotiation, mediation and/or adjudication are binding, the consequence of commencing an arbitration in disregard of such a provision should be lack of jurisdiction of the arbitral tribunal.

Even though there are no decisions concerning the consequences of commencing arbitration in disregard of multi-tier arbitration clauses, Portuguese State courts hold the validity and enforceability of said provisions¹.

- (iv) What are the requirements for a valid multi-party arbitration agreement?**

The PAL does not establish any special rule governing multi-party arbitration agreements. Therefore, the general requirements mentioned above will apply unless the parties agree otherwise.

- (v) Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?**

Although this is a matter which Portuguese scholars and courts have not addressed extensively, asymmetric arbitration clauses are generally considered to be acceptable. However, such a clause would be considered invalid if: (i) it restricts

¹ The referred decisions concern the jurisdiction of State courts and of arbitral tribunals over agreements with multi-tier arbitration clauses. On said disputes, the parties, in light of the wording of the arbitration clause, considered that, after (unsuccessfully) complying with pre-litigation proceedings (such as negotiation or mediation), could choose between resorting to State courts or to arbitral tribunals. In those cases, Portuguese State courts have decided on the exclusive jurisdiction of arbitral tribunals.

the contractual party's access to judicial recourse in standard "business to consumer" agreements; (ii) the clause is deemed unconscionable or contrary to good faith and good morals; and (iii) its enforcement surpasses the boundaries of good faith, the good morals or the economic and social purposes of such rights.

(vi) May arbitration agreements bind non-signatories? If so, under what circumstances?

As a rule, the arbitration agreement is merely binding on the signatories, whether as original parties or later adherents to the agreement.

There is, nonetheless, some discussion as to the meaning and the purview of adhesion. Some scholars suggest that adhesion may occur tacitly, notably in mergers and acquisitions, incorporation by reference, piercing of the corporate veil and application of good faith principles.

Arbitration clauses may be extended to non-signatories only if supported by unequivocal and conclusive evidence. Such extension is not automatic.

IV. Arbitrability and Jurisdiction

(i) Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?

According to the PAL, some disputes may not be arbitrated. This prohibition includes disputes under the exclusive jurisdiction of state courts and non-economic disputes in which the parties are not entitled to settle the issue under dispute.

Pursuant to the competence-competence principle, expressly recognised in the PAL, the arbitrators will decide whether the matter is arbitrable or not. However, if an action is brought before a state court and the court finds, in a prima facie analysis, that the dispute is clearly not arbitrable the court may refuse to enforce the arbitration agreement.

The PAL provides a high degree of flexibility regarding international arbitration in that it allows a dispute to be arbitrated if the requirements – as set out by the law chosen by the parties to govern the arbitration agreement, by the law applicable to the subject matter of the dispute, or by Portuguese law – are met.

The lack of arbitrability is a matter of jurisdiction.

- (ii) **What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?**

As a rule, state courts must dismiss the case if the action brought before it is subject to an arbitration agreement. The only exception to that rule is if the state court finds that the arbitration agreement is manifestly null and void, or has become inoperative or incapable of being performed.

However, the existence of an arbitration agreement shall not be taken into account by the state court on its own motion, but rather only if the respondent so requests not later than when submitting its first pleading on the substance of the dispute. Therefore, if the respondent participates in the court proceedings so as to invoke the existence of an arbitration agreement and the consequent lack of jurisdiction of the state court, the respondent is not deemed to have waived its right to arbitrate.

A dispute over jurisdiction in the state courts does not hinder the commencement or the continuation of the arbitral proceedings nor the issuance of an arbitral award.

Notwithstanding the above, if a state court finds, by means of a final and binding decision, that the arbitral tribunal lacks jurisdiction to resolve the dispute that was brought before it, the arbitral proceedings shall cease and the award made therein will cease to produce effects.

The issues of invalidity, inoperativeness or incapability of performance of an arbitration agreement cannot be litigated separately before a state court in order to hinder the constitution or the operation of an arbitral tribunal. However, as a rule, the PAL sets forth that it is not incompatible with an arbitration agreement for a party to request from a state court, before or during arbitral proceedings, an interim measure of protection and for a state court to grant such measure.

- (iii) **Can arbitrators decide on their own jurisdiction? Is the principle of competence-competence applicable in your jurisdiction? If yes, what is the nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?**

The principle of competence-competence is widely recognised in Portugal.

