# PORTUGAL

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ANNEX I: Portuguese Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (in force since 14 March 2012)
ANNEX II: Code of Civil Procedure approved by Law no. 41/2013, of 23 June 2013 (excerpts)

## Chapter I. Introduction

### 1. LAW ON ARBITRATION

*a. Overview*

Portuguese law draws a distinction between voluntary and compulsory arbitration on the one hand, and between private arbitration and public law arbitration on the other.

Voluntary arbitration (*arbitragem voluntária*) is based upon an arbitration agreement. In Portugal it is currently governed by the Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (in force since 14 March 2012) (the "Arbitration Act" or the "Act", see **Annex I** hereto). Compulsory arbitration (*arbitragem necessária*) takes place when there is a legal duty to submit the settlement of a dispute to arbitration. This is the case of the arbitration contemplated, e.g., in Law no. 26/2015, of 14 April 2015, concerning disputes between copyright-collecting societies and users of copyrighted works or their representatives in respect of the former's tariffs. Procedural rules for this kind of arbitration are set forth in Arts. 1136 to 1139 of the Code of Civil Procedure approved by Law no. 41/2013, of 23 June 2013, last amended by Law no. 55/2021, of 13 August 2021 (the "CCP", see **Annex II** hereto for excerpts).

Private law arbitration (*arbitragem privada*) concerns disputes between individuals and private corporations or between these and public entities acting without powers of authority. Public law arbitration (*arbitragem pública*) occurs when the dispute involves legal entities vested with a *jus imperium* and carrying out assignments of public interest. Such is the case of the arbitration contemplated in: (1) Arts. 180 to 187 of the Code of Procedure in the Administrative Courts approved by Law no. 15/2002, of 22 February 2002, last

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amended by Law no. 118/2019, of 17 September 2019; (2) Art. 476 of the Code of Public Contracts, approved by Decree-Law no. 18/2008, of 29 January 2008, last amended by the Parliament's Resolution no. 16/2020, of 19 March 2020; (3) Decree-Law no. 10/2011, of 20 January 2011, concerning the settlement by arbitration of disputes on tax law issues, last amended by Law no. 119/2019, of 18 September 2019.[1]

The scope of this report is limited to the Portuguese legal system on private voluntary arbitration, both domestic and international.

*b. Influence of the Model Law and other arbitration statutes*

The Portuguese Voluntary Arbitration Act of 2011 is based upon the 1985 UNCITRAL Model Law on International Commercial Arbitration, including its 2006 amendments. The Act's provisions have, however, been drafted bearing in mind the need to adapt the Model Law's rules to Portuguese legal tradition and practices. They do not, therefore, simply reproduce the Model Law. Furthermore, they govern not only international, but also domestic arbitration. Regarding some issues, such as the negative effect of competence-competence, multiparty arbitration, and joinder of third parties, the Portuguese Arbitration Act has clearly gone beyond the Model Law. The Act also draws inspiration from other modern arbitration statutes, such as the French, the German, the Italian, and the Spanish.

## 2. PRACTICE OF ARBITRATION

*a. History*

The use of arbitration in Portugal as a method for settling private disputes dates back to the middle ages and was particularly favoured by the Commercial Code of 1833.[2] It was much restricted, however, in the Civil Procedure Codes of 1939 and 1961. Over the past four decades, the popularity of arbitration has grown steadily in Portugal, in particular since the adoption of the 1986

1. See, on recent legislation concerning Public Law arbitration in Portugal, Quadros, Fausto de, *"Linhas gerais da reforma do Código de Processo nos Tribunais Administrativos em matéria de arbitragem",* Revista Internacional de Arbitragem e Conciliação (2014) pp. 7 et seq.; Vieira, Pedro Siza, *"A arbitrabilidade de Direito Público em Portugal: Um Ponto da Situação",* Revista Internacional de Arbitragem e Conciliação (2014) pp. 29 et seq.; Alves, Pedro Leite, *"Notas sobre a arbitragem de actos administrativos e de contratos públicos"*, in Cordeiro, António Menezes, *Arbitragem Comercial. Estudos Comemorativos dos 30 Anos do Centro de Arbitragem Comercial* (Almedina 2019), pp. 933 et seq.; Medeiros, Rui and Portocarrero, Marta, "Administrative Arbitration", in Fonseca, André Pereira et al. (eds*), International Arbitration in Portugal* (Kluwer 2020), pp. 371 et seq.; and Villa-Lobos, Nuno and Pereira, Tânia Carvalhais, "Tax Arbitration", in *ibid*, pp. 415 et seq.
2. See, on the history of arbitration in Portugal, Cortez, Francisco, *"A arbitragem voluntária em Portugal. Dos "ricos homens" aos tribunais privados",* O Direito (1992), pp. 365 et seq. and 541 et seq.; and Nogueira, José Artur Duarte, *"A arbitragem na História do Direito português (subsídios)",* Revista Jurídica (1996), pp. 20 et seq.

Voluntary Arbitration Act, which was replaced by the Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (the "Arbitration Act" or the "Act", see **Annex I** hereto). By December 2020, the Portuguese Ministry of Justice had authorized thirty-six arbitration centres.[3] Despite the considerable growth in the number of proceedings submitted to those arbitration centres, many significant commercial arbitrations taking place in this country are commonly referred to *ad hoc* arbitral tribunals.

*b. Arbitral institutions*

The main arbitration centre in Portugal is the Commercial Arbitration Centre of the Portuguese Chamber of Commerce and Industry (*Centro de Arbitragem Comercial*).[4] The latest version of its rules (hereinafter referred to as the "CAC Rules"), currently under revision, entered into force on 1 March 2014.[5]

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3. A list of which is available at <https://dgpj.justica.gov.pt/Resolucao-de-Litigios/Arbitragem/Centros-de-Arbitragem-autorizados>.
4. See <https://www.centrodearbitragem.pt>.
5. On which see Mendes, Armindo Ribeiro, *"O Centro de Arbitragem Comercial da Câmara de Comércio e Indústria Portuguesa : a sucessão de regulamentos de arbitragem"*, in Cordeiro, António Menezes, *Arbitragem Comercial. Estudos Comemorativos dos 30 Anos do Centro de Arbitragem Comercial* (Almedina 2019), pp. 95 et seq.; Pinto, Filipe Vaz, *"O Regulamento de Arbitragem do Centro de Arbitragem Comercial. Algumas notas"*, in *ibid*, pp. 381 et seq.; and Martins, Sofia, "Commercial Arbitration Centres", in Fonseca, André Pereira et al. (eds), *International Arbitration in Portugal* (Kluwer 2020), pp. 319 et seq.

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*e. Journals on arbitration*

Revista Internacional de Arbitragem e Conciliação (Almedina)

Revista PLMJ Arbitragem (PLMJ)

*f. Publication of awards*

A selection of arbitral awards rendered in Portugal is available on the website of the Portuguese Arbitration Association.[6] Awards made under the auspices of the *Centro de Arbitragem Comercial,* the *Centro de Arbitragem Administrativa*, and the *Arbitrare* arbitration centre are also available on their websites.[7] In 2020, the Ministry of Justice initiated, pursuant to Ordinance no. 165/2020, of 7 July 2020, the publication of arbitral awards concerning public law disputes on an electronic platform.[8]

# Chapter II. Arbitration Agreement

## 1. FORM AND CONTENTS OF THE AGREEMENT

*a. Existing and future disputes*

The Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (the "Arbitration Act" or the "Act", see **Annex I** hereto) makes a distinction between a submission agreement (*compromisso arbitral*), i.e., an agreement to submit an already existing dispute to arbitration, and an arbitration clause (*cláusula compromissória*), i.e., an agreement to refer future disputes eventually arising from a given relationship to arbitration (Art. 1(3) of the Arbitration Act). Their effects are however largely the same in Portuguese law.[9]

*b. Form of the agreement*

According to Art. 2 of the Arbitration Act, arbitration agreements must be made in writing. This requirement may however be complied with in multiple ways, since it is deemed to be met, pursuant to that provision, if the agreement

6. See <http://arbitragem.pt/jurisprudencia>.
7. See, respectively, <https://www.centrodearbitragem.pt>, <https://caad.org.pt> and <https://www.arbitrare.pt>.
8. See <https://tribunais.org.pt/Publicacoes/Arbitragem-administrativa-e-tributaria>.
9. See, on this, Ventura, Raúl, *"Convenção de Arbitragem"*, Revista da Ordem dos Advogados (1986) pp. 289 et seq.; Almeida, Carlos Ferreira de, *"Convenção de arbitragem: conteúdo e efeitos"* in *I Congresso do Centro de Arbitragem da Câmara de Comércio e Indústria Portuguesa* (Almedina 2008) pp. 81 et seq.; Vicente, Dário Moura, *"Convenção de arbitragem: problemas atuais"*, O Direito (2015) pp. 303 et seq.; and Domingues, Paulo de Tarso, "The Arbitration Agreement", in Fonseca, André Pereira et al. (eds), *International Arbitration in Portugal* (Kluwer 2020), pp. 47 et seq.

is recorded either in a written document signed by the parties, in an exchange of letters, telegrams, faxes or other means of telecommunications which provide a written record of the agreement, including electronic means of communication. The requirement that the arbitration agreement be in writing is also met if it is recorded in an electronic, magnetic, optical or any other type of medium that offers the same guarantees of reliability, comprehensiveness, and preservation. The arbitration-friendliness (*favor arbitrandum*) that inspires Portuguese law is apparent in this provision.[10]

The Arbitration Act further classifies as an arbitration agreement the situation where a reference is made in a contract to a document containing an arbitration clause, provided that the contract is in writing and that the reference is such as to make that clause part of it.[11]

An exchange of statements of claim and defence in arbitral proceedings in which the existence of such an agreement is invoked by one party and is not denied by the other has the same effect as an arbitration agreement in writing.

*c. Model arbitration clause*

The above-mentioned *Centro de Arbitragem Comercial* recommends the following clause for submitting future disputes to arbitration under its Rules:

> "All disputes arising out or in connection with the present contract shall be finally settled under the Rules of Arbitration of the Arbitration Center of the Portuguese Chamber of Commerce and Industry (Commercial Arbitration Center) by one or more arbitrators appointed in accordance with the said Rules."

## 2. PARTIES TO THE AGREEMENT

*a. Capacity*

The Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (the "Arbitration Act" or the "Act", see **Annex I** hereto) does not contain any special rule regarding the capacity to conclude an arbitration agreement. All individuals and corporations (i.e., companies, associations, and foundations) with general contractual capacity may therefore enter into an arbitration agreement.

Under Portuguese conflict of laws rules, capacity to enter a contract is governed by each party's personal law. This is, in principle, the law of the

10. See, Vicente, Dário Moura, *"A manifestação do consentimento na convenção de arbitragem"*, Revista da Faculdade de Direito da Universidade de Lisboa (2002) pp. 1001 et seq. On the notion of *favor arbitrandum* in general, see Diamvutu, Lino, *O favor arbitrandum. Ensaio de uma teorização* (Almedina 2020).
11. See Ventura, Raúl, *"Convenção de arbitragem e cláusulas contratuais gerais"*, Revista da Ordem dos Advogados (1986) p. 36.

nationality for individuals and the law of the country where the seat of the main and effective administration is located for corporations (Arts. 31 and 33 of the Civil Code, respectively, and Art. 3 of the Commercial Companies Code).

Persons affected by an incapacity cannot enter contracts by themselves and can only be bound by arbitration clauses that have been entered into by their legal representatives on their behalf. Corporations may only commit themselves to arbitration through their legal or contractual representatives.

An arbitration agreement is in principle not terminated by the death or the extinction of a party to it (Art. 4(4) of the Act).

*b. Insolvency*

Pursuant to Art. 87(1) of the Code of Insolvency and Recovery of Companies, approved by Decree-Law no. 53/04, of 18 March 2004 (last amended by Law no. 84/2019, of 28 June 2019), a declaration of insolvency of an individual domiciled in or of a company seated in Portugal suspends the effects of the arbitration agreements to which the insolvent person is a party and which relate to disputes the outcome of which may affect the value of its estate. Nevertheless, according to Art. 87(2) of the same Code, arbitral proceedings pending at the time of declaration of insolvency are allowed to continue without having to be appended to the insolvency proceedings; moreover, the administrator of the insolvency may submit requests and pleadings in those proceedings without leave of the court. An insolvent person cannot enter into an arbitration agreement related to the said disputes.[12]

*c. State and State Agencies*

The Portuguese State and other public entities may enter into arbitration agreements with either Portuguese nationals or foreign persons or entities, provided that they are authorized thereto by a special law or that the dispute which is the subject matter of the arbitration agreement arises out of a private law relationship (Art. 1(5) of the Arbitration Act).

Concerning public law relationships, the Code of Procedure in Administrative Courts expressly allows the setting up of an arbitral tribunal in order to decide disputes related to administrative contracts, non-contractual liability of the State or other administrative bodies, as well as those related to administrative acts that may be revoked on grounds other than their invalidity.

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 own domestic law either to challenge

12. See, on this, Leitão, Luís Menezes, *Direito da Insolvência*, 4th ed. (Almedina 2012) p. 174; and Nápoles, Pedro Metello de, *"Efeitos da insolvência na convenção de arbitragem. Insuficiência económica das partes em processo arbitral"* in *V Congresso do Centro de Arbitragem Comercial* (Almedina 2012) pp. 139 et seq.

the arbitrability of the dispute or its capacity to be a party to the arbitration, or to in any other way evade its obligations arising from such agreement (Art. 50 of the Arbitration Act).[13]

*d. Multi-party arbitration, joinder, and consolidation*

The Arbitration Act addresses certain problems raised by the appointment of arbitrators in *multi-party arbitrations*.[14] In the case of multiple claimants or respondents, and if the arbitral tribunal is to be composed of three arbitrators, the claimants may jointly appoint an arbitrator and the respondents may jointly appoint another one. Should, however, the claimants or the respondents fail to reach an agreement on the arbitrator to be appointed by them, the appointment of such arbitrator is made, upon request of any of the parties, by the competent State court. In that case, the State court may also appoint all arbitrators and indicate which one of them shall be the chair of the arbitral tribunal, if it becomes clear that the parties that failed to jointly appoint an arbitrator have conflicting interests regarding the substance of the dispute. In this case, the appointment of the arbitrator previously made by one of the parties shall have no effect (Art. 11).

In principle, only parties bound by the arbitration agreement, whether from the date of such agreement or by having subsequently adhered to it, are allowed to join ongoing arbitral proceedings.15 Such joinder requires, according to Art. 36 of the Act, the consent of all parties to the arbitration agreement and may only take place in respect of the arbitration in question.[16] If the arbitral tribunal has already been constituted, the joinder of a third party may only be allowed or requested if that party declares that it accepts the current composition of the tribunal. When a joinder is requested by the third party, this acceptance is presumed. A third-party joinder must always be decided by the arbitral tribunal, after giving the original parties to the arbitration and the third party in question the opportunity to state their views. The arbitral tribunal may only allow a joinder if this does not unduly disrupt

13. See, on this, Correia, José Sérvulo, *"Arbitragem internacional com Estados na nova lei de arbitragem voluntária"*, Revista Internacional de Arbitragem e Conciliação (2012) pp. 99 et seq.
14. For a detailed account of such problems, see Carvalho, Jorge Morais de & Gouveia, Mariana França, *"Arbitragens complexas: questões materiais e processuais"*, Revista Internacional de Arbitragem e Conciliação (2011) pp. 111 et seq.; Gouveia, Mariana França, *Curso de resolução alternativa de litígios* (Almedina 2014) pp. 262 et seq.; and Monteiro, António Pedro Pinto, *O Princípio da Igualdade e a Pluralidade de Partes na Arbitragem: os Problemas na Constituição do Tribunal Arbitral* (Almedina 2017).
15. On the extension of arbitration agreements to third parties, see Gonçalves, Diogo Costa, *"A vinculação de terceiros à convenção de arbitragem. Algumas reflexões"*, in Cordeiro, António Menezes, *Arbitragem Comercial. Estudos Comemorativos dos 30 Anos do Centro de Arbitragem Comercial* (Almedina 2019), pp. 285 et seq.; and Barrocas, Manuel Pereira, *"A questão da extensão da convenção de arbitragem a terceiros não subscritores"*, in *ibid*, pp. 701 et seq.
16. See, on that provision, Sousa, Miguel Teixeira de, *"A intervenção de terceiros no processo arbitral"*, Revista Internacional de Arbitragem e Conciliação (2012) pp. 149 et seq.

the normal course of the arbitral proceedings and if there are relevant reasons that justify the joinder, including the following: (1) The third party has an interest in relation to the subject matter of the dispute equal to that of the claimant or respondent, such that it would have originally permitted voluntary joinder or imposed compulsory joinder between one of the parties to the arbitration and the third party; (2) The third party wishes to present a claim against the respondent with the same object as that of the claimant, but which is incompatible with the latter's claim; (3) The respondent against whom a credit is invoked that may, *prima facie*, be characterized as a joint and several credit, wants the other possible joint and several creditors to be bound by the final award; or (4) The respondent wants the joinder of third parties against whom it may have a claim in case the claimant's request is completely or partially granted.

Under Art. 26 of the CAC Rules, any party may apply to the Chairman of the Centre for the consolidation of pending proceedings if: (1) The parties to those proceedings are the same; or (2) The requirements for third party joinder are met. The Chairman of the Centre, after consulting the parties and the arbitrators already appointed, must refuse consolidation if it is deemed not convenient in light of the need to reconstitute the arbitral tribunal, the state of the proceedings or any other special reason. If consolidation is ordered, the tribunal already constituted is maintained; if this is not possible, due to the existence of several parties because of consolidation, the tribunal is reconstituted in accordance with the applicable rules.

## 3. DOMAIN OF ARBITRATION

### *a. Arbitrability in general*

According to the Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (the "Arbitration Act" or the "Act", see **Annex I** hereto), any dispute involving economic interests may be referred to arbitration, by means of an arbitration agreement, provided that it is not exclusively submitted by a special law to the State courts or to compulsory arbitration (Art 1(1)). An arbitration agreement concerning disputes that do not involve economic interests is also valid insofar as the parties are entitled to conclude a settlement on the right in dispute (Art 1(2)).[17] Pursuant to Art. 1249 of the Civil Code, parties may not settle on rights that they may not dispose of (such as, for example, the personal rights that are comprised in the civil status of individuals) and on issues relating to unlawful transactions.

17. See, Caramelo, António Sampaio, *"A disponibilidade do direito como critério de arbitrabilidade do litígio – reflexões de jure condendo"*, Revista da Ordem dos Advogados (2006) pp. 1233 et seq.; and Correia, Alexandra Nascimento, "Arbitrability", in Fonseca, André Pereira et al. (eds), *International Arbitration in Portugal* (Kluwer 2020), pp. 33 et seq.

