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International Arbitration

Second Edition

Portugal
Morais Leitão, Galvão Teles, Soares da Silva & Associados, SP, RL.

chambers.com

2019

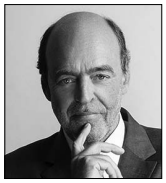
Law and Practice

Contributed by Morais Leitão, Galvão Teles, Soares da Silva & Associados, SP, RL.

Contents

Morais Leitão, Galvão Teles, Soares da Silva & Associados, SP, RL. is a leading full-service law firm in Portugal, active in several branches of the law and industry sectors, at both national and international levels. With a team comprising more than 250 lawyers, Morais Leitão is headquartered in Lisbon and has offices in Oporto and Funchal. Due to the associations and alliances with other firms and the creation of the Morais Leitão Legal Circle in 2010, the firm also offers support through offices in Angola (ALC Advogados), Hong Kong and Macau (MdME Lawyers), and Mozambique (HRA Advogados). The International Arbitration team focuses its practice on Portuguese-speaking countries (including Angola, Macau and Mozambique), and has experience in most industry sectors, including aviation, banking, construction, commodities, defence, energy, pharmaceutical, foreign investment, infrastructure, intellectual property, insurance, mining and natural resources, oil and gas, sports, transfers of technology and telecommunications. The lawyers have strong and diverse academic, professional and cultural backgrounds, and are fluent in several languages, including English, Spanish, French, German, Chinese and Portuguese.

Authors



António Pinto Leite is a founding partner of Morais Leitão and was co-chairman of the firm's board of directors from 2004 to 2012. He heads the Litigation and Arbitration department, as well as the International Arbitration team. He has vast expertise as a lawyer and as an arbitrator in various national and international arbitrations, particularly in complex disputes. António is the Chairman of the Arbitration Commercial Centre of the Portuguese Chamber of Commerce and Industry, the leading arbitration centre of Portugal, and the former Chairman of the Portuguese Arbitration Association. He also has experience in the ICC International Court of Arbitration, having been Portuguese Member of the ICC International Court of Arbitration and Chairman of the Portuguese Arbitration Committee of ICC.

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1. General

1.1 Prevalence of Arbitration

Arbitration has gained greater acceptance over the years as a method for resolving disputes in Portugal, especially since the entry into force of Law no. 63/2011, of 14 December, which approved the Portuguese Arbitration Law currently in force. This law is in line with the UNCITRAL Model Law on International Commercial Arbitration and has been generally applied by courts in an "arbitration-friendly" manner.

Arbitration is chosen as a method for resolving disputes both by international parties (eg, those carrying out business in the country) and by domestic parties – especially legal entities.

International arbitration is used both as a method for dispute resolution in Portugal, and for the enforcement of foreign arbitral awards.

1.2 Trends

The following changes or trends have been observed in Portuguese arbitration in 2018/9:

- Up until the end of 2018, Portugal had a special regime that made arbitration mandatory for the resolution of certain disputes between the owners of reference medicines and the producers of generic medicines. This regime, previously approved by Law no. 62/2011, of 14 December, was modified by the new Code of Industrial Property, approved by Decree-Law no. 110/2018, of 10 December, thereby making arbitration in this sector merely voluntary, and not compulsory.
- In 2018, the Portuguese Government approved a legislative draft on intra-corporate arbitration, based on a draft regime prepared by the Portuguese Arbitration Association (*Associação Portuguesa de Arbitragem* or APA). The legislative draft governs arbitration clauses inserted in the articles of association of companies with their registered offices in Portugal, although some have commented that the legal regime could also be applicable to foreign companies, if certain requirements are met.

- Despite the fact that the State and other public entities can, in general, arbitrate their disputes in Portugal (especially after the 2015 reforms of the Portuguese Code of Administrative Litigation, which broadened the types of cases in which public entities can have recourse to arbitration as a way of resolving public disputes), the recently approved Decree-Law no. 111-B/2017, of 31 August, established, as a mandatory rule, that arbitral decisions rendered in the context of disputes with a value in excess of EUR500,000 can be subject to review by State courts.

1.3 Key Industries

The construction and pharmaceutical industries have experienced significant international arbitration activity in recent years.

In the pharmaceutical sector, this was mainly the result of the implementation of a legal regime, abolished at the end of 2018 (with effects from 2019), that made arbitration mandatory for certain disputes involving industrial rights over reference and generic medicines.

The popularity of arbitration in the construction sector is primarily the result of the rise of foreign investment in Portugal and the choice by international investors of arbitration as the preferred method for resolving disputes.