The nature of the control exercised by the courts on the tribunal's jurisdiction is limited to a prima facie analysis. Courts may refuse to enforce the arbitration agreement only if it is manifestly null and void, inoperative, or incapable of being performed.

This said, should the arbitral tribunal consider that it holds jurisdiction and issue an award, such award is subject to eventual review within setting aside proceedings, where the issue of the tribunal's jurisdiction may be raised. State courts will then have the opportunity to address the issue.

V. Selection of Arbitrators

(i) How are arbitrators selected? Do courts play a role?

The parties enjoy freedom in the selection of arbitrators. In fact, parties may appoint arbitrators in the arbitration agreement or later, in a document signed by the parties, or the parties may agree on a procedure for appointing arbitrators, such as by assigning some or all of the appointments to a third party.

In an arbitration with a sole arbitrator, the parties must agree on the arbitrator's appointment.

In an arbitration with three or more arbitrators, each party shall appoint an equal number of arbitrators, who in turn appoint the chair of the arbitral tribunal.

Unless otherwise agreed, if a party is to appoint an arbitrator and fails to do so within 30 days of receipt of the other party's request to do so, or if the arbitrators appointed by the parties fail to agree on the choice of the chair within 30 days of the appointment of the last arbitrator, the appointment of the remaining arbitrator will be made, upon request of any party, by the competent state court. This provision also applies, as a rule, if a third party fails to appoint an arbitrator within 30 days.

The PAL includes a special provision for the appointment of arbitrators in case of multiple claimants or respondents: unless otherwise agreed by the parties, if the arbitral tribunal is to consist of three arbitrators, the claimants will jointly appoint an arbitrator and the respondents will jointly appoint another. If the claimants or the respondents fail to reach an agreement on the arbitrator to be appointed by them, the appointment of such arbitrator will be made, upon request of any party, by the competent state court. Presumably influenced by the *Dutco* doctrine (see *Sociétés BKMI et Siemens c/ société Dutco Construction*, Cour de Cassation, Jan 7, 1992), the PAL further establishes that, if requested by a party, the competent state court may appoint all arbitrators and indicate which one of them is the chair if it becomes clear that the parties that failed to jointly appoint an arbitrator have conflicting interests regarding the substance of the dispute. In such event the appointment of an arbitrator made by one of the parties becomes void.

In appointing an arbitrator, the competent state court must consider any arbitrator qualifications required by the parties' agreement. The state court must also consider the requirements of independence and impartiality. In international

arbitration, while appointing a sole or third arbitrator, the court must also consider appointing an arbitrator of a nationality other than those of the parties.

The decisions made by the competent state court in respect of the appointment of arbitrators are not subject to appeal.

(ii) What are the requirements in your jurisdiction as to disclosure of conflicts? Do courts play a role in challenges and what is the procedure?

When a person is approached in connection with his or her possible appointment as an arbitrator, he or she must disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality and independence.

Throughout the arbitral proceedings, the arbitrator must disclose to the parties and the other arbitrators, without delay, any such circumstances that arose, or of which the arbitrator only became aware, after accepting the mandate.

An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence, or if the arbitrator does not possess the qualifications agreed to by the parties. A party may challenge the arbitrator it appointed, or in whose appointment it has participated, only for reasons of which it became aware after the appointment was made.

The parties are free to agree on a procedure for challenging an arbitrator.

Failing such agreement, the party who intends to challenge an arbitrator must send a written statement of the reasons for the challenge to the arbitral tribunal within 15 days of (a) becoming aware of the constitution of the arbitral tribunal; or (b) becoming aware of circumstances that give rise to justifiable doubts as to the arbitrator's impartiality or independence. If the challenged arbitrator does not withdraw from office and the party that appointed such arbitrator insists that the arbitrator continue in office, the arbitral tribunal, including the challenged arbitrator, will decide the challenge.

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

(iii) Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source and generally what are they?

Arbitrators must be individuals and have full legal capacity.

No person may be precluded from being appointed as an arbitrator because of that person's nationality, without prejudice to the appointment of arbitrators in international arbitrations by state courts (in which state courts consider appointing an arbitrator of a nationality other than those of the parties) and the discretion of the parties.

The paramount ethical duties of arbitrators are being independent and impartial.

(iv) Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?

The Portuguese Arbitration Association has prepared a Code of Ethics for Arbitrators, which is binding on all the members of the said Association. Moreover, the provisions established in the mentioned Code may be adopted in whole or part by any entities authorised to administer arbitration proceedings, by the parties involved in ad hoc arbitrations and by any arbitral tribunal.