*b. Arbitrability of specific issues*

According to Art. 34 of the Portuguese Code of Industrial Property (approved by Decree-Law no. 110/2018, of 10 December 2018), a declaration of nullity, as well as the annulment of patents, supplementary protection certificates, utility models and topographies of semi-conductor products, may only take place through a court decision. Arbitral tribunals may nevertheless decide on the validity of such titles as incidental questions, e.g., when raised by the defendant in contractual or infringement proceedings as a means of defense, in which case the award will only have *inter partes* effects, as is now expressly provided for by Art. 3(3) of Law no. 62/2011, of 12 December 2011, as amended by Decree-Law no. 110/2018, of 10 December 2018.[18] By virtue of Arts. 38 and 47(1) of the same Code, an arbitral tribunal may be constituted to review the decisions rendered by the National Institute of Industrial Property (*Instituto Nacional da Propriedade Industrial*) that grant or refuse industrial property rights or that relate to transfers, licences, declarations of forfeiture or to any other acts that affect, modify or terminate industrial property rights. Pursuant to Art. 229 of the Code of Copyright and Neighbouring Rights, copyright disputes may also constitute the object of voluntary arbitration proceedings, as long as they do not relate to non-disposable rights (as is the case, e.g., of authors' moral rights according to Art. 56(2) of the same Code).

Although, according to Law no. 19/2012, of 8 May 2012, as amended by Law no. 23/2018, of 8 May 2018, the determination of the occurrence of anti-competitive practices or the granting of exemptions from the application of competition laws is primarily within the exclusive jurisdiction of the Portuguese state agency which administers the application of antitrust and competition laws, the Competition Authority (*Autoridade da Concorrência*), an arbitral tribunal to which a contractual issue has been submitted may also assess (as a court would) the breach of that law as an incidental question.

Corporate disputes also fall into the domain of arbitrable matters under the Portuguese Arbitration Act, although they raise specific problems (regarding, *inter alia,* shareholders' consent to arbitrate, the conduct of arbitration proceedings involving multiple shareholders and the subjective scope of the

18. See, Marques, João Paulo Remédio, *"A apreciação da validade de patentes (ou certificados complementares de protecção) por tribunal arbitral necessário – excepção versus reconvenção na Lei n.º 62/2011"*, Boletim da Faculdade de Direito de Coimbra (2011) pp. 179 et seq.; Oliveira, Ana Perestrelo de, *Arbitragem de litígios com entes públicos*, 2nd ed. (Almedina 2015) pp. 45 et seq.; Vicente, Dário Moura, "Arbitrability of Intellectual Property Disputes: a Comparative Survey", Arbitration International (2015), pp. 151 et seq.; *idem*, *A tutela internacional da propriedade intelectual*, 2nd ed. (Almedina 2019) pp. 474 et seq.; *idem*, *"O novo regime da arbitragem em matéria de patentes"*, Revista de Direito Intelectual (2019/I), pp. 37 et seq.; and Macedo, Joaquim Shearman de & Ladeira, Sofia Rebelo, "Arbitration and Intellectual Property Rights", in Fonseca, André Pereira et al. (eds), *International Arbitration in Portugal* (Kluwer 2020), pp. 431 et seq. (all with further references).

effects of arbitral awards rendered in such proceedings),[19] which have led to calls for legislative action, notably from the Portuguese Arbitration Association.[20]

*c. Filling of gaps and adaptation of contracts*

In addition to matters of a strictly contentious nature, parties may, according to Art. 1(4) of the Arbitration Act, agree to submit to arbitration any other issues that require the intervention of an impartial decision maker, including those related to the need to specify, complete and adapt contracts giving rise to long-lasting obligations to new circumstances. Even in the absence of such an agreement, arbitrators, like judges, may, pursuant to Art. 239 of the Civil Code, fill gaps in contracts in accordance with the presumed will of the parties and the principle of good faith.

Furthermore, Art. 437 of the Civil Code allows courts, as well as arbitral tribunals, to adapt contracts in cases of abnormal changes of the circumstances on which the parties have based their decision to enter a contract. This depends on whether (1) demanding compliance with the obligations stipulated therein would seriously affect the principle of good faith and (2) the change of circumstances is not covered by the risks of the contract. The award thus rendered has the same effect of any other arbitral award.

*d. Binding expertise*

Although, as seen above, under Portuguese Law arbitration is not exclusively aimed at the settlement of disputes and may also be used for the adaptation and supplementation of contracts, it should not be confused with binding expertise, which is a procedure akin to arbitration that does not have the same legal effects.

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19. See Maia, Pedro, *"Arbitragem societária: presente e prospectiva"*, Revista Internacional de Arbitragem e Conciliação (2017) pp. 38 et seq.; Silva, Paula Costa e, *"Hot topics nas especificidades processuais da arbitragem societária: disponibilidade do direito de nomeação de árbitro e objetivização do contraditório"*, Revista Internacional de Arbitragem e Conciliação (2017) pp. 16 et seq.; Júdice, José Miguel, *"Projeto de arbitragem societária. Cinco notas introdutórias. Doze questões e cinco comentários finais sobre o projeto"*, in *XII Congresso do Centro de Arbitragem Comercial* (Almedina 2019) pp. 11 et seq.; Perestrelo, Ana, *"Brevíssima introdução à arbitragem societária: a propósito do Anteprojeto da Associação Portuguesa de Arbitragem"*, Revista de Direito Civil (2019) pp. 467 et seq.; Vaz, Teresa Anselmo, *"A validade da cláusula arbitral estatutária"*, in Cordeiro, António Menezes, *Arbitragem Comercial. Estudos Comemorativos dos 30 Anos do Centro de Arbitragem Comercial* (Almedina 2019), pp. 1039 et seq.; and Dias, Rui Pereira, "Corporate Disputes Arbitration", in Fonseca, André Pereira et al. (eds), *International Arbitration in Portugal* (Kluwer 2020), pp. 449 et seq.

20. See the draft law on corporate arbitration prepared under the auspices of the Portuguese Arbitration Association, *"Regime Jurídico da Arbitragem Societária (Projeto)"*, in Revista Internacional de Arbitragem e Conciliação (2017) pp. 244 et seq., also available at <https://arbitragem.pt/pt/apa/projetos/arbitragem-societaria>.

Such is the case, according to the Supreme Court of Portugal, of a procedure stipulated in an agreement whereby the parties have entrusted an auditing company to be appointed by a third person with the task of assessing the pecuniary value of the shares of a company which one of the parties promised to sell to the other, both parties having undertaken in writing to comply with the result of such assessment and having also stipulated that a given amount would be paid by the seller to the buyer in case of non-compliance with the assessment.[21]

## 4. SEPARABILITY OF ARBITRATION CLAUSE

The Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (the "Arbitration Act" or the "Act", see **Annex I** hereto) adopts the principle of the separability of the arbitration clause from the main contract in which it is inserted or to which it relates. This rule is expressly enshrined in Art. 18(2) of the Arbitration Act, which states that "an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract".[22] Accordingly, a decision by the arbitral tribunal that the contract is null and void does not automatically entail the invalidity of the arbitration clause.

An arbitration agreement contained in a contract that did not come into existence because it was not signed by the parties is, however, deemed as non-binding, notwithstanding its autonomy vis-à-vis the main contract.[23]

Another consequence of that principle is the *competence-competence* of the arbitral tribunal,[24] which may, according to Art. 18(1) of the Act, rule on its own jurisdiction, even if for that purpose it has to determine the existence, the validity or the effectiveness of the arbitration agreement or of the contract of which it forms part, or the applicability of the said arbitration agreement.

21. See the ruling of the Supreme Court of 21 January 2003, *Cadernos de Direito Privado* (2004) pp. 44 et seq., with a note by Vicente, Dário Moura, at pp. 52 et seq. See also, on this topic, Vieira, Pedro Siza, "Expert Determination", Revista Internacional de Arbitragem e Conciliação (2017) pp. 226 et seq.
22. See, on this, below, Chapter V.4.
23. See the ruling of the Supreme Court of Justice of 6 April 2017, case no. 416/16.0YRLSB.S1 (rendered with one dissenting vote), available at <http://www.dgsi.pt>.
24. On which see Caramelo, António Sampaio, *"A competência da competência e a autonomia do tribunal arbitral na lei de arbitragem portuguesa"*, Revista del Club Español del Arbitraje (2014) pp. 19 et seq.

## 5. EFFECT OF THE AGREEMENT (SEE ALSO CHAPTER V.4 – JURISDICTION)

According to Art. 5(1) of the Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (the "Arbitration Act" or the "Act", see **Annex I** hereto), a State court before which an action is brought in a matter which is the object of an arbitration agreement shall, if the respondent so requests not later than when submitting its first statement on the substance of the dispute, dismiss the case, unless it finds that the arbitration agreement is manifestly null and void, is or has become inoperative or is incapable of being performed.[25]

In Portugal, courts may thus only carry out a *prima facie* control of the validity and enforceability of the arbitration agreement. Arbitral tribunals clearly have priority in deciding issues affecting their jurisdiction: they should decide them first. This is the so-called *negative effect* of the tribunal's competence-competence.

Portuguese law has hereby endeavoured to prevent as much as possible delaying tactics by the party resisting arbitration and to centralize the contentious issues concerning the validity and enforceability of the arbitration agreement, at least in an initial stage, in the arbitral tribunal, which is assumed to be the most appropriate forum for this purpose. This is so irrespective of whether the arbitration is to take place in Portugal or abroad. *Favor arbitrandum* is also apparent in this provision.

Arbitral proceedings may be commenced or continued, and an award may be made, while the issue of the arbitrators' jurisdiction is pending before a State court. However, Portuguese law does not entrust arbitral tribunals with the exclusive power to decide matters concerning their own jurisdiction. Pursuant to Art. 5(3) of the Act, the arbitral proceedings shall cease, and the award made therein shall produce no effects, when a State court considers, by means of a final and binding decision, that the arbitral tribunal is not competent to settle the dispute that was brought before it. This decision may be rendered namely in proceedings aimed at the annulment of the arbitral award. In what concerns the jurisdictional issues at stake, the final word is thus deferred to State courts.

In sum, arbitrators may be the *first judges* to decide on their jurisdiction, but they are not the *sole judges* of that issue. In Portugal, the negative effect of competence-competence is thus essentially a rule of *chronological*, rather than *hierarchical*, priority of the arbitral tribunal in deciding issues affecting its jurisdiction. The decision rendered by the tribunal is always subject to review by the courts.

It is noteworthy that according to Art. 5(4) of the Portuguese Arbitration Act the issues of invalidity and unenforceability of an arbitration agreement cannot be discussed autonomously in an action brought before a State court to

25. See, on this, the ruling of the Supreme Court of 2 June 2015, case no. 1279/14.6TVLSB.S1, available at <http://www.dgsi.pt>.

that effect, or in an interim measure procedure brought before the same court and aimed at preventing the constitution or the operation of an arbitral tribunal. Anti-arbitration injunctions are thus excluded in Portuguese law. This rule is a further corollary of the abovementioned negative effect of competence-competence.

## Chapter III. Arbitrators

### 1. QUALIFICATIONS

Only individuals enjoying full legal capacity may be arbitrators (Art. 9(1) of the Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (the "Arbitration Act" or the "Act", see **Annex I** hereto)). There are no other restrictions regarding who may act as an arbitrator. Portuguese law sets out no demands concerning, e.g., arbitrators' legal training or admission to the national bar, their nationality or their previous experience or responsibilities.

The parties may, however, stipulate positive and negative qualifications for arbitrators in their arbitration agreement, within the principles of Portuguese public policy. When appointing an arbitrator, the competent State court must have due regard to any qualifications required from the arbitrator or arbitrators by the agreement of the parties and secure the appointment of an independent and impartial arbitrator; in the case of an international arbitration, when appointing a sole or third arbitrator, the court shall furthermore take into account the convenience of appointing an arbitrator of a nationality other than those of the parties.

Arbitrators must in any event be independent and impartial (Art. 9(3) of the Act).[26] A person invited to act as an arbitrator should therefore disclose any circumstances that may give rise to justifiable doubts as to his impartiality and independence. An arbitrator must also, throughout the arbitral proceedings, disclose without delay to the parties and the remaining arbitrators any such circumstances that arise subsequently, or of which he only became aware after accepting his mandate (Art. 13(1) and (2)).

26. See, on this, Cardoso, Augusto Lopes, *"Da deontologia do árbitro"*, 456 Boletim do Ministério da Justiça (1996) pp. 31 et seq.; Miranda, Agostinho Pereira de, *"Investir em virtude: dever de revelação e processo de recusa do árbitro"*, Revista Internacional de Arbitragem e Conciliação (2013), pp. 9 et seq.; Caramelo, António Sampaio, *"O estatuto do árbitro e a constituição do tribunal na LAV"*, *ibid*, pp. 25 et seq.; Barrocas, Manuel, *"A ética dos árbitros e as suas obrigações legais"*, *ibid*, pp. 191 et seq.; Raposo, Mário, *"Os árbitros"*, in *Estudos em homenagem ao Prof. Doutor José Lebre de Freitas*, vol. II (Coimbra Editora 2013) pp. 893 et seq.; and Monteiro, António Pedro Pinto and Moreira, João Ilhão, "The Arbitral Tribunal", in Fonseca, André Pereira et al. (eds), *International Arbitration in Portugal* (Kluwer 2020), pp. 81 et seq.

In 2020, the Portuguese Arbitration Association adopted a new Code of Ethics (*Código Deontológico*), which is binding upon its members when participating in arbitrations, either as arbitrators or as parties' representatives, and seeks to incorporate the international best practices in this respect.[27] It expressly refers the *IBA Guidelines on Conflicts of Interest in International Arbitration* as relevant elements for its interpretation and supplementation. The Commercial Arbitration Centre has also adopted an *Arbitrators' Code of Ethics* that applies to any person who has accepted to serve as arbitrator in proceedings subject to its rules.[28]

## 2. APPOINTMENT OF ARBITRATORS

Parties are free to appoint the arbitrator or arbitrators either in the arbitration agreement or in a document subsequently signed by them, or to agree on a procedure for their appointment, notably by entrusting it to a third party (Art. 10(1) of the Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (the "Arbitration Act" or the "Act", see **Annex I** hereto)).

In arbitrations with three or more arbitrators, each party shall appoint an equal number of arbitrators and the arbitrators thus appointed shall appoint a further arbitrator, who shall act as chairman of the arbitral tribunal.

Unless otherwise agreed, if a party is to appoint an arbitrator or arbitrators and fails to do so within thirty 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 chairman within thirty days of the appointment of the last arbitrator to be appointed, the appointment of the remaining arbitrator or arbitrators is made, upon request of any of the parties, by the Court of Appeal of the place of the arbitration.

## 3. NUMBER OF ARBITRATORS (SEE ALSO CHAPTER V.2 – MAKING OF THE AWARD)

The arbitral tribunal may consist of a sole arbitrator or of several, in an uneven number; if parties fail to agree on the number of members of the arbitral tribunal, it shall consist of three arbitrators (Art. 8 (1) and (2) of the Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (the "Arbitration Act" or the "Act", see **Annex I** hereto)). Failure to comply with these rules may entail the setting aside of the award by a State court.

27. The text of the Code of Ethics is available at <http://arbitragem.pt>.
28. Text available at <http://www.centrodearbitragem.pt>.

## 4. CHALLENGE TO ARBITRATORS

An arbitrator may only be challenged if circumstances rise to justifiable doubts as to his impartiality or independence, or if he does not possess the qualifications agreed to by the parties.

Unless the parties have agreed otherwise, the challenge is to be decided by the arbitral tribunal itself; if that challenge is not successful, the challenging party may request the competent State court to decide it (Art. 14 of the Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (the "Arbitration Act" or the "Act", see **Annex I** hereto)). In arbitrations conducted under the CAC Rules, the challenge is, however, to be decided by the Centre's Chairman (Art. 12 of the Rules). The decision on the challenge, as any jurisdictional decision rendered in Portugal, must contain reasons, and be made in writing. No appeal is allowed from it.

## 5. TERMINATION OF THE ARBITRATOR'S MANDATE

An arbitrator's mandate terminates if he becomes, *de jure* or *de facto,* incapable to perform his or her functions or if he or she withdraws from office. Parties may also agree to terminate an arbitrator's mandate on grounds of his incapacity or if, for any other reason, he fails to perform his functions within a reasonable period of time. If the parties cannot agree on the termination in those situations, any of them may request the competent State court to remove such arbitrator from office, on those grounds. When, for any reason, the mandate of an arbitrator terminates, a substitute arbitrator must be appointed, according to the rules applicable to the appointment of the arbitrator being replaced, without prejudice to the parties agreeing that the replacement shall be made otherwise or their waiving such replacement (Art. 16 of the Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (the "Arbitration Act" or the "Act", see **Annex I** hereto)).

## 6. LIABILITY OF ARBITRATORS

In Portugal, arbitrators benefit from an immunity akin to that of judges. Pursuant to Art. 9(4) of the Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (the "Arbitration Act" or the "Act", see **Annex I** hereto), arbitrators may not be held liable for the decisions that they render except where judges may be so, i.e., in case they have rendered a decision manifestly unconstitutional or illegal or based upon a gross error as to the facts

and they have acted wilfully or with gross negligence.[29] Arbitrators may further be held liable for breach of their duty of confidentiality (which is expressly enshrined in Art. 30(5) of the Act), as well as if they unjustifiably withdraw from office (Art. 12(3)) or prevent the award from being made within the time limit stipulated for that purpose (Art. 43(4)).[30]

## Chapter IV. Arbitral Procedure

### 1. PLACE OF ARBITRATION (SEE ALSO CHAPTER V.3 – FORM OF THE AWARD)

Parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal, having regard to the circumstances of the case, including the convenience of the parties. Notwithstanding that, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate to hold one or more hearings, to allow the production of any evidence, or to deliberate (Art. 31 of the Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (the "Arbitration Act" or the "Act", see **Annex I** hereto)).

The determination of the place of arbitration has several important legal consequences, the first of which is the applicability of Portuguese arbitration law to all arbitrations taking place in Portuguese territory (Art. 61 of the Act). Another consequence thereof is that the Court of Appeal in the area of jurisdiction of which the place of arbitration is located is competent to decide on a number of issues, including: (1) the appointment of arbitrators who have not been appointed by the parties or by third parties that have been entrusted with this duty; (2) the challenge or removal of an arbitrator; (3) the reduction of the amount of fees or expenses fixed by the arbitrators; (4) the appeal of the arbitral award; (5) the challenge of an arbitral tribunal's interim award on its own jurisdiction; and (6) the setting aside of the final award made by the arbitral tribunal (Art. 59(1) of the Act).

### 2. ARBITRAL PROCEEDINGS IN GENERAL

In principle, parties may, until the acceptance by the first arbitrator, agree on the procedure to be followed by the arbitral tribunal in the conduct of the

29. See Arts. 13 and 14 of Law no. 67/2007, of 31 November 2007, which regulates the non-contractual liability of the State and other public entities.

30. See Pereira, Frederico Gonçalves and Fernandes, Pedro Pires, *"O regime da responsabilidade civil do árbitro. Algumas notas"*, in Cordeiro, António Menezes, *Arbitragem Comercial. Estudos Comemorativos dos 30 Anos do Centro de Arbitragem Comercial* (Almedina 2019), pp. 431 et seq.; and Pina, Miguel Esperança and Pereira, Diogo Castanheira Pereira, *"Responsabilidade civil dos árbitros no processo arbitral"*, in *ibid*, pp. 717 et seq.

proceedings. Failing such an agreement, and in the absence of applicable provisions in the Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (the "Arbitration Act" or the "Act", see **Annex I** hereto), the arbitral tribunal may conduct the arbitration as it considers appropriate, by defining the procedural rules that it deems adequate. In any event, three basic principles must be observed in the arbitration, namely: (1) The respondent shall be summoned to present its defence; (2) The parties shall be treated with equality and shall be given a reasonable opportunity to present their case, in writing or orally, before the final award is issued; and (3) In all phases of the proceedings the adversarial principle shall be observed (Art. 30 of the Act).[31]

A breach of any of these principles with a decisive influence on the outcome of the dispute may lead to the setting aside of the award (Art. 46(3)(a)(ii) of the Act).