Furthermore, there continues to be an increasing choice of arbitration as a method for resolving corporate and commercial disputes, particularly by companies operating in the banking and financial services sectors.

1.4 Arbitral Institutions

The Court of Arbitration of the International Chamber of Commerce (ICC) and the Arbitration Centre of the Portuguese Chamber of Commerce and Industry (CAC-CCIP) are the most used arbitral institutions.

2. Governing Legislation

2.1 Governing Law

Arbitration in Portugal is generally governed by Law no. 63/2011, of 14 December, which entered into force on 14 March 2012 ("Portuguese Arbitration Law" or "PAL").

The PAL is applicable to arbitrations that take place in Portuguese territory, and to the recognition and enforcement of foreign awards. This is without prejudice to other applicable laws, treaties or conventions, including special laws that make arbitration mandatory for certain disputes and the laws applicable to public arbitration.

The rules set forth in the PAL apply equally to domestic and international arbitration, with only slight variations contained in Chapter IX (Articles 49 to 54).

The PAL is based on the 1985 UNCITRAL Model Law on International Commercial Arbitration, as amended in 2006, with some modifications. The deviations from the text of the Model Law reflect both the experience gathered under the former arbitration law (Law no. 31/86, of 29 August) and the developments observed in other jurisdictions.

The following are examples of the deviations from the text of the Model Law:

- the PAL adopted a substantive/economic criterion to define "*international arbitration*", providing that an arbitration shall be deemed international when it involves international trade interests (Article 49(1));
- the PAL contains specific provisions on the constitution of the arbitral tribunal in the case of multi-party arbitrations (Article 11) and the joinder of third parties in pending arbitral proceedings (Article 36);
- when recognising the negative effect of the competence-competence principle, Article 5 of the PAL states that State courts shall dismiss a case that is (allegedly) the subject of an arbitration agreement unless the arbitration agreement is clearly invalid, or became inoperative or is incapable of being performed;
- the requirement of contrariness to international public policy as a ground for setting aside arbitral awards on public policy grounds (Article 46); and
- the regime of favorem valitatis adopted under the provision on the substantial validity of arbitration agreements in international arbitration (Article 51).

2.2 Changes to National Law

The Portuguese Arbitration Law, approved by Law no. 63/2011, of 14 December, has never been amended.

3. The Arbitration Agreement

3.1 Enforceability

The legal requirements for an arbitration agreement to be enforceable in Portugal are set out in Articles 1 and 2 of the PAL.

Pursuant to those provisions, the arbitration agreement may cover an existing dispute (submission agreement), in which case it shall determine the subject matter of the dispute, or it may cover future disputes that may arise in the context of a specific legal relationship, contractual or not (arbitration clause).

Pursuant to Article 2, the arbitration agreement shall be in writing – ie, recorded in a written document signed by the parties, in an exchange of letters, telegrams, faxes or other means of telecommunications that provides a written record of the agreement, including electronic means of telecommunication. Article 2 further provides that this requirement is

satisfied if it is recorded on an electronic, magnetic, optical or any other format that offers the same guarantees of reliability, comprehensiveness and preservation.

In the case of international arbitration, Article 51 provides that the arbitration agreement shall be considered to be substantially valid if it meets the requirements of either the law chosen by the parties to govern the arbitration agreement, the law applicable to the subject matter of the dispute, or Portuguese law.

3.2 Arbitrability

Article 1 of the PAL states that, unless exclusively submitted by a special law to the jurisdiction of State courts or to compulsory arbitration, the parties may submit any dispute involving economic interests to arbitration or, in disputes that do not involve (solely) economic interests, any dispute involving those rights that the parties are entitled to settle by way of an agreement.

Under Portuguese law, economic interests ("*interesses de natureza patrimonial*") are usually defined as those interests that are susceptible to pecuniary evaluation.

Also, under the Portuguese Civil Code, the parties cannot settle rights that they cannot freely dispose of or issues relating to illicit legal transactions by way of an agreement. Accordingly, in addition to those disputes that are exclusively submitted by a special law to State courts, as it is generally the case in criminal and insolvency matters, or to compulsory arbitration, such as certain labour disputes, the parties cannot submit disputes relating to "rights of personality" and family law matters that cannot be settled by way of an agreement to arbitration.

3.3 National Courts' Approach

Portuguese courts have consistently recognised the negative effect of arbitration agreements and are, therefore, regarded as being "arbitration-friendly".

Pursuant to Article 5(1) of the PAL, a State court before which an action is brought in a matter that is the subject of an arbitration agreement shall dismiss the case, if the defendant so requests no later than the submission of its first statement on the substance of the dispute, unless it finds that the arbitration agreement is clearly invalid, is or became inoperative or is incapable of being performed.