The major leading arbitral institutions, following the lead of the Arbitration Centre of the Portuguese Chamber of Commerce and Industry (Commercial Arbitration Centre), have also enacted Codes of Ethics and arbitrations under the auspices of such institutions shall be governed by the same.

These Codes and the IBA Guidelines on Conflicts of Interest in International Arbitration are important tools for the correct interpretation of the impartiality and independence duties set forth in the PAL. Several state court decisions have made reference both to existing codes and to the IBA Guidelines on Conflicts of Interest in International Arbitration, as well as to other international instruments.

VI. Interim Measures

(i) Can arbitrators issue interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?

Unless otherwise agreed, the arbitral tribunal may, at the request of a party and after hearing the opposing party, grant the interim measures it deems necessary.

At any time prior to the issuance of a final award, the arbitral tribunal may issue an interim measure, whether or not in the form of an award. An interim measure is a temporary measure by which the arbitral tribunal orders a party to:

1. Maintain or restore the status quo pending determination of the dispute;

2. Take action that would prevent harm or prejudice to the arbitral process, or refrain from taking action that is likely to do so;
3. Provide a means of preserving assets out of which a subsequent award may be satisfied;
4. Preserve evidence that may be relevant and material to the resolution of the dispute.

A party may, without notice to any other party, request an interim measure and apply for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

Preliminary orders shall be binding on the parties but are not be subject to enforcement by a state court. Their validity is limited to 20 days.

In contrast, interim measures are, as a rule, enforceable by the competent state court, even if the arbitration in which it was issued was seated abroad.

(ii) Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court ordered provisional relief remain in force following the constitution of the arbitral tribunal?

The PAL fully allows the intervention of state courts, provided that such intervention supports the arbitration proceedings. Such powers are deemed to be concurrent and not merely subsidiary and are irrespective of the place of the arbitration.

As previously mentioned (Section IV(ii) above), it is not incompatible with an arbitration agreement for a party to request from a state court, before or during arbitral proceedings, an interim measure of protection and for a state court to grant such measure.

State courts must exercise such power in accordance with their own procedures, taking into consideration the specific features of international arbitration.

(iii) To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?

When the evidence to be taken depends on one of the parties or on a third party who refuses to cooperate, a party may, with the approval of the arbitral tribunal if constituted, request from the competent state court that the evidence be taken before it. The results from the state court are forwarded to the arbitral tribunal.

This provision applies to both arbitration proceedings seated in Portugal and abroad.

VII. Disclosure/Discovery

- (i) What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?**

Portuguese law gives arbitral tribunals wide discretion in conducting the proceedings, especially concerning procedural rules and evidence.

The arbitral tribunal has the power to determine the admissibility, relevance, materiality and weight of any evidence presented or to be presented.

Especially in international arbitrations, it is common for tribunals to agree with parties that for disclosure or discovery matters, the IBA Rules on the Taking of Evidence will be followed, either strictly or merely as guidance.

- (ii) What, if any, limits are there on the permissible scope of disclosure or discovery?**

There is no specific rule in Portuguese law establishing limits on the permissible scope of disclosure or discovery.

- (iii) Are there special rules for handling electronically stored information?**

There is no specific rule in Portuguese law for handling electronically stored information.

VIII. Confidentiality

- (i) Are arbitrations confidential? What are the rules regarding confidentiality?**

Arbitrators, parties and arbitral institutions are obliged to maintain confidentiality regarding all information they obtain in the course of the arbitration, without prejudice to the duty to communicate or disclose information or activities to the competent authorities, if so imposed by law (eg, corruption and money laundering prevention).

Notwithstanding the above, unless a party objects, awards and other decisions may be published, excluding the details that would identify the parties.

According to the rules of the Arbitration Centre of the Portuguese Chamber of Commerce and Industry (Commercial Arbitration Centre), arbitrations involving

the State or other public entities will, as a rule, be published. A similar rule has meanwhile been incorporated into the law.

(ii) Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?

There are no provisions in the PAL specifically governing the arbitral tribunal's power to protect trade secrets and confidential information.

However, under the wide power conferred upon the arbitral tribunal to determine the admissibility, relevance, materiality and weight of any evidence, the arbitral tribunal will certainly consider the need to protect trade secrets and confidential information.