The arbitral proceedings in respect of a particular dispute are deemed to commence on the date on which a request that such dispute be referred to arbitration is received by the respondent. Within the period agreed by the parties or determined by the arbitral tribunal, the claimant must submit its statement of claim, and the respondent must present its statement of defence. The parties may submit with their written statements all documents that they consider to be relevant and may add a reference therein to the documents or other means of evidence they will subsequently submit. Either party may, in the course of the arbitral proceedings, amend or supplement its statement of claim or defence, unless the arbitral tribunal considers it inappropriate to allow such a change having regard to the delay in making it and the absence of sufficient justification for this. The respondent may present a counterclaim, provided that its subject matter is covered by the arbitration agreement (Art. 33 (1) to (4) of the Act).

Subject to any contrary agreement by the parties, the tribunal shall decide whether to hold hearings for the presentation of evidence, or whether the proceedings shall be conducted merely based on documents and other means of proof. The arbitral tribunal must however hold one or more hearings for the presentation of evidence whenever so requested by a party, unless the parties have previously agreed that no hearings shall be held (Art. 34(1) of the Act).

## 3. EVIDENCE

### *a. General*

The powers conferred upon the arbitral tribunal include the determination of the admissibility, relevance and weight of any evidence presented or to be

31. See, for an overview of these principles, Moura, Ana Serra e, "The Conduct of Arbitral Proceedings", in Fonseca, André Pereira et al. (eds), *International Arbitration in Portugal* (Kluwer 2020), pp. 97 et seq.

presented. Hence, the arbitral tribunal is entitled to freely assess the evidence produced and, like a court, shall decide according to its prudent conviction on each fact or issue.

The Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (the "Arbitration Act" or the "Act", see **Annex I** hereto) does not contain specific rules of evidence to be applied by arbitrators. Therefore, with or without the consent of the parties, the arbitrators are free either to follow the rules of the Code of Civil Procedure ("CCP", see **Annex II** hereto for excerpts) governing evidence submitted to judicial courts or to adopt more flexible rules for this purpose.[32] In any event, parties, as far as the presentation of evidence is concerned, should be treated with equality.

*b. Witnesses*

As regards the hearing of witnesses, Portuguese procedural law provides that depositions are, in principle, to be made orally. This rule has very few exceptions (e.g., the President of the Republic, Members of the Government, High Court Judges, the State Prosecutor and his Deputy, Armed Forces Generals, high-ranking officers from religious institutions and a few other entities). Witnesses appearing before arbitrators are usually sworn in.

In light of the discretion granted to arbitrators to determine the method by which the parties should produce evidence in the arbitration, arbitrators are empowered to order, for example, that witnesses submit written statements on which they may be cross-examined and subsequently re-examined before the tribunal.[33]

Witnesses cannot be compelled to appear before arbitrators. When a witness refuses to cooperate, a party may, with the approval of the arbitral tribunal, request from the competent State court that such witness be heard before it.

*c. Documentary evidence*

The CCP contains detailed rules on the production of documentary evidence. However, these rules are only applicable to arbitration if the parties or the arbitrators so decide. Disclosure of documents in possession of one of the parties or of a third party may be ordered under those rules or any other ones that are agreed by the parties. Failure to comply with the duty to disclose may entail the reversal of the burden of the proof pursuant to Art. 344(2) of the Civil Code.

The arbitral tribunal may also seek assistance from a State court in regard of the disclosure of documents. All documents supplied to the arbitral tribunal

32. In this sense too, see Mendes, Sofia Ribeiro, "Evidence", in Fonseca, André Pereira et al. (eds), *International Arbitration in Portugal* (Kluwer 2020), p. 132.
33. See Carvalho, Filipa Cansado de & Carrera, Iñaki, *"A prova testemunhal na arbitragem"*, in Cordeiro, António Menezes, *Arbitragem Comercial. Estudos Comemorativos dos 30 Anos do Centro de Arbitragem Comercial* (Almedina 2019), pp. 353 et seq.

by one party must be communicated to the other party. In addition, any evidentiary document on which the arbitral tribunal may rely in making its decision must be communicated to the parties (Art. 34(3) of the Arbitration Act).

## 4. TRIBUNAL-APPOINTED EXPERTS (SEE CHAPTER IV.3 FOR PARTY-APPOINTED EXPERT WITNESSES)

The arbitral tribunal may, *ex officio* or upon a request from the parties, appoint one or more experts to prepare a written or oral report on specific issues to be defined by the arbitral tribunal. For that purpose, the arbitral tribunal may require the parties to give the expert any relevant information or to produce or open any relevant documents or other objects for the expert's inspection.[34]

If a party so requests, or if the arbitral tribunal deems it necessary, the expert may, after the delivery of his report, be requested to participate in a hearing in which the arbitral tribunal and the parties may examine him. Rules on the challenge of arbitrators apply, with the necessary adaptations, to tribunal-appointed experts.

## 5. INTERIM MEASURES OF PROTECTION

Pursuant to Art. 7 of the Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (the "Arbitration Act" or the "Act", see **Annex I** hereto), it is not incompatible with an arbitration agreement for a party to request from a State court, before or during the arbitral proceedings, an interim measure (*providência cautelar)* and for that court to grant such a measure. However, under the Arbitration Act (as was already acknowledged by some Portuguese authors prior to its entry into force)[35] an arbitral tribunal may also grant any interim measure that it deems necessary in relation to the subject matter of the dispute, through which it orders a party, prior to the issuance of the award, to: (1) maintain or restore the *status quo* pending the settlement of the dispute; (2) take action that would prevent, or refrain from taking action that is likely to cause, harm or prejudice to the arbitral process itself; (3) provide a means of preserving assets out of which a subsequent award may be satisfied;

34. See Antunes, José Manuel Oliveira, *"Breves notas sobre a perícia em tribunal arbitral"*, in Cordeiro, António Menezes, *Arbitragem Comercial. Estudos Comemorativos dos 30 Anos do Centro de Arbitragem Comercial* (Almedina 2019), pp. 605 et seq.

35. See Silva, Paula Costa e, *"A arbitrabilidade de medidas cautelares"*, Revista da Ordem dos Advogados (2003) pp. 211 et seq.; and Mendes, Armindo Ribeiro, *"As medidas cautelares e o processo arbitral (Algumas notas)"*, Revista Internacional de Arbitragem e Conciliação (2009) pp. 57 et seq., both with further references.

or (4) preserve evidence that may be relevant and material to the resolution of the dispute.

Arts. 20 et seq. of the Arbitration Act follow the UNCITRAL Model Law's rules on such measures closely. They shall be granted by the arbitral tribunal as long as two basic requirements are met: (1) there should be a serious probability that the right invoked by the requesting party exists and the fear that such right will be harmed is sufficiently evidenced; and (2) the harm resulting from the interim measure to the party against whom the measure is directed should not substantially outweigh the damage that the requesting party wishes to avoid with the measure.[36]

A party may also, without notice to any other party, make a request for an interim measure together with an application for a preliminary order (*ordem preliminar)* directing a party not to frustrate the purpose of the interim measure requested. The arbitral tribunal may grant that preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

The interim measure is to be given either in the form of an award or in any other form. That award is binding on the parties and, unless otherwise provided by the arbitral tribunal, is enforceable upon application to the competent State court.

## 6. REPRESENTATION AND LEGAL ASSISTANCE

A power of attorney is in principle necessary for the representation of a party before an arbitral tribunal in Portugal.[37] Regarding parties' representation by foreign legal counsel, Portugal has transposed Directive 77/249/EEC, of 22 March 1977, to facilitate the effective exercise by lawyers of the freedom to provide services (as amended), as well as Directive 98/5/EC, of 16 February 1998, to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.

Accordingly, the by-laws of the Portuguese Bar Association (*Ordem dos Advogados*) determine that advocates, barristers and solicitors of other Member States of the EU are allowed to practice in Portuguese courts using their original professional titles, although they must be supervised by a member of

36. See, on this, Gouveia, Mariana França, *"A competência cautelar do tribunal arbitral, em especial as providências executivas e as anti-suit injunctions"* in *Estudos em homenagem ao Prof. Doutor José Lebre de Freitas*, vol. II (Coimbra Editora 2013) pp. 861 et seq.; and Gouveia, Mariana França and Monteiro, Matilde Líbano, "Interim Measures and Preliminary Orders", in Fonseca, André Pereira et al. (eds), *International Arbitration in Portugal* (Kluwer 2020), pp. 151 et seq.

37. See Art. 2 of Law no. 49/2004, of 24 August 2004, which equates, for this purpose, practice before State courts and arbitral tribunals.

the Portuguese Bar.[38] As an alternative, they may exercise their activity in Portugal with the title of *Advogado*, subject to prior registration in the Portuguese Bar Association. They must also inform the Bar Association of any services occasionally rendered in Portugal.[39] If they wish to establish themselves permanently in Portugal, they must register in the Bar Association.[40] Non-EU lawyers who are not members of the Portuguese Bar Association are not allowed to represent parties in arbitrations in Portugal.

## 7. DEFAULT

Without prejudice to what the parties may have agreed on the consequences of default, if the claimant fails to present its statement of claim within the stipulated time, the arbitral tribunal shall terminate the proceedings. If the respondent fails to present its statement of defence, the arbitral tribunal shall continue the proceedings without treating such failure as an admission of the claimant's allegations. If one of the parties fails to appear at a hearing or to produce documentary evidence within the determined period, the arbitral tribunal may continue the proceedings and make the award on the evidence before it. The arbitral tribunal may however, if it deems the default justified, allow a party to perform the omitted act (Art. 35 (1) to (4) of the Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (see **Annex I** hereto)).

## 8. CONFIDENTIALITY OF THE AWARD AND PROCEEDINGS

*a. Confidentiality of the arbitral award and proceedings*

Arbitrators, the parties and arbitral institutions (in an administered arbitration), are obliged to maintain confidentiality regarding all information obtained and documents brought to their attention in the course of the arbitration proceedings, without prejudice to the right of the parties to make public procedural acts necessary to the defence of their rights and to the duty to communicate or disclose procedural acts to the competent authorities, which may be imposed by law (Art. 30(5) of the Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (see **Annex I** hereto)). Data protection rules contained in Regulation (EU) 2016/679, of the European Parliament and of the Council, of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free

38. See Art. 204(2) of the By-Laws of the Portuguese Bar Association, approved by Law no. 145/2015, of 9 September 2015, as amended by Law no. 23/2020, of 6 July 2020.
39. *Ibid,* Art. 205(1).
40. *Ibid,* Art. 205(2).

movement of such data, and in Law no. 58/2019, of 8 August 2019, which ensures the Regulation's implementation in the Portuguese legal system, involve further restrictions regarding the processing, e.g., in publicly available databases, of information contained in arbitral awards.

*b. Confidentiality of arbitration-related court proceedings*

Documents filed in legal proceedings for the annulment or the enforcement of an arbitral award form part of the public record. Hearings eventually held in such proceedings are in principle also public. Unauthorized use of information obtained therein may, however, constitute an unlawful act, e.g., if such information consists of trade secrets, which are protected by Arts. 313 to 315 of the Code of Industrial Property in accordance with the rules set out in Directive (EU) 2016/943 of the European Parliament and of the Council, of 8 June 2016, on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

Judgments rendered by higher courts on a request for the annulment or an appeal lodged against an arbitral award are regularly made available online with the suppression of the names of the parties and witnesses involved, as required by data protection rules in force in Portugal.[41]

# Chapter V. Arbitral Award

## 1. TYPES OF AWARD

According to Art. 42(2) of the Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (the "Arbitration Act" or the "Act", see **Annex I** hereto), unless otherwise agreed by the parties, the arbitrators may decide the merits of the dispute in a single award or in as many partial awards as they deem necessary.[42] The Act's provisions on the form and contents of the award, its annulment and enforcement (described hereunder) apply to each of the partial awards eventually rendered by the arbitral tribunal, even if the proceedings are to continue in respect of issues not decided in them. The time limit set out in Art. 43 for the decision of the merits of the dispute may, however, only be deemed to be complied with once a final award dealing with all the issues comprised in the subject matter of that dispute have been disposed of by the arbitrators.

41. See <http://www.dgsi.pt>.
42. See Vicente, Dário Moura, *"Sentença arbitral",* in *XII Congresso do Centro de Arbitragem Comercial* (Almedina 2019) pp. 117 et seq.; and Pina, Miguel Esperança, "The Arbitral Award", in Fonseca, André Pereira et al. (eds), *International Arbitration in Portugal* (Kluwer 2020), pp. 169 et seq.

## 2. MAKING OF THE AWARD

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal should be made by the majority of its members; failing a majority decision, the award shall be made by the Chairman of the Tribunal (Art. 40(1) of the Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (the "Arbitration Act" or the "Act", see **Annex I** hereto)). Dissenting opinions are allowed and they are usually annexed to the award, of which they form part.[43]

In principle, the final award must be rendered within twelve months from the date of acceptance of the last arbitrator. That time limit may be freely extended one or more times by an agreement of the parties or, alternatively, by a duly motivated decision of the arbitral tribunal, for successive periods of twelve months. The parties may, however, by mutual agreement, oppose the extension.

The failure to deliver the final award within the said time limit automatically terminates the arbitral proceedings and the arbitrators' jurisdiction to decide on the dispute. The arbitration agreement remains, however, effective, notably in order that a new arbitral tribunal may be constituted, and a new arbitration commenced. Arbitrators that have unjustifiably prevented the award from being made within the time limit set for that purpose are liable for the damages thus caused (Art. 43(4) of the Act).

## 3. FORM OF THE AWARD

In Portugal, arbitral awards must be issued in writing and signed by the arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of the members of the arbitral tribunal or that of the chairman, in case the award is to be made by the latter, shall suffice, provided that the reason for the omission of the remaining signatures is stated in the award (Art. 42(1) of the Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (the "Arbitration Act" or the "Act", see **Annex I** hereto)).

Awards must also state the reasons upon which they are based, unless the parties have agreed that no reasons are to be given or the award merely records a settlement reached by the parties (Art. 42(3) of the Act).[44] According to the

43. See, on the making and contents of arbitral awards, Carlos Ferreira de Almeida, *"Sentença arbitral: preparação e conteúdo"*, in Cordeiro, António Menezes, *Arbitragem Comercial. Estudos Comemorativos dos 30 Anos do Centro de Arbitragem Comercial* (Almedina 2019), pp. 197 et seq.

44. See Marques, João Paulo Remédio, *"A (densidade da) falta de fundamentação da matéria de facto enquanto causa de anulação da sentença arbitral"*, in Cordeiro, António Menezes, *Arbitragem Comercial. Estudos Comemorativos dos 30 Anos do Centro de Arbitragem Comercial* (Almedina 2019), pp. 485 et seq.

Portuguese Supreme Court, an award is sufficiently reasoned if it "sets out, in a manner that is perfectly intelligible and comprehensible to the persons to whom it is addressed, the factual and normative grounds for the award, and thereby makes clear the logical path followed in the settlement of the dispute".[45]

The award must furthermore state the date in which it was rendered, as well as the place of the arbitration. It is deemed for all purposes to have been made at that place (Art. 42(4) of the Act).

## 4. JURISDICTION (SEE ALSO CHAPTER II.5 – EFFECT OF THE AGREEMENT)

As mentioned above, the arbitral tribunal may, according to Art. 18(1) of the Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (the "Arbitration Act" or the "Act", see **Annex I** hereto), rule on its own jurisdiction. Such ruling may be rendered either in an interim decision or in the award on the merits (Art. 18(8) of the Act). It may, within thirty days after its notification to the parties, be challenged by any of them before the competent State court (Art. 18(9)). If the arbitrators have ruled that they do not have jurisdiction, a State court may only be approached on this issue insofar as an appeal from the award is allowed in the instant case.

A plea that the arbitral tribunal does not have jurisdiction must be raised not later than the submission of the statement of defence as to the substance of the dispute, or jointly with it. A plea that the arbitral tribunal has exceeded or may exceed its jurisdiction in the course of the arbitral proceedings must be raised as soon as the issue alleged to be beyond the scope of its jurisdiction is raised during the proceedings. In either case, the arbitral tribunal may, according to Art. 18(7) of the Act, allow that a plea of lack of jurisdiction be presented after the abovementioned time limits if it considers this to be justified.

## 5. APPLICABLE LAW

*a. Domestic arbitration*

In domestic arbitration, arbitrators must decide in accordance with the law (*direito constituído*), unless the parties have authorized them to decide according to equity (*equidade*) (Art. 39(1) of the Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (the "Arbitration Act" or the "Act", see **Annex I** hereto)). An arbitrator empowered to decide according to equity is not bound by strictly legal criteria. Instead, he may render the decision that seems most appropriate to the instant case. According to the

45. See the ruling of 16 March 2017, case no. 1052/14.1TBBCL.P1.S1, available at <http://www.dgsi.pt>.

prevailing opinion in Portuguese legal doctrine, an arbitrator *ex aequo et bono* is not exempted from determining the applicable rules of law; he may, however depart from them insofar as justice requires, taking into consideration the particular circumstances of the case.[46]

*b. International commercial arbitration*

International arbitration is defined in Art. 49(1) of the Arbitration Act as "that in which the interests of international trade are at stake". International arbitrations are subject to the Act's general provisions on domestic arbitration, with the necessary adaptations, without prejudice to the special rules on such arbitrations contained in Chapter IX of the Act (Art. 49(2)).

According to Art. 52(1) of the Act, in international arbitration parties may choose the applicable substantive law rules unless they have authorized the arbitrators to decide according to equity. Failing such a choice, arbitrators shall, pursuant to Art. 52(2), apply the law of the State with which the subject matter of the dispute has the closest connection (*conexão mais estreita*).[47]

Insofar as contracts are concerned, arbitrators should give particular consideration, as an expression of the closest connection, to the law of the country of habitual residence or of the central administration of the party subject to the duty to effect the characteristic performance (e.g., the vendor in a contract of sale). This is required, e.g., by Regulation (EC) no. 593/2008 on the

46. See, on this issue, Varela, Antunes, *"Valor da equidade como fonte de Direito"*, Ciência e Técnica Fiscal (1966) pp. 7 et seq.; Cordeiro, António Menezes, *"A decisão segundo a equidade"*, O Direito (1990) pp. 261 et seq.; and Frada, Manuel Carneiro da, *"A equidade (ou a 'justiça com coração'). A propósito da decisão arbitral segundo a equidade"*, Revista da Ordem dos Advogados (2012) pp. 109 et seq.

47. For a more detailed discussion of this issue, see Vicente, Dário Moura, Da arbitragem comercial internacional. Direito aplicável ao mérito da causa (Coimbra Editora 1990); *idem*, *"O Direito aplicável ao mérito da causa na arbitragem internacional à luz da nova lei portuguesa da arbitragem voluntária"*, Revista Internacional de Arbitragem e Conciliação (2012) pp. 37 et seq.; Collaço, Isabel de Magalhães, *"L'arbitrage international dans la recente loi portugaise sur l'arbitrage volontaire (Loi no. 31/86, du 29 août 1986). Quelques réflexions"* in *Droit International et Droit Communautaire. Actes du Colloque Paris 5-6 avril 1990* (FCG 1991) pp. 55 et seq.; Correia, Ferrer, *"O Direito aplicável pelo árbitro internacional ao fundo da causa"*, Boletim da Faculdade de Direito da Universidade de Coimbra (2001) pp. 1 et seq.; Pinheiro, Luís de Lima, *Arbitragem Transnacional. A determinação do estatuto da arbitragem* (Almedina 2005) pp. 234 et seq.; Brito, Maria Helena, *"As novas regras sobre a arbitragem internacional. Primeiras reflexões"* in *Estudos em homenagem a Miguel Galvão Teles*, vol. II (Almedina 2012) pp. 27 et seq.; Ramos, Rui de Moura, *"A arbitragem internacional no novo direito português da arbitragem"*, Boletim da Faculdade de Direito da Universidade de Coimbra (2012), pp. 583 et seq.; Pires, Catarina Monteiro and Dias, Rui Pereira, *"Arbitragem internacional e autonomia privada: primeiras reflexões"*, in Cordeiro, António Menezes, *Arbitragem Comercial. Estudos Comemorativos dos 30 Anos do Centro de Arbitragem Comercial* (Almedina 2019), pp. 233 et seq.; and Oliveira, Elsa Dias, "Choice of Law Issues", in Fonseca, André Pereira et al. (eds), *International Arbitration in Portugal* (Kluwer 2020), pp. 187 et seq.

Law Applicable to Contractual Obligations, of 17 June 2008 ("Rome I" Regulation).

The rule providing for the applicability of the law with the closest connection does not prevent arbitrators from considering the usages of international trade. This can occur in two types of circumstances. First, when the parties have made an express reference to those usages in the contract or in the arbitration agreement, arbitrators are required to apply them, to the extent that they do not conflict with the mandatory provisions of the applicable law; usages can thus be the object of a substantive reference, but not of a conflictual one (i.e., they cannot be the sole criterion according to which the subject matter of the dispute is to be decided). Second, in the event that the parties have made no provision in this regard, usages must still be taken into consideration by the arbitrators, as provided by Art. 52(3) of the Voluntary Arbitration Act, e.g., as aids in the construction and integration of the terms of the contract.

## 6. SETTLEMENT

Parties may at any time during the proceedings conclude a settlement on the subject matter of the dispute. In this case, the arbitral tribunal must terminate the proceedings and, if so requested by the parties, record the settlement in the form of an arbitral award on agreed terms, unless the contents of such settlement is in violation of any principle of public policy. Such an award is subject to the provisions of the Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (the "Arbitration Act" or the "Act", see **Annex I** hereto) on the form and contents of arbitral awards and has the same effect as any other award on the merits of the case (Art. 41 of the Act).

## 7A. CORRECTION AND INTERPRETATION OF THE AWARD

According to Art. 45(1) of the Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (the "Arbitration Act" or the "Act", see **Annex I** hereto), parties may, within thirty days of the notification of the award, request the arbitral tribunal to correct errors in computation, clerical or typographical errors or any other error of an identical nature. They may also request the arbitral tribunal to clarify any obscurity or ambiguity of the award or of the reasons on which it is based. If the arbitral tribunal considers the request to be justified, it shall make the correction or give the clarification within thirty days of receipt of the request. The clarification thus provided forms part of the award. The arbitral tribunal may also on its own initiative correct any error of the said nature within thirty days of the date of notice of the award. The general provisions of the Act on the form of the award apply to its correction and clarification.

### 7B. ADDITIONAL AWARD

Parties may furthermore, under Art. 45(5) of the Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (see **Annex I** hereto), request the arbitral tribunal, within thirty days of the notification of the award, to make an additional award on parts of the claim or claims submitted in the arbitral proceedings that have been omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days of the request. The general rules on the form of awards and the apportionment of costs apply to the additional award.

## 8. FEES AND COSTS

*a. Costs in general*

The arbitral award must, according to Art. 42(5) of the Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (the "Arbitration Act" or the "Act", see **Annex I** hereto), determine the proportions in which the parties shall bear the costs directly resulting from the arbitration. These costs include, inter alia, the arbitrators' fees and expenses, the tribunal's expert fees and expenses and, in the case of institutional arbitrations, the applicable administrative fees.

*b. Deposit*

Arbitrators may, under Art. 17(2) of the Arbitration Act, require the parties to make advance payments of their fees and expenses. In the case of a failure to make such advance payments, the arbitrators may suspend or end the arbitral proceedings after a reasonable additional time that was granted to that effect to the party or parties in default has lapsed (Art. 17(4)). If one of the parties has not made its advance payment within the time limit granted therefor, the arbitrators, before deciding to suspend or end the arbitral proceedings, must give notice thereof to the remaining parties so that these may, if they wish, remedy the failure to make the said advance payment (Art. 17(5)).

In institutional arbitrations conducted under the CAC Rules, parties must make an advance to guarantee payment of the arbitration costs (Art. 54(1) of the Rules). Before the arbitral tribunal is constituted, an initial provisional advance is to be paid by each of the parties, in an amount determined by the Secretariat of the Centre, corresponding to no more than thirty-five percent of the likely arbitration costs. During the proceedings, the Secretariat may collect further advances until the total advance covers the likely total costs of the arbitration (CAC Rules, Art. 54(2) and (3)). In the event of an advance failing to be paid within the established time limit, the Secretariat may establish a new time limit for the payment to be made by the defaulting party and may, if the situation continues, notify the other party of the fact so that it may pay the

outstanding advance. If the initial advance is not paid, the arbitration shall not proceed, and the arbitral proceedings shall be deemed to have ended; if it is the respondent that has failed to pay, the arbitration shall proceed, but the tribunal may determine inadmissibility of the reply (CAC Rules, Art. 55).

*c. Fees of arbitrators*

In *ad hoc* arbitrations, arbitrators' fees and expenses are in principle agreed between the parties and the arbitrators. Failing such an agreement, the arbitrators shall decide the amount of their fees and expenses, taking into account the complexity of the issues decided or to be decided, the amount in dispute and the time spent or likely to be spent by them with the arbitral proceedings until their conclusion (Art. 17(2) of the Act). Parties may, however, request the competent State court to reduce the amounts of the fees and expenses determined by the arbitrators; that State court may define the amounts it deems appropriate after having heard the members of the arbitral tribunal on the issue (Art. 17(3) of the Act).[48]

In arbitrations conducted according to the CAC Rules, the fees of each arbitrator are established by the Chairman of the Arbitration Centre taking into consideration the value of the arbitration, in accordance with the table that is annexed to the Rules (Art. 50(1) of the Rules).

*d. Costs of legal assistance to parties*

The arbitrators may decide in the award that one of the parties shall compensate the other for the whole or part of the reasonable costs and expenses that the latter can prove to have incurred due to its participation in the arbitration (Art. 42(5) of the Act).

*e. Allocation of costs*

Art. 527 of the Portuguese Code of Civil Procedure (see **Annex II**) states that, as a rule, the costs of judicial proceedings are borne by the losing party. This provision is not binding upon arbitrators, but it is an important guideline for them.

48. See, on this, Marques, João Paulo Remédio, *"Algumas notas sobre a determinação e fixação dos custos da arbitragem, incluindo os honorários dos juízes-árbitros"*, Revista Internacional de Arbitragem e Conciliação (2013) pp. 97 et seq.*;* Júdice, José Miguel, *"Fixação dos honorários dos árbitros"*, *ibid*, pp. 139 et seq.; and Henriques, Duarte Gorjão, "Costs and Fees", in Fonseca, André Pereira et al. (eds), *International Arbitration in Portugal* (Kluwer 2020), pp. 297 et seq.

## 9. NOTIFICATION OF THE AWARD AND REGISTRATION

Once an award has been rendered, it must be immediately notified through the delivery to each of the parties of a copy thereof signed by the arbitrator or arbitrators; the award produces its effects on the date of such notification (Art. 42(6) of the Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (the "Arbitration Act" or the "Act", see **Annex I** hereto)). No registration or deposit of an award rendered in a voluntary arbitration is in principle required for this purpose. The chairman of the arbitral tribunal must however 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 (Art. 44(4) of the Act). In institutional arbitrations conducted under the CAC Rules, the Secretariat must keep in its archives the originals of the arbitral awards for each arbitration, and parties may obtain certified copies thereof (Art. 47(1) of the Act).

## 10. ENFORCEMENT OF DOMESTIC AND INTERNATIONAL AWARDS RENDERED IN PORTUGAL (SEE ALSO CHAPTER VI – ENFORCEMENT OF FOREIGN ARBITRAL AWARDS)

*a. Leave for enforcement*

An arbitral award rendered in Portugal is enforceable in the same terms as a judgment rendered by a State court (Art. 42(7) of the Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (the "Arbitration Act" or the "Act", see **Annex I** hereto)). No leave for enforcement is thus required.

The enforcement of an arbitral award made in Portugal takes place in the State court of first instance that is competent under the applicable procedural law rules (Art. 59(9) of the Act). If the award was rendered in Portugal, that court is the district court (*Tribunal de Comarca*) of the place of the arbitration (Art. 85(3) of the Code of Civil Procedure) (see **Annex II**).

*b. Enforcement*

The party against whom the enforcement of the arbitral award is requested may oppose it on any of the grounds of the annulment of the award (described in Chapter VII.2 below), provided that an application for the setting aside of the award on the same grounds has not been previously rejected by a final and binding judgment (Art. 48(1) of the Act). Only the grounds for setting the award aside that may be considered by the court *ex officio* in annulment proceedings (i.e., the non-arbitrability of the dispute and violation of international public policy) may be invoked in an opposition to the enforcement after the time limit of sixty days to request the setting aside has lapsed (Art. 48(2)). Such grounds may also be considered by the court on its own motion if the party against whom enforcement of the arbitral award is

invoked does not raise them (Art. 48(3)). Decisions rendered by State courts in enforcement proceedings are subject to appeal in the same terms as those rendered in declaratory proceedings conducted before them.

### 11. PUBLICATION OF THE AWARD

As mentioned above, arbitrators, parties and arbitral institutions must maintain confidentiality regarding all information obtained during the arbitration proceedings. However, this duty does not prevent the publication of awards and other decisions of the arbitral tribunal, with the exclusion of all elements identifying the parties, unless any of them opposes publication (Art. 30(6)).[49]

The CAC Rules further provide that arbitral awards rendered in disputes in which one party is the State or another public law entity are deemed to be public unless the parties decide otherwise. Other arbitral awards are similarly public, once the elements that identify the parties have been removed, unless one of the parties opposes such publicity (Art. 41 of the Rules). This innovative provision seeks to ensure transparency and enhance the credibility of arbitrations involving public entities, which have been growing in number in this country.

## Chapter VI. Enforcement of Foreign Arbitral Awards

### 1. ENFORCEMENT UNDER CONVENTIONS AND TREATIES

The main multilateral conventions governing the enforcement of foreign arbitral awards presently in force in Portugal are the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, of 1965 (the "Washington Convention"). The Inter-American Convention on International Commercial Arbitration of 1975 was ratified by Portugal, but its accession instrument was not deposited.[50]

The New York Convention was approved for ratification by the Portuguese Parliament's Resolution no. 37/94, passed on 10 March 1994.[51] It was

49. See Miguel Lucas Pires, *"Publicidade das decisões arbitrais"*, in Cordeiro, António Menezes, *Arbitragem Comercial. Estudos Comemorativos dos 30 Anos do Centro de Arbitragem Comercial* (Almedina 2019), pp. 745 et seq.
50. See Vicente, Dário Moura, *"Portugal e as convenções internacionais em matéria de arbitragem"* in *I Congresso do Centro de Arbitragem da Câmara de Comércio e Indústria Portuguesa (Centro de arbitragem comercial)* (Almedina 2008) pp. 71 et seq.
51. See Coelho, Cristina Pimenta, *"A Convenção de Nova Iorque de 10 de Junho de 1958 Relativa ao Reconhecimento e Execução de Sentenças Arbitrais Estrangeiras"*, Revista

subsequently ratified by the President of the Republic's Decree no. 52/94, signed on 1 June 1994. Portugal deposited its instrument of accession to the Convention with the Secretary-General of the United Nations on 18 October 1994. Pursuant to Art. XII (2) of the Convention, it entered into force in Portugal on 16 January 1995. Portugal has made a reciprocity reservation pursuant to Art. I (3) of the New York Convention, which is stated in Art. 2 of the said Parliament's Resolution and in the text of the President's Decree. By virtue of this reservation, the Convention only applies in Portugal to the recognition and enforcement of awards made in the territory of another Contracting State. However, Arts. 55 et seq. of the Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (the "Arbitration Act" or the "Act", see **Annex I** hereto), examined below, have in practice extended the Convention's regime to the recognition of awards made in non-Contracting States, thereby depriving that reservation of much of its relevance.[52]

A number of bilateral treaties which also provide for the enforcement of foreign arbitral awards have been entered into between Portugal and other Portuguese-speaking countries, such as São Tomé e Príncipe (in 1976), Guinea-Bissau (in 1988), Mozambique (in 1990), Brazil (in 1994), Angola (in 1995) and Cape Verde (in 2003).

According to the Portuguese Constitution (Art. 8(2)), the rules contained in international conventions duly ratified or approved by Portugal enter into force in the internal legal order after their publication in the Republic's official journal. No implementing legislation is thus required for the purpose of incorporating international conventions ratified by Portugal into the national legal system.

If the New York Convention applies, the enforcement of a foreign arbitral award shall follow the rules of procedure of the Portuguese Code of Civil Procedure ("CCP", see **Annex II** for excerpts) regarding all aspects of procedure not expressly provided for in the Convention. The Washington Convention contains in Arts. 53 to 55 special provisions on the recognition and enforcement of arbitral awards made in accordance with the Convention. Pursuant to Art. 54(3) of the Convention, if the enforcement of such an award is sought in Portugal it shall be governed by the rules on the enforcement of judgments in force in this country.

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Jurídica (1996) pp. 37 et seq.; Ramos, Rui de Moura, *"No sexagésimo aniversário da Convenção de Nova Yorque de 1958"*, Revista Internacional de Arbitragem e Conciliação (2019) pp. 13 et seq.; and Pinheiro, Luís de Lima, *"O reconhecimento de decisões arbitrais 'estrangeiras' ao abrigo da Convenção de Nova Iorque – Perspetiva atual"*, in Cordeiro, António Menezes, *Arbitragem Comercial. Estudos Comemorativos dos 30 Anos do Centro de Arbitragem Comercial* (Almedina 2019), pp. 665 et seq.

52. See, on the interaction of the New York Convention and Portuguese Arbitration Law, Caramelo, António Sampaio, *O reconhecimento e a execução de sentenças arbitrais estrangeiras perante a Convenção de Nova Iorque e a Lei da Arbitragem Voluntária* (Almedina 2016).

Hierarchically, the competent court to recognize a foreign arbitral award is, according to Art. 59(1)(h) of the Arbitration Act, the Court of Appeal of the domicile of the respondent.[53] If the latter is domiciled abroad, the Court of Appeal of the domicile of the claimant shall be competent; and if both are domiciled abroad, the Court of Appeal of Lisbon shall be competent (Art. 80(3) CCP).

The enforcement of the award takes place before the court of first instance of the domicile of the respondent (Arts. 86 and 90 CCP). If the respondent is domiciled abroad, but has assets in Portugal, the enforcement proceedings may take place before the court of first instance of the location of such assets (Art. 89(3) CCP).

The decisions rendered by these courts are subject to appeal to the court or courts superior in hierarchy in accordance with the general rules on the of appeal of court decisions (Art. 59(8) of the Arbitration Act).

## 2. ENFORCEMENT WHERE NO CONVENTION OR TREATY APPLIES

Arts. 55 to 58 of the Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (the "Arbitration Act" or the "Act", see **Annex I** hereto) govern the procedure and the requirements for the recognition of foreign arbitral awards when no international conventions ratified by Portugal apply.[54]

In conformity with Art. 57 of the Act, the procedure for the recognition of foreign awards comprises the following main steps: (1) The party seeking recognition of a foreign arbitral award must supply the duly authenticated original award or a duly certified copy thereof, as well as the original of the arbitration agreement or a duly authenticated copy thereof; (2) If the award or

53. This rule supersedes previous case law from Portuguese higher courts that deferred that competence to the court of first instance of the domicile of the requested party. See in this sense, e.g., the decision rendered by the Supreme Court on 22 April 2004, *Colectânea de Jurisprudência do Supremo Tribunal de Justiça*, tome II (2004) pp. 50 et seq. That case law was widely criticized by commentators in Portugal: see Pinheiro, Lima, *Arbitragem Transnacional*, *op. cit.*, pp. 299 et seq.; Brandão, Manuel Cavaleiro, *"Aplicación de la Convención de Nueva York en Portugal. Análisis de la jurisprudencia portuguesa"* in Coaguila, Carlos Soto (ed.), *Convención de Nueva York de 1958. Reconocimiento y Ejecución de Sentencias Arbitrales Extranjeras* (Instituto Peruano de Arbitraje 2009) pp. 737 et seq.; Pina, Miguel Esperança and Ferreira, Frederico Bettencourt, *"A jurisprudência portuguesa sobre o reconhecimento de sentenças arbitrais estrangeiras no âmbito da Convenção de Nova Iorque de 1958"* in *ibid*, pp. 747 et seq.; and Vicente, Dário Moura, "Interpretation and Application of the New York Convention by Portuguese Courts", in George A. Bermann (ed.), *Recognition and Enforcement of Foreign Arbitral Awards: The Application of the New York Convention by National Courts* (Springer 2017) pp. 765 et seq.

54. For an analysis of those provisions, see Oliveira, Elsa Dias, *"Reconhecimento de sentenças arbitrais estrangeiras"*, Revista Internacional de Arbitragem e Conciliação (2012) pp. 73 et seq.; and Silva, Guilherme Santos, "Recognition and Enforcement of Foreign Arbitral Awards", in Fonseca, André Pereira et al. (eds), *International Arbitration in Portugal* (Kluwer 2020), pp. 275 et seq.

the agreement is not made in Portuguese, the party that seeks recognition shall supply a duly certified translation thereof into this language; (3) After the application for recognition, accompanied by the abovementioned documents, is made, the opposing party shall be summoned to present its opposition, within fifteen days; (4) After the written pleadings and the procedural steps deemed indispensable by the reporting judge are taken, access to the file is granted to the parties and to the Public Prosecutor (*Ministério Público*), for fifteen days, for the purpose of presenting closing arguments; (5) The hearing is conducted in accordance with the rules applicable to appeals.

Portuguese courts do not, in principle, have the power to review foreign awards as to their merits. The court may not, therefore, refuse the recognition and enforcement of such awards based on non-compliance with Portuguese law. In fact, refusal of enforcement may only occur if the party against whom the award is invoked furnishes proof that: (1) 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, failing any indication thereon, under the law of the country where the award was made; (2) 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; (3) The award deals with a dispute not contemplated by the arbitration agreement or contains decisions on matters beyond the scope of the arbitration agreement; (4) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (5) The award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.

Recognition may further be refused if the court finds that: (1) The subject matter of the dispute is not capable of settlement by arbitration under Portuguese law; or (2) The recognition or enforcement of the award would lead to a result clearly incompatible with the international public policy of the Portuguese State.