Again, especially in international arbitration proceedings, it is common for tribunals to agree with parties that for disclosure or discovery matters, the IBA Rules on the Taking of Evidence will be followed, either strictly or as guidance, which would likely lead to protect such sensitive information.

(iii) Are there any provisions in your arbitration law as to rules of privilege?

There are no provisions in the PAL specifically governing the arbitral tribunal's power to protect privileged information.

However, under the wide power conferred upon the arbitral tribunal to determine the admissibility, relevance, materiality and weight of any evidence, the arbitral tribunal will certainly consider the need to protect privileged information.

Again, especially in international arbitration proceedings, it is common for tribunals to agree with parties that for disclosure or discovery matters, the IBA Rules on the Taking of Evidence will be followed, either strictly or as guidance, which would likely lead to protect such sensitive information.

IX. Evidence and Hearings

(i) Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration proceedings? If so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?

There is a growing trend to seek guidance from the IBA Rules on the Taking of Evidence, especially in international arbitration proceedings.

Anecdotal evidence shows that such Rules are mostly followed as guidance, the arbitral tribunal thus retaining discretion to depart from them. It is common for

the parties and the arbitral tribunal to agree upon the partial application of the IBA Rules or on specific amendments to the provisions established therein.

(ii) Are there any limits to arbitral tribunals' discretion to govern the hearings?

In the absence of an agreement by the parties or an applicable provision in the PAL, the arbitral tribunal may conduct the arbitration in the manner it considers appropriate, defining the procedural rules it deems adequate.

The paramount duties the arbitral tribunal must observe during the hearings and throughout the proceedings are treating the parties with equality and giving them a reasonable opportunity to present their case.

Unless the parties agree otherwise, the arbitral tribunal will decide whether to hold hearings for the presentation of evidence or whether the proceedings will be conducted merely on the basis of documents or other means of evidence. Notwithstanding the above, the arbitral tribunal must hold one or more hearings whenever so requested by a party, unless the parties previously agreed that no hearings would be held.

(iii) How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?

Witness testimony is usually presented through direct oral examination, but the use of witness statements with live cross examination is becoming increasingly common.

If witness statements are used, direct examinations are normally shortened.

Arbitrators normally have the right to examine witnesses and to interject questions at any time during the examination by counsel.

It is also normal for the arbitral tribunal to maintain complete control over the procedure for a witness giving oral evidence. The tribunal may limit or exclude any question or refuse to permit a party to examine a witness if the tribunal finds the witness' testimony would be irrelevant, immaterial, burdensome or duplicative.

(iv) Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?

There are no specific provisions on who can or cannot appear as a witness within arbitration proceedings.

There are no mandatory rules in Portugal on oath or affirmation within arbitration proceedings.

- (v) **Are there any differences between the testimony of a witness specially connected with one of the parties (eg legal representative) and the testimony of unrelated witnesses?**

Before the entry into force of the current PAL, there was some discussion as to the admissibility of testimony from the parties or from a witness specially connected with the parties. Such discussion has stabilized around the idea that such testimony is admissible because the current PAL widely provides for the power of the arbitral tribunal to determine the admissibility, relevance, materiality and weight of any evidence, and also because such testimony is allowed in some arbitration regulations (among them, the Rules of the Arbitration Centre of the Portuguese Chamber of Commerce and Industry).

- (vi) **How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?**

There are no specific rules on the presentation of expert testimony.

Concerning independence and impartiality of expert witnesses, the PAL contains only a specific provision regarding experts appointed by the arbitral tribunal. Such experts are subject to the same rules as the arbitral tribunal regarding disclosure of any circumstances likely to give rise to justifiable doubts as to the expert's impartiality and independence. Such experts are also subject to the same challenge procedure.

- (vii) **Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?**

Unless otherwise agreed by the parties, the arbitral tribunal may, on its own initiative or upon request of the parties, appoint one or more experts to prepare a written or oral report on specific issues to be determined by the arbitral tribunal. In such case, the arbitral tribunal may require a party to provide information, documents or goods for the expert's inspection.

Unless otherwise agreed by the parties, if a party requests or if the arbitral tribunal considers it necessary, the expert will, after delivery of his or her report, participate in a hearing where the arbitral tribunal and the parties have the opportunity to examine the expert.

There are no requirements that experts be selected from a particular list. However, the experts appointed by the arbitral tribunal are subject to the same rules as the arbitral tribunal concerning impartiality and independence.