## 3. RULES OF PUBLIC POLICY

In a ruling of 9 October 2003,[55] the Portuguese Supreme Court declared that what is meant by Art. V(2)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention")[56] is solely "international public policy", that is to say, the

55. Case no. 03B1604, available at <http://www.dgsi.pt>.

56. According to which: "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds

"fundamental principles governing the presence of Portugal in the international community". Such is the case, according to that ruling, of the principle *pacta sunt servanda.*

The recognition of a foreign arbitral award rendered against a commercial company seated in Portugal that allegedly lacked the necessary financial resources to pay for the expenses of an international arbitration, and that, for this reason, didn't make the advance payments requested by the arbitral tribunal, which in turn led to the dismissal of its defence and counterclaim, is not, according to the same ruling, contrary to international public policy. As the Supreme Court stated in that ruling, commercial companies may only exist insofar as they can provide for themselves. Therefore, they are not entitled to judicial support by the State in the same terms as individuals. They should therefore ensure the financial means necessary to exercise their rights. The defendant in the case at hand knew that use of arbitral tribunals implies expenditure. When it agreed to submit to arbitration the disputes eventually arising from its contractual dealings with foreign parties, it should have forearmed itself against such expenditures. The recognition of the arbitral award therefore cannot, according to the Supreme Court, be refused on that ground.

In a subsequent ruling, of 2 February 2006,[57] the Portuguese Supreme Court reaffirmed the notion that Art. V(2)(b) of the New York Convention only envisages international public policy. According to this ruling, the notification of the defendant by registered mail with a certificate of receipt and the employment of the national language of that party in such a notification are not principles of international public policy and may therefore not be invoked in support of a plea for the refusal of recognition.

This restrictive interpretation of Art. V(2)(b) of the New York Convention was also espoused by the Lisbon Court of Appeal in a ruling issued on 17 December 1998,[58] which confirmed an award rendered in France in proceedings conducted in accordance with the rules of the International Chamber of Commerce. In those proceedings, a company seated in Panama was in dispute with a company seated in Portugal. The arbitral award ordered the latter company to pay the agreed price in an advertising contract, plus interest at the rate of 1.8 percent per month, damages for breach of contract, tribunal fees and expenses. The Portuguese company contested the application for recognition, inter alia, on the grounds that the rate of the interest due for late payment that was applied was contrary to the international public policy of the Portuguese State because it by far exceeded the legal rate of interest in

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that: […] The recognition or enforcement of the award would be contrary to the public policy of that country."

57. Case no. 05B3766, available at <http://www.dgsi.pt>.

58. Published in *Colectânea de Jurisprudência*, tome V (1998) pp. 125 et seq.

force in Portugal. The Lisbon Court of Appeal rejected this argument and recognized the foreign arbitral award pursuant to the New York Convention.

In a ruling of 16 January 2014,[59] the same Court decided that Art. 33 of the Portuguese law on commercial agency contracts (Decree-Law no. 178/86, of 3 July 1986, amended by Decree-Law 118/93, of 13 April 1993), which grants agents the right to a goodwill compensation (*indemnização de clientela*) in case of termination of the contract, is a rule of internal, not international public policy. Accordingly, that rule does not prevent the recognition and enforcement in Portugal of a foreign arbitral award that refused the said compensation to a commercial agent acting in Portugal for a foreign company. The Supreme Court confirmed this ruling on 23 October 2014.[60]

A more wide-ranging notion of public policy transpires, however, in the Supreme Court's ruling of 14 March 2017,[61] which denied the recognition of an arbitral award rendered in Spain that had ordered the respondent, a Portuguese lawyer, to pay a law firm of which it had been previously a partner liquidated damages for the breach of a non-compete clause in the amount of € 4.5 million, which the Court found disproportionate to the respondent's earnings and excessively restrictive of its constitutional right to practice the profession.[62]

The distinction between domestic and international public policy was enshrined in the Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (see **Annex I** hereto), which provides in Art. 56(1)(b)(ii), that the recognition and enforcement of a foreign arbitral award may be refused if the court finds that: "The recognition or enforcement of the award would lead to a result clearly incompatible with the international public policy of the Portuguese State." This provision is a corollary of the abovementioned principle according to which no revision on the merits of foreign arbitral awards is allowed.

# Chapter VII. Means of Recourse

## 1. APPEAL ON THE MERITS FROM AN ARBITRAL AWARD

### *a. Appeal to a second arbitral instance*

Portuguese law does not expressly provide for an appeal to a second arbitral instance in domestic arbitration. Nevertheless, the principle of party autonomy

59. Case no. 1036/12.4YRLSB-8, available at <http://www.dgsi.pt>.
60. Ruling of the Supreme Court of 23 October 2014 in case no. 1036/12.4YRLSB.S1, available at <www.dgsi.pt>.
61. Case no. 103/13.1YRLSB.S1, available at <http://www.dgsi.pt>.
62. See, for a comment on this ruling, Vicente, Dário Moura, *"El arbitraje en las relaciones luso-españolas: la jurisprudencia portuguesa reciente"*, Arbitraje: Revista de Arbitraje Comercial y de Inversiones (2018) pp. 735 et seq.

should allow the parties to agree on the admissibility of such an appeal. In what concerns international arbitration this is contemplated in Art. 53 of the Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (the "Arbitration Act" or the "Act", see **Annex I** hereto), according to which the award is subject to no appeal, unless the parties have expressly agreed on the possibility of an appeal to another arbitral tribunal and have regulated its terms.

*b. Appeal to a court*

In domestic arbitration, the award on the merits of the dispute, as well as an award that terminates the arbitral proceedings without deciding on the merits, is only subject to an appeal to a State court if the parties have expressly foreseen this possibility in the arbitration agreement and insofar as the dispute has not been decided *ex aequo et bono* or through *amiable composition* (Art. 39(4) of the Arbitration Act).

It should however be borne in mind that if the arbitration agreement was concluded before the new Arbitration Act entered into force (i.e., before 14 March 2012) parties to that agreement maintain, by virtue of Art. 4(3) of Law no. 63/2011, of 14 December 2011, which approved the new Arbitration Act, the right to appeal from the arbitral award, which the previous Arbitration Act granted them, as a default rule, in domestic arbitration.

According to Art. 665(1) of the Code of Civil Procedure ("CCP", see **Annex II**), the Court of Appeal must render a new judgment on the subject matter of the appeal. It may not, therefore, simply annul the award and remit it to the arbitrators. The same rule applies to appeals submitted to the Supreme Court (Art. 679 CCP).

As mentioned above, no appeal to a State court is allowed in international arbitration.

## 2. SETTING ASIDE OF THE ARBITRAL AWARD (ACTION FOR ANNULMENT, VACATION OF THE AWARD)

*a. Grounds for setting aside*

Under the Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (the "Arbitration Act" or the "Act", see **Annex I** hereto), recourse to a State court against an arbitral award may in principle only be made by an application for setting aside (Art. 46(1)).[63]

63. See, generally, on the forms of recourse allowed against the arbitral award, Mendes, Armindo Ribeiro, *"A nova lei de arbitragem voluntária e as formas de impugnação das decisões arbitrais (algumas notas)"*, in *Estudos em homenagem ao Prof. Doutor José Lebre de Freitas*, vol. II (Coimbra Editora 2013) pp. 703 et seq.; Caramelo, António Sampaio, *A impugnação da sentença arbitral* (Coimbra Editora 2014); *idem*, "Challenge of Arbitral Awards", in Fonseca, André Pereira et al. (eds), *International Arbitration in Portugal*

According to Art. 46(3)(a) of the Arbitration Act, the arbitral award may only be set aside if the interested party furnishes proof of one or more of the following situations: (1) One of the parties 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, failing any indication thereon, under the Portuguese Arbitration Act; (2) One of the fundamental principles referred in Art. 30(1), of the Act was breached during the proceedings with a decisive influence on the outcome of the dispute; (3) The award deals with a dispute not contemplated by the arbitration agreement, or contains decisions beyond its scope; (4) The composition of the arbitral tribunal or the arbitral procedure did not comply with the agreement of the parties, unless this agreement was in conflict with a provision of the Act from which the parties cannot derogate, or, failing such agreement, they were not in accordance with the Act, provided that, in either case, this non-conformity had a decisive influence on the decision of the dispute; (5) The arbitral tribunal has ordered an amount in excess of what was claimed or on a different claim from that which was presented, or has dealt with issues that it should not have dealt with, or failed to decide issues that it should have decided; (6) The award was made in violation of the requirements set out in Art. 42(1) and (3) of the Act in regard of the award's form and contents; or (7) The award was notified to the parties after the maximum time limit set out in Art. 43 had lapsed.

The arbitral award may furthermore be set aside, pursuant to Art. 46(3)(b) of the Act, if the court *ex officio* finds that: (1) The subject matter of the dispute cannot be decided by arbitration under Portuguese law; or (2) The content of the award is in conflict with the principles of the *international public policy* of the Portuguese State (which is generally held to be a more restricted notion than that of public policy *tout court,* as it comprises solely those fundamental legal principles that the forum State will not abdicate, even if the issue at stake is submitted to a foreign law in accordance with a choice of law rule or has been decided by a foreign court or tribunal).

The provision regarding the setting aside of an arbitral award on grounds of violation of the principles of the international public policy of the Portuguese State must, in any event, be understood in light of Art. 46(9) of the Act, according to which the State court to which the application for the setting aside of an arbitral award was submitted may not deal with the merits of the issues decided in the award. This provision may not, therefore, be construed as enabling courts to review the merits of the award; it merely allows a prima facie control thereof.

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(Kluwer 2020), pp. 239 et seq.; and Almeida, António Pereira de, *"A anulação das decisões arbitrais"*, in Cordeiro, António Menezes, *Arbitragem Comercial. Estudos Comemorativos dos 30 Anos do Centro de Arbitragem Comercial* (Almedina 2019), pp. 67 et seq.

Art. 54 of the Arbitration Act contains a special rule on the setting aside of the award on grounds of public policy in international arbitrations that take place in Portugal. By virtue of this provision, in such arbitrations the award may only be set aside on these grounds if: (1) Non-Portuguese law has been applied to the merits of the dispute; (2) The award is to be enforced or to produce other effects in national territory; and (3) Its enforcement leads to a result that is manifestly incompatible with the principles of international public policy.[64]

If the award is set aside, the merits of the dispute may be submitted, upon request of any of the parties, to another arbitral tribunal (Art. 46(9) of the Act).

*b. Procedure*

The setting aside of an arbitral award must be requested within sixty days from the date on which the interested party has been notified of the award or, if a request for correction or clarification of the award had been made, from the date on which such request had been disposed of by the arbitral tribunal (Art. 46(6) of the Act). However, the grounds for setting aside may also be invoked in the context of an opposition to the enforcement of the award, provided that, on the date on which such opposition is presented, an application for the setting aside on the same grounds has not already been rejected by a final and binding judgment (Art. 48(1) of the Act).

The application for setting aside must be brought before the Court of Appeal with jurisdiction over the place of arbitration (Art. 59(1) of the Act).

That court may, where appropriate, and insofar as this is requested by one of the parties, suspend the setting aside proceedings for a period of time determined by it, in order to give the arbitral tribunal the opportunity to resume the arbitral proceedings or to take such other action as the arbitral tribunal deems appropriate to eliminate the grounds for setting aside (Art. 46(8) of the Act).

Unless otherwise agreed by the parties, the setting aside of an award results in the arbitration agreement becoming operative again in respect of the subject matter of the dispute (Art. 46(10) of the Act).

64 For a discussion of this rule and its relationship with Art. 46 of the Act, see Vicente, Dário Moura, *"Impugnação da sentença arbitral e ordem pública"* in *Estudos em homenagem a Miguel Galvão Teles*, vol. II (Almedina 2012) pp. 327 et seq.; Caramelo, António Sampaio, *"A sentença arbitral contrária à ordem pública perante a nova LAV"* in *ibid*, pp. 51 et seq.; Monteiro, António Pedro Pinto, *"Da ordem pública no processo arbitral"* in *Estudos em homenagem ao Prof. Doutor José Lebre de Freitas*, vol. II (Coimbra Editora 2013) pp. 589 et seq.; and Cordeiro, António Menezes, *"A ordem pública nas arbitragens: as últimas tendências"* in *VII Congresso do Centro de Arbitragem Comercial* (Almedina 2014) pp. 73 et seq.

*c. Waivers*

The right to apply for the setting aside of an arbitral award cannot be waived (Art. 46(5) of the Act). However, a party that, knowing that one of the provisions of the Act from which the parties can derogate, or any condition set out in the arbitration agreement, was not complied with, nonetheless pursued the arbitration without immediate opposition or, if there was a time limit therefore, did not object within this time limit, is deemed to have waived the right to bring an action to set aside the arbitral award on such ground (Art. 46(4) of the Act).

*d. Effect of an award that has been set aside*

An award that has been set aside has in principle no effect. However, if the part of the award regarding which any of the grounds for setting aside is considered to have occurred can be separated from the rest of the award, only that part of the award shall be set aside (Art. 46(7) of the Act).

## 3. OTHER MEANS OF RECOURSE

Other possible means of recourse against the award in addition to those discussed in Chapter VII above, although much less frequently resorted to, comprise the following: (1) the extraordinary appeal for the review of a judgment or award that constitutes *res judicata*, allowed in Art. 696 of the Code of Civil Procedure ("CCP", see **Annex II**) in exceptional circumstances (such as a crime having been committed by the judge in the performance of his or her functions, the falsehood of a judicial document or act, or of a statement by experts, having determined the decision to be reviewed, or the dispute having been based on a simulated act of the parties);[65] (2) the appeal to the Constitutional Court, which is allowed, pursuant to Arts. 280(1) of the Constitution and 70(1) of Law no. 28/82, of 15 November 1982, in respect of decisions that refuse to apply a norm on grounds of its unconstitutionality or that apply a norm whose unconstitutionality was raised by the appellant during the proceedings.[66]

65. See, on this Silva, Paula Costa e, "*Anulação e recursos da decisão arbitral*", Revista da Ordem dos Advogados (1992) pp. 893 et seq., at p. 991.
66. See, on this Teles, Miguel Galvão, "*Recurso para Tribunal Constitucional das decisões dos tribunais arbitrais*", in *Estudos em homenagem ao Prof. Doutor Sérvulo Correia*, vol. I (Coimbra Editora 2010), pp. 637 et seq.

# Chapter VIII. Conciliation / Mediation

## 1. GENERAL

Interest in conciliation and mediation as alternative means for the settlement of disputes has been rising in Portugal. Although the UNCITRAL Model Law on International Commercial Conciliation has not been adopted in Portugal, a Resolution passed by the Portuguese Government in 2001[67] stated as its purpose "to promote and encourage the settlement of disputes by alternative means, such as mediation or arbitration", including in relationships between the State and its citizens or other organizations. In that year, a system of Justices of the Peace (*Julgados de Paz*) with jurisdiction over small claims (presently up to € 15,000) and largely based on mediation and conciliation as the preferred dispute-settlement mechanisms was instituted in Portugal.[68] Twenty-five such extrajudicial tribunals have been set up in the country since then. Approximately 123,000 cases were submitted to them until 31 December 2019, thirty-eight percent of which ended through mediation, conciliation, or settlement in 2019.[69] A considerable number of private mediation institutions have in the meantime emerged in Portugal.[70]

## 2. LEGAL PROVISIONS

### *a. The Arbitration Act*

The Voluntary Arbitration Act approved by Law no. 63/2011, of 14 December 2011 (the "Arbitration Act" or the "Act", see **Annex I** hereto) provides in Art. 39(3), that, if so empowered by the parties, the arbitral tribunal may decide the dispute by appealing to a "reconciliation of the parties on the basis of a balancing of the interests at stake". This form of dispute settlement should, however, not be confused with conciliation or mediation because, unlike a conciliator or mediator, such an *amiable compositeur* must decide a dispute by way of an award (although he must endeavour to reach a decision that is

67. Resolution no. 175/2001, of 28 December 2001.
68. Law no. 78/2001 of 13 July 2001, concerning the competence, organization and functioning of the Justices of the Peace, amended by Law no. 54/2013, of 31 July 2013. On this law, see Ferreira, J.O. Cardona, *Julgados de Paz: Organização, Competência e Funcionamento*, 3rd ed. (Coimbra Editora 2014); and Gouveia, Mariana França, *Curso de resolução alternativa de litígios*, *op. cit*., pp. 317 et seq.
69. See *Conselho dos Julgados de Paz*, *Relatório Anual 2019*, available at <http://www.conselhodosjulgadosdepaz.com.pt>.
70. The abovementioned *Centro de Arbitragem Comercial*, for example, published a set of Rules on Mediation and Conciliation in 1994 (an English translation of which is available at <http://www.centrodearbitragem.pt>) and has been offering mediation and conciliation services since then.

acceptable to both parties and that will accordingly allow their business dealings to proceed).[71]

*b. Law on Mediation*

A modern law on mediation, establishing the general principles applicable to mediation that takes place in Portugal, was published on 19 April 2013.[72] This law, through which Portugal has fulfilled its obligations under Directive 2008/52/EC of the European Parliament and of the Council, of 21 May 2008, on certain aspects of mediation in civil and commercial matters, entered into force on 19 May 2013.[73] It regulates public, as well as civil and commercial mediation. Mediation is defined in it as "an alternative form of dispute resolution, undertaken by public or private entities, through which two or more conflicting parties voluntarily endeavour to reach an agreement with the assistance of a conflict mediator" (Art. 2(a)). The new law sets out the general principles governing mediations in Portugal. These include: (1) The voluntary nature of mediation; (2) the confidentiality of the mediation process; (3) the equal treatment of parties; (4) The impartiality and independence of mediators; and (5) the enforceability of agreements obtained through mediation (Arts. 4-9). In line with the Arbitration Act, the law adopts as general criteria for the admissibility of mediation the pecuniary nature of the interests at stake in the dispute and, alternatively, the fact that parties are allowed to settle on the right in issue (Art. 11). Among other topics, the law regulates the agreements whereby parties submit their disputes to mediation (known as "mediation agreements") (Art. 12), the mediation process (Arts. 16-22), the status of mediators (Arts. 23-29), and the functioning of public mediation systems (Arts. 30-44).

Agreements concluded in mediations that conform to the requirements of the law are directly enforceable in Portuguese courts without any need for homologation by a State court (Art. 9(1)), although such homologation may be jointly requested by the parties (Art. 14(1)). This rule also applies to agreements concluded in mediations that have taken place in other EU Member States insofar as their law equally provides for the direct enforcement of such agreements (Art. 9(4)).

71. See, on this, Vicente, Dário Moura, *Da arbitragem comercial internacional. Direito aplicável ao mérito da causa*, op. cit., pp. 31 et seq., with further references.
72. Law no. 29/2013, of 19 April 2013. See, on this law, Lopes, Dulce and Patrão, Afonso, *Lei da Mediação Comentada*, 2nd ed. (Almedina 2016); and Gouveia, Mariana França, *Curso de resolução alternativa de litígios*, *op. cit.*, pp. 47 et seq.
73. On the transposition of that Directive into Portuguese law, see, Vicente, Dário Moura, *"A Diretiva sobre a mediação em matéria civil e comercial e a sua transposição para a ordem jurídica portuguesa"*, Revista Internacional de Arbitragem e Conciliação (2009) pp. 125 et seq.

*c. Code of Civil Procedure*

Art. 594(1) of the Code of Civil Procedure ("CCP", see **Annex II**) states that when the dispute relates to disposable rights an attempt to conciliate between parties may take place at any stage of the judicial proceedings, as long as the parties jointly request it or the judge considers it appropriate. Parties may, however, not be summoned for this purpose more than once. This conciliation attempt ordinarily takes place at the preliminary hearing (*audiência prévia*) provided for in Art. 591(1)(a) CCP. It is presided over by the judge, who must actively seek an equitable solution for the dispute (Art. 594(3) CCP). If the conciliation attempt is not successful, the minutes of the hearing must refer the solutions suggested by the judge and the reasons that, according to the parties, justify the persistence of the dispute.

*d. Specific provisions*

Conciliation and mediation are also regulated in legal provisions concerning specific types of disputes. Such is the case, for example, of disputes on securities (see Art. 33 of the Securities Code approved by Decree-Law no. 486/99 of 13 November 1999, last amended by Law no. 50/2020, of 25 August 2020)[74] and labour relations (see Arts. 523 to 528 of the Labour Code approved by Law no. 7/2009, of 12 February 2009, last amended by Law no. 93/2019, of 4 September 2019).[75]

# Chapter IX. Investment Treaty Arbitration

## 1. CONVENTIONS AND TREATIES

Portugal has been a party to the Convention on the Settlement of Investment Disputes ("ICSID Convention") since 1984. Sixty bilateral investment treaties ("BITs") have been entered into by this country since then,[76] many of which provide for arbitration of investment disputes under the ICSID Arbitration Rules.

According to the Portuguese model BIT, disputes that may arise between an investor of one of the parties and the other party are, insofar as possible, to be settled amicably. If, within six months after the commencement of consultations, it has not been possible to settle the dispute amicably, the

74. An English translation thereof is available at <http://www.cmvm.pt>.
75. An English translation of an earlier version of the Labour Code was published in Portugal under the title *Portuguese Labour Code: Código do Trabalho* (Almedina 2005).
76. A list of the BITs entered by Portugal is available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/169/portugal>. A more detailed list, comprising all economic bilateral agreements entered into by Portugal and containing links to the Portuguese Republic's official journal's issues where the full text of those agreements is published, can be found at <http://www.portugalglobal.pt>.

investor may submit it: (1) to the competent courts of the Contracting Party where the investment is situated; (2) to ICSID, for conciliation or arbitration, under the terms of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, of 1965 (the "Washington Convention"); (3) to an *ad hoc* arbitral tribunal established by a special agreement between the Parties or under the UNCITRAL arbitration rules; or (4) to any other arbitration institution or in conformity with any other arbitration rules, as long as the State party to the dispute does not object this. The decision to submit the dispute to any of these procedures is irreversible. Notwithstanding that, if the investor opts to settle the dispute in the national courts of the Party where the investment is situated and no decision has been rendered within twenty-four months, the investor may give up the national instance and submit the dispute to any of the abovementioned forms of international arbitration, by notifying the national court of this decision.

Judgments and awards are binding and may only be subject to appeal or any other procedure insofar as this is expressly provided for in the applicable law and rules. The State party to the dispute may not, at any moment, avail itself of the fact that the investor has received, by virtue of an insurance contract, a compensation covering all or part of the damage caused. After the proceedings are concluded, and in case of non-compliance with the judgment or award rendered in accordance with this article, the parties may exceptionally resort to diplomatic channels in order to ensure the enforcement of the abovementioned judgment or award. Judgments and awards are to be recognized and enforced in accordance with the law of the party in the territory of which the investment is situated and in conformity with the applicable International Law.[77]

## 2. INVESTMENT ARBITRATION

So far, Portugal has not been a respondent in any investment arbitration under the ICSID Rules, although Portuguese investors have resorted to ICSID arbitration in disputes against other States.[78]

77. See, on investment arbitration in Portuguese literature, Pinheiro, Luís de Lima, *"A Arbitragem CIRDI e o regime dos contratos de Estado"*, Revista International de Arbitragem e Conciliação (2008) pp. 75 et seq.; Vicente, Dário Moura, *"Arbitragem de Investimento: a Convenção ICSID e os Tratados Bilaterais"*, Revista da Ordem dos Advogados (2011) pp. 751 et seq.; *idem, "Os mecanismos de resolução de litígios entre Estados e investidores na perspetiva europeia: desenvolvimentos recentes"*, in Liber Amicorum Fausto Quadros (Almedina 2016), vol. I, pp. 331 et seq.; and Tiago Duarte, *"As fronteiras do Direito Público e a arbitragem internacional de investimentos",* Scientia Iuridica, 2011, pp. 293 et seq.; *idem, "A arbitragem ICSID e o desenvolvimento económico dos Estados",* in *Estudos em homenagem ao Prof. Doutor José Joaquim Gomes Canotilho* (Coimbra Editora 2012), vol. I, pp. 269 et seq.
78. See the information available at <https://icsid.worldbank.org/ICSID/Index.jsp>.

## 3. NATIONAL INVESTMENT LEGISLATION

Art. 9 of Decree-Law no. 191/2014, of 31 December 2014, which establishes a special regime concerning contracts for the provision of support and incentives to large investment projects, provides that, in order to settle disputes arising from the interpretation and application of such contracts, the parties may agree to resort to arbitration, with the exception of issues relating to tax benefits. The Portuguese State is represented before the arbitral tribunal by the Agency for Investment and Foreign Trade (*Agência para o Investimento e Comércio Externo de Portugal* or AICEP).

# ANNEX I

## PORTUGUESE VOLUNTARY ARBITRATION LAW 2011*

(*In force since 14 March 2012*)

CHAPTER I. THE ARBITRATION AGREEMENT

*Article 1. Arbitration agreement*

1. Any dispute involving economic interests may be referred by the parties to arbitration, by means of an arbitration agreement, provided that it is not exclusively submitted by a special law to the State courts or to compulsory arbitration.

2. An arbitration agreement concerning disputes that do not involve economic interests is also valid provided that the parties are entitled to conclude a settlement on the right in dispute.

3. The arbitration agreement may concern an existing dispute, even if it has been brought before a State court (submission agreement), or disputes that may arise from a given legal relationship, contractual or non-contractual (arbitration clause).

4. In addition to matters of a strictly contentious nature, the parties may agree to submit to arbitration any other issues that require the intervention of an impartial decision maker, including those related to the need to specify, complete and adapt contracts with long-lasting obligations to new circumstances.

5. The State and other legal entities governed by public law may enter into arbitration agreements insofar as they are authorised to do so by law, or if such agreements concern private law disputes.

*Article 2. Arbitration agreement requirements; its termination*

1. The arbitration agreement shall be in writing.

2. The requirement that the arbitration agreement be in writing is met if the agreement is recorded in a written document signed by the parties, in an exchange of letters, telegrams, faxes or other means of telecommunications which provide a written record of the agreement, including electronic means of communication.

3. The requirement that the arbitration agreement be in writing is met if it is recorded on an electronic, magnetic, optical or any other type of support, that offers the same guarantees of reliability, comprehensiveness and preservation.

4. Without prejudice to the legal regime on general contract clauses, the reference made in a contract to a document containing an arbitration clause constitutes an arbitration agreement, provided that such contract is in writing and that the reference is such as to make that clause part of the contract.

5. The requirement that the arbitration agreement be in writing is also met when there is an exchange of statements of claim and defence in arbitral proceedings, in which the existence of such an agreement is invoked by one party and not denied by the other.

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* Unofficial translation revised by Dário Moura Vicente, Professor of Law at the University of Lisbon and Member of the Bar Association of Portugal.

6. A submission agreement shall specify the subject matter of the dispute; an arbitration clause shall specify the legal relationship to which the disputes are related.

*Article 3. Invalidity of the arbitration agreement*
The arbitration agreement entered into in breach of the provisions of Arts. 1 and 2 is null and void.

*Article 4. Modification, revocation and expiry of the agreement*
1. The arbitration agreement may be altered by the parties until the acceptance of the first arbitrator or, if all arbitrators agree thereto, until the arbitral award is issued.

2. The arbitration agreement may be revoked by the parties, until the arbitral award is issued.

3. The agreement of the parties foreseen in the preceding paragraphs must be in writing and comply with the provisions of Art. 2.

4. Unless otherwise agreed, the death or the extinction of the parties shall neither render the arbitration agreement forfeit nor lead to the termination of the arbitral proceedings.

*Article 5. Negative effect of the arbitration agreement*
1. The State court before which an action is brought in a matter which is the object of an arbitration agreement shall, if the respondent so requests not later than when submitting its first statement on the substance of the dispute, dismiss the case, unless it finds that the arbitration agreement is clearly null and void, is or became inoperative or is incapable of being performed.

2. In the case foreseen in the previous paragraph, arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the State court.

3. The arbitral proceedings shall cease and the award made therein shall cease to produce effects, when a state court considers, by means of a final and binding decision, that the arbitral tribunal is incompetent to settle the dispute that was brought before it, whether such decision is rendered in the action referred to in paragraph 1 of the present article, or whether it is rendered under Art. 18(9) and under Art. 46(3), a), i) and iii).

4. The issues of invalidity, inoperativeness or unenforceability of an arbitration agreement cannot be discussed autonomously in an action brought before a State court to that effect or in an interim measure procedure brought before the same court, aiming at preventing the constitution or the operation of an arbitral tribunal.

*Article 6. Reference to arbitration rules*
All references made in this Law to provisions of the arbitration agreement or to the agreement between the parties include not only what the parties have directly regulated therein, but also the arbitration rules to which the parties have referred to.

*Article 7. Arbitration agreement and interim measures granted by a State court*
It is not incompatible with an arbitration agreement for a party to request from a State court, before or during the arbitral proceedings, an interim measure and for a State court to grant such a measure.

CHAPTER II. ARBITRATORS AND THE ARBITRAL TRIBUNAL

*Article 8. Number of arbitrators*

1. The arbitral tribunal may consist of a sole arbitrator or of several, in an uneven number.

2. Should the parties fail to agree on the number of members of the arbitral tribunal, the arbitral tribunal shall consist of three arbitrators.

*Article 9. Arbitrators' requirements*

1. The arbitrators must be individuals and have full legal capacity.

2. No person shall be precluded, by reason of that person's nationality, from being appointed as an arbitrator, without prejudice to the provisions of Art. 10(6), and the discretion of the parties.

3. Arbitrators must be independent and impartial.

4. Arbitrators may not be held liable for damages resulting from their decisions, save for those situations in which judges may be so.

5. The liability of the arbitrators as mentioned in the preceding paragraph only exists towards the parties.

*Article 10. Appointment of arbitrators*

1. The parties are free to appoint the arbitrator or arbitrators that shall form the arbitral tribunal in the arbitration agreement or in a document subsequently signed by the parties, or to agree on a procedure for appointing them, notably by entrusting the appointment of all or some of the arbitrators to a third party.

2. In an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator's appointment, such arbitrator shall be appointed, upon request of any party, by the State court.

3. In an arbitration with three or more arbitrators, each party shall appoint an equal number of arbitrators and the arbitrators thus appointed shall appoint a further arbitrator, who shall act as chairman of the arbitral tribunal.

4. Unless otherwise agreed, if a party is to appoint an arbitrator or arbitrators and fails to do so within thirty 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 chairman within thirty days of the appointment of the last arbitrator to be appointed, the appointment of the remaining arbitrator or arbitrators shall be made, upon request of any of the parties, by the competent State court.

5. Unless otherwise agreed, the provisions of the preceding paragraph shall apply if the parties have entrusted the appointment of all or some of the arbitrators to a third party and the appointment does not occur within thirty days of the request to do so.

6. In appointing an arbitrator, the competent State court shall have due regard to any qualifications required of the arbitrator or arbitrators by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator; in the case of an international arbitration, while appointing a sole or third arbitrator, the court shall furthermore take into account the advisability of appointing an arbitrator of a nationality other than those of the parties.

7. The decisions made by the competent State court under the provisions of the preceding paragraphs of this article are not subject to appeal.

*Article 11. Multiple claimants or respondents*

1. In case of multiple claimants or respondents, and if the arbitral tribunal is to consist of three arbitrators, the claimants shall jointly appoint an arbitrator and the respondents shall jointly appoint another one.

2. Should the claimants or the respondents fail to reach an agreement on the arbitrator to be appointed by them, the appointment of such arbitrator shall be made, upon request of any party, by the competent State court.

3. In the case foreseen in the previous paragraph, the State court may appoint all arbitrators and indicate which one of them shall be the chairman, if it becomes clear that the parties that failed to jointly appoint an arbitrator have conflicting interests regarding the substance of the dispute, and in such event the appointment of the arbitrator meanwhile made by one of the parties shall become void.

4. The provisions of this article are without prejudice to what may have been stipulated in the arbitration agreement for multi-party arbitrations.

*Article 12. Acceptance of mandate*

1. No person may be compelled to act as an arbitrator; but if the mandate has been accepted, withdrawal shall only be legitimate if it is based on a supervening impossibility of the appointee to perform said appointee's functions, or in case of non-conclusion of the agreement referred to in Art. 17(1).

2. Unless otherwise agreed by the parties, each appointed arbitrator shall, within fifteen days from the notice of his or her appointment, declare in writing the acceptance of the mandate to whomever appointed him or her; if within such period the arbitrator neither declares his or her acceptance, nor in any other way reveals his or her intent to act as an arbitrator, such arbitrator shall be deemed not to accept the appointment.

3. The arbitrator who, having accepted the mandate, unjustifiably withdraws from exercising his or her office shall be liable for the damages caused.

*Article 13. Grounds for challenge*

1. When a person is invited to act as an arbitrator, he or she shall disclose any circumstances that may give rise to justifiable doubts as to his or hers impartiality and independence.

2. The arbitrator shall, throughout the arbitral proceedings, disclose without delay to the parties and the remaining arbitrators any of the circumstances referred to in the preceding paragraph that arise subsequently, or of which he only became aware after accepting the mandate.

3. An arbitrator may only be challenged 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 only challenge an arbitrator appointed by it, or in whose appointment it has participated, for reasons of which it becomes aware after the appointment has been made.

*Article 14. Challenge procedure*

1. The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of para. 3 of this article.

2. Failing such agreement, the party intending to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of the circumstances referred to in Art. 13, send to the arbitral tribunal a written statement of the reasons for the challenge. If the challenged arbitrator does not

withdraw from office and the party that appointed such arbitrator insists that the arbitrator continues in office, the arbitral tribunal, including the challenged arbitrator, shall decide on the challenge.

3. If a challenge under any procedure agreed upon by the parties or under the procedure of para. 2 of this article is not successful, the challenging party may request, within fifteen days after having received notice of the decision rejecting the challenge, the competent State court to decide on the challenge, which decision shall be subject to no appeal. While such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

*Article 15. Incapability or failure of an arbitrator to act*

1. The arbitrator's mandate shall terminate if he becomes, *de jure* or *de facto,* incapable to perform his or her functions, if he or she withdraws from office or if the parties agree on the termination on such grounds.

2. If an arbitrator, for any other reason, fails to perform his or her functions within a reasonable period of time, the parties may, by mutual agreement, terminate the mandate, without prejudice to any eventual liability of the arbitrator in question.

3. If the parties cannot agree on the termination in any of the situations referred to in the preceding paragraphs of this article, any party may request the competent State court to remove such arbitrator from office, on those grounds, which decision of the State court shall be subject to no appeal.

4. If, under the preceding paragraphs of this article or under Art. 14(2) an arbitrator withdraws from office or if the parties agree on the termination of the mandate of an arbitrator allegedly found to be in one of the circumstances referred therein, that does not involve the acceptance of the validity of the grounds for the removal from office mentioned in those provisions.

*Article 16. Appointment of a substitute arbitrator*

1. Where, for any reason, the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed, according to the rules applicable to the appointment of the arbitrator being replaced, without prejudice to the parties agreeing that the replacement shall be made otherwise or waiving such replacement.

2. The arbitral tribunal shall decide, taking into consideration the stage of the proceedings, whether any procedural act should be repeated in view of the new composition of the tribunal.

*Article 17. Arbitrators' fees and expenses*

1. If the parties have failed to regulate such matters in the arbitration agreement, the arbitrators' fees, the method of reimbursement of their expenses and the payment by the parties of advances on such fees and expenses shall be agreed upon in writing by the parties and the arbitrators, said agreement to be entered into before the acceptance by the last of the arbitrators to be appointed.

2. If such matters have not been regulated in the arbitration agreement, and an agreement thereon has not been entered into between the parties and the arbitrators, the arbitrators shall, taking into consideration the complexity of the issues decided, the amount in dispute and the time spent or to be spent with the arbitral proceedings until its conclusion, fix the amount of their fees and expenses, and furthermore determine the payment by the parties of their advance payments, by means of one or several decisions separate from those in which procedural issues or the substance of the dispute are decided.

3. In the situation foreseen in the previous paragraph of the present article, any of the parties may request the competent State court to reduce the amounts of the fees or the expenses and respective advance payments fixed by the arbitrators, whereby that State court may define the amounts it deems adequate, after having heard the members of the arbitral tribunal on the issue.

4. In the case of a failure to make advance payments for fees and expenses previously agreed or fixed by the arbitral tribunal or the State court, the arbitrators may suspend or end the arbitral proceedings after a reasonable additional time limit granted to that effect to the party or parties in default has elapsed, without prejudice to the provisions of the following paragraph of this article.

5. If one of the parties has not made its advance payment within the time limit determined in accordance with the previous paragraph, the arbitrators, before deciding to suspend or end the arbitral proceedings, shall give notice thereof to the remaining parties so that these may, if they wish, remedy the failure to make said advance payment within the time limit granted to that effect.

## CHAPTER III. JURISDICTION OF THE ARBITRAL TRIBUNAL

*Article 18. Competence of arbitral tribunal to rule on its jurisdiction*

1. The arbitral tribunal may rule on its own jurisdiction, even if for that purpose it is necessary to assess the existence, the validity or the effectiveness of the arbitration agreement or of the contract of which it forms part, or the applicability of the said arbitration agreement.

2. For the purpose of the previous paragraph, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

3. The decision by the arbitral tribunal that the contract is null and void shall not automatically entail the invalidity of the arbitration clause.

4. A plea that the arbitral tribunal does not have jurisdiction to hear the whole or part of the dispute submitted to it shall be raised not later than the submission of the statement of defence as to the substance of the dispute, or jointly with it.

5. A party is not precluded from raising a plea that the arbitral tribunal does not have jurisdiction to hear the dispute brought before it by the fact that it has appointed, or participated in the appointment of, an arbitrator.

6. A plea that the arbitral tribunal, in the course of the arbitral proceedings, has exceeded or may exceed its jurisdiction shall be raised as soon as the issue alleged to be beyond the scope of its jurisdiction is raised during the proceedings.

7. The arbitral tribunal may, in the cases mentioned in paras. 4 and 6 of the present article, allow that a plea based on the arguments mentioned in the said paragraphs be presented after the time limits established therein, if it considers the delay justified.

8. The arbitral tribunal may rule on its jurisdiction either in an interim decision or in the award on the merits.

9. The interim decision by which the arbitral tribunal rules that it has jurisdiction may, within thirty days after its notification to the parties, be challenged by any of them before the competent State court, under Art. 46(3), a), i) and ii), and under Art. 59(1), f).

10. While the challenge mentioned in the previous paragraph is pending in the competent State court, the arbitral tribunal may continue the arbitral proceedings and make an award on the merits of the dispute, without prejudice to the provisions of Art. 5(3).

*Article 19. Scope of the State court's intervention*
In the matters governed by this Law, State courts may only intervene where so provided in this Law.