(viii) Is witness conferencing ('hot-tubbing') used? If so, how is it typically handled?

There is no specific legal provision in Portugal in this respect and its use is still uncommon, particularly in domestic arbitration proceedings.

(ix) Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?

There are no specific rules or requirements in Portuguese law as to the use of arbitral secretaries, but their use is becoming increasingly common in both ad hoc and institutional arbitrations.

X. Awards

(i) Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?

The award must meet the following requirements:

1. Be in writing and signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of the arbitral tribunal (or merely the signature of the chair if the award is to be made by the chair only, eg, when a majority decision cannot be achieved) will suffice provided that the reason for the omitted signature is stated in the award.
2. State the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or if the award is an award by consent.
3. State its date and the place of arbitration.
4. Determine the proportions of costs to be borne by the parties, unless otherwise agreed by the parties.

Moreover, the award shall be issued within the set time limit. Failure to deliver the final award within the time limit results in the termination of the arbitral proceedings and may subject the arbitrators that unjustifiably hinder the award from being made within the time limit to liability for damages. However, the arbitration agreement will remain effective for the purpose of constituting a new arbitral tribunal and for commencing a new arbitration.

Under the PAL, there are no limitations on the types of permissible relief. However, the rules applicable to the merits of the dispute may limit the permissible relief.

(ii) Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?

The PAL does not contain any provision on these matters, as these are matters generally governed by the rules applicable to the merits of the dispute.

Anecdotal evidence shows that arbitrators normally award interest and compound interest, especially when the relevant contracts or arbitration regulations contain provisions to that effect.

It is uncertain whether an award ordering punitive or exemplary damages could be deemed as contrary to Portuguese international public policy in the context of setting aside proceedings.

(iii) Are interim or partial awards enforceable?

Both interim and partial awards are enforceable in Portugal.

(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?

Unlike the previous law, the PAL currently in force does not contain any reference to dissenting opinions. Be that as it may, there is no reason to consider that the issuance of dissenting opinions to the award is forbidden. In practice, this often happens.

(v) Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?

Awards by consent are specifically permitted by the PAL.

Pursuant to this provision, if the parties settle the dispute during the proceedings, the arbitral tribunal will terminate the proceedings. If the parties so request and provided that their settlement is not in violation of public policy, the arbitral tribunal will record the settlement in the form of an arbitral award on agreed terms. Awards by consent must meet the same formal requirements as any other award. Such awards have the same status and effect as any other award on the merits of the case.

Arbitral proceedings are terminated by the final award or by an order issued by the arbitral tribunal in the following cases:

1. When the claimant withdraws its claim, unless the respondent objects and the arbitral tribunal recognizes a legitimate interest in obtaining a final settlement of the dispute;
2. When the parties agree on the termination of the proceedings;
3. When the arbitral tribunal finds that the continuation of the proceedings has for any reason become unnecessary or impossible; or
4. When the parties have failed to provide the relevant advance payments for fees and expenses, after having been given reasonable additional time, provided that none of the remaining parties, after being given proper notice, wishes to remedy the failure.

The mandate of the arbitral tribunal ends with the termination of the arbitral proceedings, subject to the provisions governing the correction and interpretation of the award, the issuance of additional awards and the remanding of awards to the arbitral tribunal.

Unless otherwise agreed by the parties, the chair of the arbitral tribunal must keep the original file of the arbitral proceedings for a minimum period of two years and the original arbitral award for a minimum period of five years after termination of the proceedings.

(vi) What powers, if any, do arbitrators have to correct or interpret an award?

The arbitral tribunal may correct computational, clerical or typographical errors, if any party so requests (with notice to the other party), or on its own motion, within 30 days of the receipt of the award.

The arbitral tribunal may also interpret any obscurity or ambiguity in the award or the reasons on which it is based, if any of the parties so requests (with notice to the other party), within 30 days of the receipt of the award.

Unless otherwise agreed by the parties, the arbitral tribunal may issue an additional award as to parts of the claim or claims presented in the arbitral proceedings but omitted from the award, if any of the parties so requests (with notice to the other party), within 30 days of receipt of the award.

These powers must be exercised within the time limit set for the issuance of the final award.

Moreover, the PAL sets forth that within setting aside proceedings the state court may stay the proceedings and allow the tribunal the possibility of resuming the arbitral proceedings or to take any other measure so as to allow for elimination of the grounds for setting aside.

XI. Costs

(i) Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?

There are no specific rules in this regard in the PAL.