## CHAPTER IV. INTERIM MEASURES AND PRELIMINARY ORDERS

### SECTION I. INTERIM MEASURES

*Article 20. Power of the arbitral tribunal to grant interim measures*
1. 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 in relation to the subject matter of the dispute.

2. For the purpose of this Law, an interim measure is a temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

a) maintain or restore the status quo pending determination of the dispute;

b) take action that would prevent, or refrain from taking action that is likely to cause, harm or prejudice to the arbitral process itself;

c) provide a means of preserving assets out of which a subsequent award may be satisfied;

d) preserve evidence that may be relevant and material to the resolution of the dispute.

*Article 21. Conditions for granting interim measures*
1. Interim measures requested under Art. 20(2), a), b) and c) shall be granted by the arbitral tribunal as long as:

a) there is a serious probability that the right invoked by the requesting party exists and the fear that such right will be harmed is sufficiently evidenced; and

b) the harm resulting from the interim measure to the party against whom the measure is directed does not substantially outweigh the damage that the requesting party wishes to avoid with the measure.

2. The determination of the arbitral tribunal on the probability referred to in para. 1, sub-para. a) of this article shall not affect the discretion of the arbitral tribunal in making any subsequent determination on any matter.

3. With regard to the request for an interim measure presented under Art. 20(2), d), the requirements foreseen in para. 1, sub-paras. a) and b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

### SECTION II. PRELIMINARY ORDERS

*Article 22. Application for preliminary orders; conditions*
1. Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

2. The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

3. The conditions defined under Art. 21 apply to any preliminary order, provided that the harm to be assessed under Art. 21(1), b) is, in such case, the harm likely to result from the order being granted or not.

*Article 23. Specific regime for preliminary orders*

1. Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communications between any party and the arbitral tribunal in relation thereto.

2. At the same time, the arbitral tribunal shall give an opportunity to the party against whom the preliminary order is directed to present its case, at the earliest practicable time, to be set by the arbitral tribunal.

3. The arbitral tribunal shall decide promptly on any objection to the preliminary order.

4. A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

5. A preliminary order shall be binding on the parties but shall not be subject to enforcement by a state court.

SECTION III. PROVISIONS APPLICABLE TO INTERIM MEASURES AND PRELIMINARY ORDERS

*Article 24. Modification, suspension and termination; security*

1. The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted or issued, upon application of any party or, in exceptional circumstances and after hearing the parties, on the arbitral tribunal's own initiative.

2. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security.

3. The arbitral tribunal shall require the party applying for a preliminary order to provide appropriate security, unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

*Article 25. Duty to disclose*

1. The parties shall promptly disclose any material change in the circumstances on the basis of which the interim measure was requested or granted.

2. The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, para. 1 of this article shall apply.

*Article 26. Responsibility of the requesting party*

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs or damages caused by such measure or order to the other party if the arbitral

tribunal later determines that, in the circumstances, the measure or the order should not have been granted or issued. The arbitral tribunal may, in the latter situation, order the requesting party to pay the corresponding indemnification at any point during the proceedings.

SECTION IV. RECOGNITION OR ENFORCEMENT OF INTERIM MEASURES

*Article 27. Recognition or enforcement*

1. An interim measure issued by an arbitral tribunal shall be binding on the parties and, unless otherwise provided by the arbitral tribunal, shall be enforced upon application to the competent State court, irrespective of the arbitration in which it was issued being seated abroad, subject to the provisions of Art. 28.

2. The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the State court of any termination, suspension or modification of that interim measure by the arbitral tribunal that has granted it.

3. The State court where recognition or enforcement of the measure is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

4. The decision of an arbitral tribunal granting a preliminary order or interim measure and the judgment of a State court deciding on the recognition or enforcement of an interim measure issued by an arbitral tribunal are not subject to appeal.

*Article 28. Grounds for refusing recognition or enforcement*

1. Recognition or enforcement of an interim measure may be refused by a State court only:

a) at the request of the party against whom it is invoked, if the court is satisfied that:

i) such refusal is warranted on the grounds set forth in Art. 56(1), a), i), ii), iii) or iv); or

ii) the arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

iii) the interim measure has been revoked or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

b) if the State court finds that:

i) the interim measure is incompatible with the powers conferred upon the State court unless the State court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

ii) any of the grounds for refusal of recognition set forth in Art. 56(1), b), i) or ii) apply to the recognition or enforcement of the interim measure.

2. Any determination made by the State court on any ground in para. 1 of this article shall be effective only for the purposes of the application to recognize or enforce the interim measure granted by the arbitral tribunal. The State court where recognition or enforcement of the interim measure is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

*Article 29. State court-ordered interim measures*

1. State courts shall have the power to issue interim measures dependent from arbitration proceedings, irrespective of the location where these take place, in the same terms as they may do so in relation to proceedings before State courts.

2. State courts shall exercise such power in accordance with the applicable procedural rules, taking into consideration the specific features of international arbitration, should that be the case.

## CHAPTER V. CONDUCT OF THE ARBITRAL PROCEEDINGS

*Article 30. Principles and rules of the arbitral proceedings*

1. The arbitral proceedings shall always comply with the following fundamental principles:

a) The respondent shall be summoned to present its defence;

b) The parties shall be treated with equality and shall be given a reasonable opportunity to present their case, in writing or orally, before the final award is issued;

c) In all phases of the proceedings the adversarial principle shall be guaranteed, with the exceptions set out in this Law.

2. The parties may, until the acceptance by the first arbitrator, agree on the procedure to be followed by the arbitral tribunal in the conduct of the proceedings, respecting the fundamental principles referred to in the preceding paragraph of this article and the mandatory provisions of this Law.

3. Failing such agreement of the parties and in the absence of applicable provisions in this Law, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, defining the procedural rules it deems adequate and specifying, if this is the case, that it considers the provisions of the law that governs the proceedings before the competent State court to be subsidiarily applicable.

4. The powers conferred upon the arbitral tribunal include the determination of the admissibility, relevance and weight of any evidence presented or to be presented.

5. The arbitrators, the parties and the arbitral institutions, if such is the case, are obliged to maintain confidentiality regarding all information obtained and documents brought to their attention in the course of the arbitration proceedings, without prejudice to the right of the parties to make public procedural acts necessary to the defence of their rights and to the duty to communicate or disclose procedural acts to the competent authorities, which may be imposed by law.

6. The preceding paragraph does not prevent the publication of awards and other decisions of the arbitral tribunal, with the exclusion of any elements of identification of the parties, unless any of them opposes thereto.

*Article 31. Place of arbitration*

1. The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal, having regard to the circumstances of the case, including the convenience of the parties.

2. Notwithstanding para. 1 of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate to hold one or more hearings, to allow the production of any evidence, or to deliberate.

*Article 32. Language of the proceedings*
1. The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings.

2. The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or chosen by the arbitral tribunal.

*Article 33. Commencement of proceedings; statements of claim and defence*
1. Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute shall commence on the date on which a request that such dispute be referred to arbitration is received by the respondent.

2. Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall submit its statement of claim, in which the remedy sought and the facts supporting the claim shall be stated, and the respondent shall present its statement of defence in which its defence in respect of these particulars shall be outlined, unless the parties have agreed otherwise regarding the required elements of such statements. The parties may submit with their written statements all documents they consider to be relevant and may add a reference therein to the documents or other means of evidence they will submit.

3. Unless otherwise agreed by the parties, either party may, in the course of the arbitral proceedings, amend or supplement its statement of claim or defence, unless the arbitral tribunal considers it inappropriate to allow such a change having regard to the delay in making it and the absence of sufficient justification for this.

4. The respondent may present a counterclaim, provided that its subject matter is covered by the arbitration agreement.

*Article 34. Hearings and written proceedings*
1. Subject to any contrary agreement by the parties, the tribunal shall decide whether to hold hearings for the presentation of evidence, or whether the proceedings shall be conducted merely on the basis of documents and other means of proof. The arbitral tribunal shall however hold one or more hearings for the presentation of evidence whenever so requested by a party, unless the parties have previously agreed that no hearings shall be held.

2. The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of producing evidence.

3. All written statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

*Article 35. Default and absence of a party*
1. If the claimant fails to present its statement of claim in accordance with Art. 33(2) the arbitral tribunal shall terminate the arbitral proceedings.

2. If the respondent fails to present its statement of defence in accordance with Art. 33(2) the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations.

3. If one of the parties fails to appear at a hearing or to produce documentary evidence within the determined period of time, the arbitral tribunal may continue the proceedings

and make the award on the evidence before it.

4. The arbitral tribunal may however, in case it deems the default justified, allow a party to perform the omitted act.

5. The provisions of the preceding paragraphs of this article are without prejudice to what the parties may have agreed on the consequences of default.

*Article 36. Third party joinder*

1. Only third parties bound by the arbitration agreement, whether from the date of such agreement or by having subsequently adhered to it, are allowed to join ongoing arbitral proceedings. Such adhesion requires the consent of all parties to the arbitration agreement and may only take place in respect of the arbitration in question.

2. If the arbitral tribunal has already been constituted, the joinder of a third party can only be allowed or requested if such party declares that it accepts the current composition of the tribunal; when a joinder is requested by the third party such acceptance is presumed.

3. Joinder must always be decided by the arbitral tribunal, after giving the original parties to the arbitration and the third party in question the opportunity to state their views. The arbitral tribunal shall only allow joinder if this does not unduly disrupt the normal course of the arbitral proceedings and if there are relevant reasons that justify the joinder, such as, in particular, those situations in which, provided that the request is not clearly impracticable:

a) the third party has an interest in relation to the subject matter of the dispute equal to that of the claimant or respondent, such that it would have originally permitted voluntary joinder or imposed compulsory joinder between one of the parties to the arbitration and the third party; or

b) the third party wishes to present a claim against the respondent with the same object as that of the claimant, but which is incompatible with the latter's claim; or

c) the respondent against whom a credit is invoked that may, *prima facie*, be characterized as a joint and several credit, wants the other possible joint and several creditors to be bound by the final award; or

d) the respondent wants that third parties to be joined, against whom it may have a claim in case the claimant's request is completely or partially granted.

4. The provisions of the preceding paragraphs referring to claimant and respondent are applicable, with the necessary adjustments, respectively to respondent and claimant, in case of a counterclaim.

5. In case a joinder is allowed, the provisions of Art. 33 shall apply, with the necessary adjustments.

6. Without prejudice to the following paragraph, a joinder before the arbitral tribunal has been constituted can only take place in institutionalised arbitration, and provided that the applicable arbitration rules ensure that the principle of equal participation of all parties is upheld, including members of multiple parties, in the choice of the arbitrators.

7. The arbitration agreement may regulate third party joinder in ongoing arbitrations differently from the provisions of the preceding paragraphs, either directly, upholding the principle of equal participation of all parties in the choice of the arbitrators, or by reference to an institutionalised arbitration regulation that allows such joinder.

*Article 37. Expert appointed by the arbitral tribunal*

1. 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.

2. In the case foreseen in the previous paragraph, the arbitral tribunal may require any party to give the expert any relevant information or to produce, or to provide access to, any relevant documents or other goods for the expert's inspection.

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

4. The provisions of Art. 13 and of Art. 14, paras. 2 and 3, apply, with the necessary adaptations, to the experts appointed by the arbitral tribunal.

*Article 38. State court assistance in taking evidence*

1. When the evidence to be taken depends on the will of one of the parties or of third parties and these refuse to cooperate, a party may, with the approval of the arbitral tribunal, request from the competent State court that the evidence be taken before it, the results thereof being forwarded to the arbitral tribunal.

2. The preceding paragraph is applicable to the requests to take evidence addressed to a Portuguese State court, in case of arbitrations seated abroad.

## CHAPTER VI. THE ARBITRAL AWARD AND THE CLOSING OF THE PROCEEDINGS

*Article 39. Rules applicable to substance of dispute, resort to equity; inadmissibility of appeal of the award*

1. The arbitrators shall decide the dispute in accordance with the law, unless the parties agree that they shall decide *ex aequo et bono*.

2. If the parties' agreement to decide *ex aequo et bono* was entered into after the acceptance by the first arbitrator, its effectiveness shall depend on the acceptance by the arbitral tribunal.

3. If the parties have entrusted the tribunal with that mission, the tribunal may decide the dispute as *amiable compositeur*.

4. The award on the merits of the dispute, or which terminates the arbitral proceedings without a decision on the merits, is only subject to appeal to the competent State court if the parties have expressly contemplated such possibility in the arbitration agreement, and provided that the dispute has not been decided *ex aequo et bono* or through *amiable composition*.

*Article 40. Decision-making by a panel of arbitrators*

1. In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of its members. Failing a majority decision, the award shall be made by the chairman of the tribunal.

2. If an arbitrator refuses to take part in the vote on the decision, the other arbitrators may make the award without such arbitrator, unless otherwise agreed by the parties. The parties shall be subsequently informed of that arbitrator's refusal to participate in the vote.

3. Issues related to procedural ordering, procedural sequence or procedural initiative, may be decided by the chairman alone, if so authorized by the parties or all other members of the arbitral tribunal.

*Article 41. Settlement*

1. If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if so requested by the parties, record the settlement in the form of an arbitral award on agreed terms, unless the contents of such settlement is in violation of any principle of public policy.

2. An award on agreed terms shall be made in accordance with the provisions of Art. 42 and shall state that it is an award. Such an award has the same effect as any other award on the merits of the case.

*Article 42. Form, contents and effectiveness of award*

1. The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of the members of the arbitral tribunal or that of the chairman, in case the award is to be made by the latter, shall suffice, provided that the reason for the omission of the remaining signatures is stated in the award.

2. Unless otherwise agreed by the parties, the arbitrators may decide the merits of the dispute in a single award or in as many partial awards as they deem necessary.

3. The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is rendered on the basis of an agreement of the parties under Art. 41.

4. The award shall state the date in which it was rendered, as well as the place of the arbitration determined in accordance with Art. 31(1). The award shall be deemed to all effects as having been made at that place.

5. Unless otherwise agreed by the parties, the award shall determine the proportions in which the parties shall bear the costs directly resulting from the arbitration. The arbitrators may furthermore decide in the award, if they so deem fair and appropriate, that one or some of the parties shall compensate the other party or parties for the whole or part of the reasonable costs and expenses that they can prove to have incurred due to their participation in the arbitration.

6. After the award is made, it shall be immediately notified through the delivery to each of the parties of a copy signed by the arbitrator or arbitrators, in accordance with para. 1 of this article. The award shall produce its effects on the date of such notification, without prejudice to the provisions of para. 7.

7. An arbitral award that cannot be appealed and that is no longer subject to amendments under Art. 45 has the same binding effect on the parties as the final and binding judgment of a State court, and is enforceable as a State court judgement.

*Article 43. Time limit to make the award*

1. Unless the parties have agreed, up to the acceptance by the first arbitrator, on a different time limit, the arbitrators shall deliver the final award on the dispute brought before them to the parties within twelve months from the date of acceptance of the last arbitrator.

2. The time limit set in accordance with para. 1 may be freely extended one or more times by an agreement of the parties or, alternatively, by a decision of the arbitral tribunal, for successive periods of twelve months, such extensions to be duly motivated. The parties may, however, by mutual agreement, oppose the extension.

3. Failure to deliver the final award within the maximum time limit set in accordance with the preceding paragraphs of this article shall automatically terminate the arbitral

proceedings and the arbitrators' jurisdiction to decide on the dispute. The arbitration agreement will, however, remain effective, notably in order that a new arbitral tribunal may be constituted and a new arbitration commenced.

4. The arbitrators that unjustifiedly prevent the award from being made within the time limit set for that purpose shall be liable for damages thus caused.

*Article 44. Termination of proceedings*

1. The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with para. 2 of this article.

2. The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

a) the claimant withdraws its claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on its part in obtaining a final settlement of the dispute;

b) the parties agree on the termination of the proceedings;

c) the arbitral tribunal finds that the continuation of the proceedings has for any reason become unnecessary or impossible.

3. The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of Art. 45 and Art. 46, para.

4. Unless otherwise agreed by the parties, the chairman of the arbitral tribunal shall 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.

*Article 45. Correction and interpretation of award; additional award*

1. Within thirty days of receipt of the notification of the award, unless another period of time has been agreed upon by the parties, any party may, with notice to the other party, request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical error or any error of an identical nature.

2. In the time period foreseen in the previous paragraph any party may, with notice to the other party, request the arbitral tribunal to clarify any obscurity or ambiguity of the award or of the reasons on which it is based.

3. If the arbitral tribunal considers the request to be justified, it shall make the correction or give the clarification within thirty days of receipt of the request. The clarification shall form part of the award.

4. The arbitral tribunal may also on its own initiative correct any error of the type referred to in para. 1 of this article within thirty days of the date of notice of the award.

5. Unless otherwise agreed by the parties, any party may, with notice to the other party, request the arbitral tribunal within thirty days of receipt of the notice of the award to make an additional award as to parts of the claim or claims submitted in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days of the request.

6. The arbitral tribunal may extend, if necessary, the period of time within which it may correct, clarify or complete the award under paras. 1, 2 or 5 of this article, without prejudice to the compliance with the time limit set in accordance with Art. 43.

7. The provisions of Art. 42 shall apply to the correction and clarification of the award as well as to the additional award.

CHAPTER VII. RECOURSE AGAINST AWARD

*Article 46. Application for setting aside*

1. Unless otherwise agreed by the parties, under Art. 39(4), recourse to a State court against an arbitral award may be made only by an application for setting aside in accordance with the provisions of this article.

2. The application for setting aside the arbitral award, which must be accompanied by a certified copy thereof, and, if it is drafted in a foreign language, by a translation into Portuguese, shall be submitted to the competent State court, observing the following rules, without prejudice to the provisions of the further paragraphs of this article:

a) Evidence shall be presented with the application.

b) The opposing party shall be summoned to present its opposition to the request and to present evidence.

c) The requesting party may present a statement in reply to eventual objections raised by the opposing party.

d) The taking of evidence shall follow.

e) The procedure shall follow, with the necessary adjustments, the rules on appeals.

f) The action for setting aside is considered, for effects of distribution, a type 5 class of action.

3. An arbitral award may be set aside by the competent State court only if:

a) the party making the application furnishes proof that:

i) one of the parties to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under this Law; or

ii) there has been a violation within the proceedings of some of the fundamental principles referred in Art. 30(1), with a decisive influence on the outcome of the dispute; or

iii) the award dealt with a dispute not contemplated by the arbitration agreement, or contains decisions beyond the scope of the latter; or

iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law, and, in any case, this inconformity had a decisive influence on the decision of the dispute; or

v) the arbitral tribunal has condemned in an amount in excess of what was claimed or on a different claim from that that was presented, or has dealt with issues that it should not have dealt with, or has failed to decide issues that it should have decided; or

vi) the award was made in violation of the requirements set out in Art. 42(1) and (3); or

vii) the award was notified to the parties after the maximum time limit set in accordance with Art. 43 had lapsed; or

b) the court finds that:

i) the subject matter of the dispute cannot be decided by arbitration under Portuguese law;

ii) the content of the award is in conflict with the principles of international public policy of the Portuguese State.

4. If a party, knowing that one of the provisions of this Law that parties can derogate from, or any condition set out in the arbitration agreement, was not respected, and

nonetheless continues the arbitration without immediate opposition or, if there is a defined time limit therefore, does not object within said time limit, it is deemed that the party has waived the right to set aside the arbitral award on such grounds.