Unless otherwise agreed by the parties, the award will determine the proportions in which the parties will bear the costs directly resulting from the arbitration.

The arbitrators may also decide in the award, if they deem it fair and appropriate, to order parties to compensate other parties for some or all of the reasonable costs and expenses they incurred in the arbitration.

(ii) What are the elements of costs that are typically awarded?

The costs typically awarded are the arbitration costs (the fees and expenses of arbitrators, the institution and the arbitral secretary) and the reasonable costs and expenses that the parties incurred in the arbitration (eg, relating to counsel, party representatives, witnesses or correspondence).

(iii) Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?

The arbitral tribunal has jurisdiction to decide on its own costs and expenses if such matters have not been regulated in the arbitration agreement or any later agreement between the parties and the arbitrators.

In fixing its fees, the arbitral tribunal will consider the complexity of the issues decided, the amount of the dispute and the time to conclude the arbitration. The arbitral tribunal may require advance payments from the parties through a separate decision.

However, any of the parties may request the competent state court to reduce the amounts of the fees, expenses, or advance payments fixed by the arbitrators. The state court may determine the amounts it deems adequate after giving the members of the arbitral tribunal the opportunity to present their views on the matter.

- (iv) **Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?**

Subject to the parties' agreement, the arbitral tribunal has discretion to apportion the costs between the parties.

- (v) **Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?**

There is no basis for courts to review the tribunal's decision on costs unless a party can demonstrate that such decision is manifestly contrary to public policy). However, the arbitral tribunal's decision on the amount of its fees, expenses and advance payments may be reviewed by the courts.

XII. Challenges to Awards

- (i) **How may awards be challenged and on what grounds? Are there limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?**

Unless otherwise agreed by the parties, awards can only be challenged by means of an application to set aside.

An arbitral award may be set aside by the competent state court only if:

1. The party making the application furnishes proof that:

- (i) One of the parties to the arbitration agreement was under some incapacity; or the arbitration agreement is not valid under the law to which the parties have subjected it (or by default, the PAL); or
- (ii) There has been a material violation of the fundamental principles in the PAL (ie, the respondent must be summoned to present its defence, the parties must be treated with equality and must be given a reasonable opportunity to present their case before the award is issued, and in all phases of the proceedings the principle of adversarial process must be guaranteed); or
- (iii) The award deals with a dispute beyond the scope of the arbitration agreement; or
- (iv) The composition of the arbitral tribunal or the arbitral procedure was materially not in accordance with the agreement of the parties (or by

default, the PAL), unless such agreement was in conflict with a non-derogable provision of the PAL; or

- (v) The arbitral tribunal awarded an amount exceeding what was claimed; the arbitral tribunal decided a different claim than what was presented; the arbitral tribunal dealt with issues that it should not have dealt with; or the arbitral tribunal failed to decide issues that it should have decided; or
- (vi) The award was not in writing, did not display the necessary signatures of the arbitrators or lacked reasoning; or
- (vii) The parties were not notified of the award until after the relevant time limit had lapsed; or

2. The court finds that:

- (i) The subject matter of the dispute cannot be decided by arbitration under Portuguese law; or
- (ii) The content of the award conflicts with the principles of international public policy of the Portuguese State.

An application for setting aside must be made within 60 days from the date the party making that application received the notification of the award. If the application for setting aside concerns the arbitral tribunal's decision on a request for correction, interpretation, or issuance of an additional award, the party must make its application within 60 days from the date of the arbitral tribunal's decision.

Although there are no official statistics, the average duration of challenge proceedings is not less than two years.

The arbitral award may be enforced even if an application for setting aside has been made. However, the party against whom enforcement is sought may request a stay of the enforcement proceedings, provided that such party offers to provide security. A stay is granted only if security is effectively provided within the time limit set by the court.

(ii) May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?

As a rule, the right to apply for the setting aside of an arbitral award cannot be waived. The PAL allows a waiver only if a party knew that a provision of the PAL that parties can derogate from, or any condition set out in the arbitration

agreement, was not respected and the party proceeds without making a timely objection.

(iii) Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?

The rule established in the PAL is that arbitral awards cannot be appealed.

However, in domestic arbitration, the PAL establishes that the final award is subject to appeal to the competent state court only if the parties expressly contemplated such possibility in the arbitration agreement and provided that the dispute has not been decided *ex aequo et bono* or as *amiable compositeur*.

If the parties have expressly contemplated the possibility of appeal in the arbitration agreement, there are two levels of appeal: one to the relevant appeal court (*Tribunal da Relação*) and another to the Supreme Court (*Supremo Tribunal de Justiça*).

In international arbitration, the award is not subject to appeal unless the parties have expressly agreed on the possibility of appeal to another arbitral tribunal and established its terms.

(iv) May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?

Yes. Where appropriate and if so requested by a party, the competent state court may suspend the setting aside proceedings for a period of time in order to give the arbitral tribunal the opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

The state court cannot go into the merits of issues decided by the award. As a consequence, if the state court sets aside the arbitral award, the issues must be submitted to another arbitral tribunal.

XIII. Recognition and Enforcement of Awards

(i) What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court? Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?

Domestic awards do not need recognition and are enforceable as soon as any appeals or amendments are concluded.

In contrast, regardless of the nationality of the parties, awards made in arbitrations seated abroad are effective in Portugal only if such awards have been recognised by the competent Portuguese state court, without prejudice to the mandatory provisions of the New York Convention.

The party that seeks recognition of a foreign arbitral award in Portugal must supply the original, authenticated award or a duly certified copy thereof, as well as the original of the arbitration agreement or a duly authenticated copy thereof (along with translations into Portuguese if needed).

After the application for recognition is made, accompanied by the documents referred to above, the opposing party will be summoned to present its opposition within 15 days.

After the necessary pleadings are submitted and the procedural steps are completed, the parties and an appointed member of the Public Prosecutor's Office are granted access to the file for 15 days, for the purpose of closing arguments, after which the relevant state court will make a decision.

Recognition and enforcement of an arbitral award may be refused only:

1. If the party against whom the award is invoked proves that:
 - (i) A party to the arbitration agreement was under some incapacity; or the agreement is not valid under the law to which the parties have subjected it (or by default, the law of the country where the award was made); or
 - (ii) The party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case; or
 - (iii) The award deals with a dispute beyond the scope of the arbitration agreement; however, parts of the award that are within the scope of the arbitration agreement may still be recognized and enforced; or
 - (iv) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties (or by default, the law of the country where the arbitration took place); or
 - (v) 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, the award was made; or
2. If the court finds that:

- (i) The subject matter of the dispute is not capable of settlement by arbitration under Portuguese law; or
- (ii) The recognition or enforcement of the award would lead to a result clearly incompatible with the international public policy of the Portuguese State.

The competent state court for the recognition of a foreign arbitral award is the court of appeal (*Tribunal da Relação*) in the same district as the domicile of the person against whom the recognition is requested. If the arbitral award refers to public law matters, the competent state court is the Central Administrative Court (*Tribunal Central Administrativo*) of the same district.

Only after having been duly recognised by the competent state court can the relevant arbitral award be enforced in Portugal.

- (ii) **If an exequatur is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?**

Once the award has been recognised, enforcement proceedings must be brought in the competent court of first instance. Enforcement may be challenged on the grounds listed in the Portuguese Civil Procedural Code. However, the grounds for refusal of recognition cannot be reiterated in the enforcement proceedings.

- (iii) **Are conservatory measures available pending enforcement of the award?**

Yes, provided that the necessary legal requirements are met (basically, the requirements of *fumus boni iuris* and *periculum in mora*).

- (iv) **What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?**

Portuguese courts generally display a pro-arbitration and pro-enforcement attitude.

There is no case law in Portugal concerning the enforcement of foreign awards set aside by the courts at the place of arbitration.

- (v) **How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?**

The duration of proceedings depends on a number of factors, including the complexity of the matter and the filing of a defence, but it is generally not less

than two years. The enforcement of an award must be sought before the expiration of the statute of limitations applicable to the obligation created under the award.

XIV. Sovereign Immunity

- (i) Do state parties enjoy immunities in your jurisdiction? Under what conditions?**

When the arbitration is international and one of the parties to the arbitration agreement is a state, a state-controlled organisation or a state-controlled company, this party may not invoke its domestic law to challenge the arbitrability of the dispute or its capacity to be a party to the arbitration, or in any other way evade its obligations arising from the arbitration agreement.

The entry into arbitration agreements by the state and other legal entities governed by public law is also recognised by the PAL.

- (ii) Are there any special rules that apply to the enforcement of an award against a state or state entity?**

Portuguese case law distinguishes between assets dedicated to a sovereign activity (*jure imperii*), which are protected assets, and assets dedicated to an economic or commercial activity (*jure gestionis*), which are not protected by the state's immunity.