5. Without prejudice to the provisions of the preceding paragraph, the right to apply for the setting aside of an arbitral award cannot be waived.

6. An application for setting aside may only be made within sixty days from the date on which the party making that application had received the notification of the award or, if a request had been made under Art. 45, from the date on which such request had been disposed of by the arbitral tribunal.

7. If the part of the award as to which any of the grounds for setting aside referred to in para. 3 of this article is considered to have occurred can be separated from the rest of the award, only that part of the award shall be set aside.

8. The competent State court, when asked to set aside an arbitral award, may, where appropriate, and if it is so requested by ones of the parties, suspend the setting aside proceedings for a period of time determined by it, in order to give the arbitral tribunal the opportunity to resume the arbitral proceedings or to take such other action as the arbitral tribunal deems likely to eliminate the grounds for setting aside.

9. The State court that sets aside the arbitral award may not deal with the merits of the issue or issues decided in the award, such issues to be submitted, if any party so wishes, to another arbitral tribunal in order to be decided by the latter.

10. Unless the parties have agreed otherwise, setting aside the award shall result in the arbitration agreement becoming operative again in respect of the subject matter of the dispute.

## CHAPTER VIII. ON THE ENFORCEMENT OF THE ARBITRAL AWARD

### *Article 47. Enforcement of the arbitral award*

1. The party applying for the enforcement of the award to the competent State court shall supply the original award or a certified copy thereof and, if the award is not made in Portuguese, a certified translation thereof into this language.

2. In case the arbitral tribunal has issued an award without liquidating the damages, such liquidation shall be made under Art. 805(4), of the Civil Procedure Code; however, the arbitral tribunal may be requested to liquidate the damages under Art. 45(5), in which case the arbitral tribunal, after giving the other party the opportunity to state its views and after evidence has been taken, shall issue a supplementary decision, judging on equitable terms within the proven limits.

3. The arbitral award may be enforced even if an application for setting aside in accordance with Art. 46 has been made; however, the party against whom enforcement is invoked may request that such application has a suspensive effect of the enforcement proceedings, provided that such party offers to provide security, such effect only being granted if and when security is effectively provided within the time limit set by the court. In this case the provisions of Art. 818(3), of the Civil Procedure Code shall apply.

4. For the purposes of the previous paragraph, the provisions of Arts. 692-A and 693-A of the Civil Procedure Code shall apply, with the necessary adjustments.

### *Article 48. Grounds for refusing enforcement*

1. The party against whom enforcement of the arbitral award is invoked may oppose the enforcement on any of the grounds which may be used for the setting aside of the award

foreseen in Art. 46(3), provided that, on the date on which the opposition is presented, an application for setting aside on the same grounds has not already been rejected by a final and binding judgement.

2. The party against whom enforcement of the arbitral award is requested may not base its opposition on any of the grounds set out in Art. 46(3), a), if the time limit provided for in para. 6 of the same article to apply for the setting aside of the award has expired, without any party having made such application.

3. Notwithstanding the expiry of the time limit provided for in Art. 46(6), the judge may *ex officio*, under Art. 820 of the Civil Procedure Code, examine the merits of the ground for setting aside foreseen in Art. 46(3), b), of this Law, whereby it shall, if it considers that the award is invalid for that reason, reject enforcement on such grounds.

4. The provisions of para. 2 of the present article do not affect the possibility of invoking, in the opposition to the enforcement of the arbitral award, any of the other grounds foreseen in the applicable procedural law, under the terms and within the time limits provided therein.

## CHAPTER IX. ON INTERNATIONAL ARBITRATION

*Article 49. Concept and regime of international arbitration*

1. An arbitration is considered international when international trade interests are at stake.

2. Notwithstanding what is provided in the present chapter, the provisions of this Law on domestic arbitration shall apply to international arbitration, with the necessary adjustments.

*Article 50. Inadmissibility of pleas based on domestic law of a party*

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 either challenge the arbitrability of the dispute or its capacity to be a party to the arbitration, neither to in any other way evade its obligations arising from such agreement.

*Article 51. Substantial validity of the arbitration agreement*

1. In an international arbitration, the arbitration agreement is valid as to its substance and the dispute it governs may be submitted to arbitration if the requirements set out either 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.

2. The State court to which an application is made to set aside an award in an international arbitration seated in Portugal, on the grounds foreseen in Art. 51(3), b), of this Law, shall take into consideration the preceding paragraph of this article.

*Article 52. Rules of law applicable to the merits of the dispute*

1. The parties may choose the rules of law to be applied by the arbitrators, if they have not authorised them to decide *ex aequo et bono*. Any choice of the law or legal system of a given State shall be construed, unless otherwise expressly agreed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

2. Failing any choice by the parties, the arbitral tribunal shall apply the law of the State with which the subject matter of the dispute has the closest connection.

3. In both cases referred to in the preceding paragraphs, the arbitral tribunal shall take into consideration the contractual terms agreed by the parties and the relevant trade usages.

*Article 53. Inadmissibility of appeal of the award*
In international arbitration the award made by the arbitral tribunal is subject to no appeal, unless the parties have expressly agreed on the possibility of an appeal to another arbitral tribunal and regulated its terms.

*Article 54. International public policy*
An award made in Portugal, in an international arbitration in which non-Portuguese law has been applied to the merits of the dispute, may be set aside on the grounds provided for in Art. 46, and also, if such award is be enforced or produce other effects in national territory, whenever such enforcement leads to a result that is manifestly incompatible with the principles of international public policy.

## CHAPTER X. RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

*Article 55. Need for recognition*
Without prejudice to the mandatory provisions of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as well as to other treaties or conventions that bind the Portuguese State, the awards made in arbitrations seated abroad shall only be effective in Portugal, regardless of the nationality of the parties, if they have been recognised by the competent Portuguese State court, under the present chapter of this Law.

*Article 56. Grounds for the refusal of recognition and enforcement*
1. Recognition and enforcement of an arbitral award made in an arbitration taking place in a foreign country may only be refused:

a) at the request of the party against whom the award is invoked, if that party furnishes to the competent court to which recognition or enforcement is demanded proof that:

i) a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under 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 not contemplated by the arbitration agreement or contains decisions on matters beyond the scope of the arbitration agreement; however, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may 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, failing such agreement, was not in accordance with 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, that

award was made; or

b) 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.

2. If an application for setting aside or suspension of an award has been made to a court in the country referred to in para. (1), a), v), of the present article, the Portuguese State court to which recognition or enforcement are requested may, if it considers it proper, stay the proceedings and may also, on the application of the party claiming recognition and enforcement of the award, order the other party to provide appropriate security.

*Article 57. Recognition procedure*

1. The party that seeks recognition of a foreign arbitral award, particularly if enforcement in Portugal is sought, shall supply the duly authenticated original award or a duly certified copy thereof, as well as the original of the arbitration agreement or a duly authenticated copy thereof. If the award or the agreement is not made in Portuguese, the party that seeks recognition shall supply a duly certified translation thereof into this language.

2. After the application for recognition, accompanied by the documents referred to in the preceding paragraph, is made, the opposing party shall be summoned to present its opposition, within fifteen days.

3. After the written pleadings and the procedural steps deemed indispensable by the rapporteur are taken, access to the file is granted to the parties and to the Public Prosecutor, for fifteen days, for the purpose of closing arguments.

4. The trial is conducted pursuant to the rules applicable to appeals.

*Article 58. Foreign awards on administrative law disputes*

In the recognition of an arbitral award made in an arbitration taking place abroad and related to a dispute that, according to Portuguese law, should fall under the jurisdiction of the administrative courts, the provisions of Arts. 56, 57 and 59(2), of this Law shall apply, with the necessary adjustments to the specific procedural regime of these courts.

## CHAPTER IX. THE COMPETENT STATE COURTS

*Article 59. Competent state courts*

1. Regarding disputes that fall under the jurisdiction of judicial courts, the Court of Appeal in whose district the place of arbitration is located or, in case of a decision referred to in sub-para. h) of para. 1 of this article, in which the domicile of the person against whom the decision to be invoked is located, is competent to decide on:

a) the appointment of arbitrators who have not been appointed by the parties or by third parties that have been entrusted with this duty, in accordance with the provisions of Art. 10(3) (4) and (5), and Art. 11(1);

b) the challenge made under Art. 14(2), against an arbitrator who has not accepted such challenge, in case the challenge is deemed to be justified;

c) the removal of an arbitrator, requested under Art. 15(1);

d) the reduction of the amount of fees or expenses fixed by the arbitrators, under Art. 17(3);

e) the appeal of the arbitral award, when it has been agreed on under Art. 39(4);
f) the challenge of an arbitral tribunal's interim award on its own jurisdiction, in accordance with Art. 18(9);
g) the recourse against the final award made by the arbitral tribunal, in accordance with Art. 46;
h) the recognition of an arbitral award made in an arbitration taking place abroad.

2. In respect of disputes that, according to Portuguese law, fall under the jurisdiction of administrative courts, the Central Administrative Court in whose circuit the place of arbitration is located, or in case of a decision referred to in para. 1, sub-para. h), of this article, in which the domicile of the person against whom the decision is to be invoked is located, is competent to decide on the matters referred to in any of the sub-paragraphs of para. 1 of this article.

3. The President of the Court of Appeal or the President of the Central Administrative Court that have territorial jurisdiction shall, depending on the nature of the dispute, be competent to appoint the arbitrators referred to in para. 1, sub-para. a), of this article.

4. For any issues or matters not covered by paras. 1, 2 and 3 of the present article and regarding which this Law confers competence to a State court, the judicial court of first instance or the administrative court in whose jurisdiction the place of arbitration is located shall be competent, depending on whether the dispute falls respectively within the jurisdiction of the judicial courts or of the administrative courts.

5. In respect of disputes falling under the jurisdiction of judicial courts, the judicial court of first instance in whose jurisdiction the interim measure should be granted in accordance with the rules on territorial jurisdiction provided for in Art. 83 of the Civil Procedure Code, or in whose jurisdiction the production of evidence requested under Art. 38(2), of this Law should occur, is competent to render assistance under Art. 29 and Art. 38(2), of this Law to arbitrations located abroad.

6. Regarding disputes falling under the jurisdiction of administrative courts, the assistance to arbitrations located abroad is rendered by the administrative court with territorial jurisdiction in accordance with para. 5 of this article, to be applied with the necessary adjustments to the regime of administrative courts.

7. In the proceedings leading to the decisions referred to in para. 1 of this article, the competent court shall observe the provisions of Arts. 46, 56, 57, 58 and 60 of this Law.

8. Unless it is stated in this Law that the competent State court decision shall not be subject to appeal, the decisions rendered by the State courts referred to in the preceding paragraphs of this article, in accordance with what is provided therein, are subject to appeal to the court or courts superior in hierarchy, whenever such recourse is admissible pursuant to the rules that apply to the possibility of appeal of the decisions in question.

9. The enforcement of an arbitral award made in Portugal shall take place in the competent State court of first instance, under the applicable procedural law.

10. The judicial courts of first instance in whose jurisdiction the domicile of the defendant is located, or of the place of arbitration, as chosen by the claimant, are competent for an action concerning civil liability of an arbitrator.

11. If in an arbitral proceeding a judicial or an administrative court, or the respective President, consider the dispute as falling under that court's jurisdiction for the purposes of this article, such decision is not, in this part, subject to appeal and must be complied with by all others courts called upon in the same proceedings to exercise any of the powers provided herein.

*Article 60. Applicable procedure*

1. Whenever it is intended that the competent State court renders a decision under any of sub-paras. a) to d) of Art. 59(1), the interested party shall present in its application the facts that justify the request, including the information it considers relevant to this effect.

2. Upon receipt of the application foreseen in the previous paragraph, the other parties in the arbitration and, if such is the case, the arbitral tribunal, are notified to state their views thereon within ten days.

3. Before rendering its decision, the court may, if it deems it necessary, gather or request all information deemed convenient in order to render its decision.

4. The procedures set out in the preceding paragraphs of this article are always deemed urgent, the respective actions having priority over any other non-urgent judicial service.

## CHAPTER XII. FINAL PROVISIONS

*Article 61. Territorial scope of application*

The present Law is applicable to all arbitrations that take place in Portuguese territory, as well as to the recognition and enforcement in Portugal of awards made in arbitrations seated abroad.

*Article 62. Institutionalised arbitration centres*

1. The creation in Portugal of institutionalised arbitration centres is subject to authorisation of the Minister of Justice, under the terms provided for in special legislation.

2. The reference made in Decree-Law no. 425/86, dated 27th December 1986, to Article 38 of Law no. 31/86, dated 29th August 1986, is considered to be made to the present article.

# ANNEX II

## CODE OF CIVIL PROCEDURE
approved by Law No. 41/2013, of 23 June 2013 (excerpts)*

*Article 80. General rule*

3. If the defendant is domiciled and resident in a foreign country, it shall be sued in the court of its current location; if it is not located in Portuguese territory, the defendant shall be sued in the court of the place of the claimant's domicile, and if this domicile is in a foreign country, the court for Lisbon shall have jurisdiction to hear the case.

*Article 85. Jurisdiction for the enforcement based upon a judgment or award*

(...)

3. If the decision was rendered by arbitrators in an arbitration that took place in Portuguese territory, the district court of the place of the arbitration shall have jurisdiction over enforcement.

*Article 86. Enforcement of a judgment rendered by higher courts*

If the proceedings were commenced before a Court of Appeal or the Supreme Court, the court of the domicile of the person against whom the enforcement is requested shall be competent, except in the case provided for in Article 84; in any event, the file shall be sent to the competent court for the enforcement.

*Article 89. General rule on jurisdiction for enforcement proceedings*

(…)

3. Where enforcement is to be sought in the court of the domicile of the defendant and the defendant is not domiciled in Portugal but has property there, the court where that property is situated shall have jurisdiction over enforcement.

*Article 90. Enforcement proceedings based on a foreign judgment or award*

Jurisdiction for the enforcement based upon a foreign judgment or award is determined in accordance with Article 86.

*Article 527. General rule on costs*

1. A decision that disposes of the proceedings or of any of its incidental questions or appeals shall order the party that caused the costs to pay them or, if none of the parties prevailed, that whoever took advantage of the proceedings shall bear such costs.

2. It shall be assumed that the losing party caused the costs, in the same proportion in which it lost the proceedings.

3. If the decision determines that the losing parties are jointly and severally liable, this shall extend to the liability for the costs.

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* In force since 1 September 2013; last amended by Law no. 55/2021, of 13 August 2021, in force since 13 October 2021. Unofficial translation by Dário Moura Vicente, Professor of Law, University of Lisbon; Member of the Portuguese Bar.

*Article 590. Initial management of the case*
(...)
2. At the end of the pleadings, the judge shall make, where appropriate, a preliminary order providing for:
a) The remedying of procedural defences, pursuant to paragraph 2 of Article 6;
b) The amendment of the pleadings, in accordance with the subsequent paragraphs;
c) The submission of documents in order to allow the examination of procedural defences or the decision, in whole or in part, of the merits of the case in a summary judgment.

*Article 591. Preliminary hearing*
1. Once the procedural steps foreseen in paragraph 2 of the previous article have been taken, if any of them should take place, a preliminary hearing shall be convened, to be held within the next 30 days, for one or more of the following purposes:
a) To carry out an attempt at conciliation, in accordance with Article 594.
(…)

*Article 594. Attempted conciliation*
1. Where the case falls within the ambit of the parties' powers of disposal, an attempt at conciliation may be made at any stage of the proceedings, provided that the parties jointly request it or the judge deems it appropriate, but the parties may not be summoned solely for that purpose more than once.
(…)
3. The attempt at conciliation is presided over by the judge, who must actively engage in obtaining the equitable solution most appropriate to the terms of the dispute.

*Article 665. Rule of substitution of the court whose judgment was appealed*
1. Even if it declares the decision terminating the proceedings to be null and void, the court of appeal must decide on the subject of the appeal.
(…)

*Article 679. Application of the appeal system*
The provisions relating to the trial of the appeal to the Court of Appeal [orig: *recurso de apelação*] shall apply to the appeal to the Supreme Court [orig: *recurso de revista*], with the exception of Articles 662 and 665, and the following articles.

*Article 696. Grounds for appeal*
A judgment that constitutes *res judicata* can only be reviewed if:
a) Another final decision has deemed that a crime was committed by the judge in the performance of its functions;
b) There is a falsehood of a judicial document or act, of a statement by experts or arbitrators, which may, in either case, have determined the decision to be reviewed, the matter not having been the subject of discussion in the proceedings in which it was rendered;
c) A document is presented, which a party was not aware of, or could not make use of, in the proceedings in which the decision to be reviewed was rendered and which, on its own, is sufficient to modify the decision in a manner more favourable to the losing party;

d) There is a nullity or voidability of the confession, withdrawal or transaction on which the decision was based;
e) If the declaratory proceedings and the enforcement have been carried out in absentia, due to the absolute lack of intervention of the defendant, it is shown that the summons was missing or that the summons made is null and void;
f) It is irreconcilable with a final decision of an international appeal body binding on the Portuguese State;
g) The dispute is based on a simulated act of the parties and the court has not made use of the power conferred on it by Article 612, because it has not been aware of the fraud.

*Article 705. Enforceability of procedural orders and arbitral awards*

(...)

2. Decisions rendered by arbitral tribunals are enforceable in the same terms as decisions of judicial courts.

*Article 726. Preliminary order and summons of the defendant*

(...)

2. The judge shall *in limine* reject the request for enforcement whenever:

(...)

d) In the case of enforcement proceedings based upon an arbitral award, the dispute could not be referred to arbitration, either because it was exclusively referred, by a special statute, to a judicial court or to compulsory arbitration, or because the right in issue did not have a pecuniary nature and could not be the subject matter of a settlement.

*Article 730. Grounds for the opposition to enforcement proceedings based on an arbitral award*

The grounds for the opposition to the enforcement of an arbitral award are not only those foreseen in the previous article, but also those on which the setting aside of the same award can be based, without prejudice to the terms of paragraphs 1 and 2 of Article 48 of the Voluntary Arbitration Act.

*Article 1136. Rules governing compulsory arbitration*

If the arbitration is prescribed by a special law, the provisions of that law be observed; in the absence of such provisions, the following articles shall apply.

*Article 1137. Appointment of arbitrators and umpire*

1. Either party may request that the other party be notified r for the appointment of arbitrators, the provisions of the Voluntary Arbitration Act being applicable with the necessary adaptations.

2. The third arbitrator shall always vote, but shall be obliged to join one of the others, so that a majority can be formed on the points on which there is a disagreement.

*Article 1138. Replacement of arbitrators and liability of defaulting arbitrators*
1. In all cases where, for any reason, the functions of an arbitrator cease, another arbitrator shall be appointed in accordance with the terms of the Voluntary Arbitration Act, and the appointment, whenever possible, shall be made by the party who appointed the previous arbitrator.

2. If the award is not made within the time limit, the limit shall be extended by agreement of the parties or by a judicial decision. The arbitrators who unjustifiably caused the lack of compliance shall be liable for the resulting prejudice and a fine shall be imposed upon them; if there is a further lack of compliance, the amounts of the fine shall be doubled.

*Article 1139. Application of the provisions concerning the necessary arbitral tribunal*
The provisions of the Voluntary Arbitration Act, in its applicable part, shall be observed in respect of all aspects not specifically regulated here.