XV. Investment Treaty Arbitration

- (i) Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?**

Portugal ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States in 1984.

Portugal has also been a party to the Energy Charter Treaty since 1998.

Reference to other multilateral treaties on the protection of investments can be found at: www.gddc.pt/siii/tratados.html.

- (ii) Has your country entered into bilateral investment treaties with other countries?**

Portugal has ratified over 50 Agreements on the Mutual Promotion and Protection of Investments (including with members of the Community of Portuguese Speaking Countries, eg, East Timor, Angola (not yet in force), Brazil, Macao,

Mozambique, Sao Tome and Principe (not yet in force), and Cape Verde). A list with links to the respective full text can be found at: www.gddc.pt/siii/tratados.html or <https://icsid.worldbank.org/ICSID/FrontServlet> .

XVI. Resources

(i) What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?

Practitioners wishing to learn more about arbitration in Portugal may consult the following:

- The website of the Portuguese Arbitration Association, where, *inter alia*, a translation into English of the PAL can be found (<http://arbitragem.pt/legislacao/2011-12-14--lav/lav-english.pdf>);
- The *Revista Internacional de Arbitragem e Conciliação*, periodically published by the Portuguese Arbitration Association;
- The Interventions of the Annual Congress of the Arbitration Centre of the Portuguese Chamber of Commerce and Industry, annually published by Almedina (currently edition VI);
- The Young Arbitration Review, the first under-40 Portuguese International Arbitration Review written in English by lawyers from around the world, distributed online to its subscribers every January, April, July and October;
- Manuel Pereira Barrocas, *Lei de Arbitragem Comentada* (Almedina, 2013);
- António Sampaio Caramelo, *Temas de Direito da Arbitragem* (Coimbra Editora, 2013);
- Armindo Ribeiro Mendes / Dário Moura Vicente / José Miguel Júdice / José Robin de Andrade / Nuno Ferreira Lousa / Pedro Metello de Nápoles / Pedro Siza Vieira / Sofia Martins, *Lei da Arbitragem Voluntária Anotada* (Almedina, 2015);
- Mariana França Gouveia, *Curso de Resolução Alternativa de Litígios* (Almedina, 2014);
- Manuel Pereira Barrocas, *Manual de Arbitragem* (Almedina, 2013);

- Luís de Lima Pinheiro, *Arbitragem Transnacional - A determinação do estatuto da arbitragem* (Almedina, 2005).

(ii) Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they and when do they take place?

The following major arbitration events may be highlighted:

- The Annual Congress of the Arbitration Centre of the Portuguese Chamber of Commerce and Industry, a conference where relevant issues and recent developments on international arbitration are discussed, held every June/July in Lisbon;
- APA-40 events, organised by the under-40 section of the Portuguese Arbitration Association, where practical experiences are periodically exchanged throughout the year;
- *Encontro Internacional de Arbitragem de Coimbra*, an event organized by practitioners José Miguel Júdice and António Pinto Leite, held every October in Coimbra;
- Periodical events organized by various organizations, such as the Portuguese Chapter of the Spanish Arbitration Club.
- *Faculdade de Direito da Universidade Nova de Lisboa* and *Faculdade de Direito de Lisboa* Post-Graduation Programs on Arbitration, which provide a wide overview on both domestic and international arbitration proceedings.

XVII. Trends and Developments

(i) Do you think that arbitration has become a real alternative to court proceedings in your country?

In domestic arbitration, arbitration has become more and more of an alternative to court proceedings, but there is an increased concern about costs.

International arbitration has commonly been regarded as the normal method for solving international disputes.

(ii) What are the trends in relation to other ADR procedures, such as mediation?

Although a new boost to mediation proceedings was expected to derive from the publication of Law no. 29/2013, of 19 April 2013, which establishes the general principles governing mediation proceedings taking place in Portugal (by public or private entities), the legal framework of civil and commercial mediation and the framework applicable to mediators in Portugal, mediation is still rarely used.

(iii) Are there any noteworthy recent developments in arbitration or ADR?

The entry into force of the PAL has been a major development for arbitration in Portugal.

This law, which wisely implemented many internationally tested solutions, has been a valuable way of modernising Portuguese arbitration and making it more competitive and attractive, hopefully fostering the choice of Portugal as a seat for international arbitrations, in particular those involving parties from Portuguese speaking countries.