Furthermore, as clarified by paragraph 4 of Article 5, the invalidity, inoperativeness or incapability of performance of an arbitration agreement cannot be discussed autonomously in an action brought before a State court to that effect or in the context of a request for an interim measure brought before a State court in order to prevent the constitution or the operation of an arbitral tribunal.

After an award has been rendered, the competent State court is entitled to review the validity of arbitration agreements in the context of setting aside or enforcement proceedings, and recognition and enforcement proceedings (in the case of foreign awards), upon the request of the interested party.

3.4 Validity

Article 18(2) of the PAL recognises the principle of separability. Pursuant to this provision, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

In line with such provision, Article 18(3) of the PAL expressly clarifies that a decision by the arbitral tribunal on the invalidity of the main contract shall not automatically entail the invalidity of the arbitration agreement.

4. The Arbitral Tribunal

4.1 Limits on Selection

Article 9(1) of the PAL states that arbitrators must be individuals (not legal entities) with full legal capacity. Pursuant to paragraph 3 of the same Article, arbitrators must also be independent and impartial.

As to the number of arbitrators, the PAL provides that the arbitral tribunal must be constituted of a sole arbitrator or of several arbitrators, in an uneven number (Article 8(1)).

According to Article 10(1) of the PAL, the parties may appoint the arbitrator or arbitrators that shall form part of the arbitral tribunal in the arbitration agreement or in a later document signed by the parties, or may agree on a procedure for appointing them, namely by assigning the appointment of all or some of the arbitrators to a third party.

4.2 Default Procedures

The determination of the number of arbitrators and the selection or appointment of arbitrators are governed by Articles 8, 10 and 11 of the PAL.

Pursuant to Article 8, the parties are free to determine that the arbitral tribunal shall be constituted by one or several arbitrators, in an uneven number (paragraph 1); if the parties fail to agree on the number of arbitrators, the number of arbitrators shall be three (paragraph 2).

As for the method for selecting the arbitrators, Article 10 provides that the parties are free to appoint the arbitrator or arbitrators that shall form part of the arbitral tribunal in the arbitration agreement or in a later document signed by the parties, or to agree on an alternative appointment procedure, namely by assigning the appointment of all or some of the arbitrators to a third party (paragraph 1).

Failing an agreement by the parties on the method for selecting the arbitrators, the PAL provides that:

- in an arbitration with a sole arbitrator, such arbitrator shall be appointed, upon the request of any party, by the competent State court (Article 10, paragraph 2); and
- in an arbitration with three or more arbitrators, each party shall appoint an equal number of arbitrators, who shall then appoint a further arbitrator to act as chairman of the arbitral tribunal (Article 10, paragraph 3).

Under the method for selecting the arbitrators agreed by the parties, if a party or a third party fails to appoint an arbitrator or arbitrators within 30 days of the request to do so, or if the arbitrators appointed by the parties fail to agree on the choice of the chairman within 30 days of the appointment of the last arbitrator, the appointment of the remaining arbitrator or arbitrators shall be made, upon the request of any party, by the competent State court (Article 10, paragraphs 4 and 5).

Article 11 contains special default rules about the appointment of the arbitral tribunal in the case of multi-party proceedings. Pursuant to the provisions of this article, if the arbitral tribunal is to consist of three arbitrators, each side (claimants or respondents) shall jointly appoint one arbitrator. If either the claimants or the respondents fail to reach an agreement on the arbitrator to be jointly appointed by them, the appointment of such arbitrator shall be made, upon the request of any party, by the competent State court (paragraph 2). In the latter case, if it becomes clear that the parties (the claimants or the respondents) who failed to jointly appoint an arbitrator have conflicting interests regarding the substance of the dispute, the State court may appoint all arbitrators and indicate which one of them shall act as chairman, thus rendering any appointment made in the interim by the other parties (the claimants or the respondents) ineffective (paragraph 3).

4.3 Court Intervention

State courts can intervene in the selection of arbitrators where the parties or third parties to whom the parties assigned the selection of arbitrators fail to do so (Articles 10 and 11 of the PAL).

According to Article 59, paragraphs 1, 2 and 3, of the PAL, the President of the Court of Appeal ("*Tribunal da Relação*") or the President of the Central Administrative Court ("*Tribunal Central Administrativo*") in whose district the place of the arbitration is located shall, depending on the nature of the dispute, be competent to appoint the arbitrators who have not been appointed by the parties or by third parties to whom this task was entrusted, in accordance with the provisions of Article 10, paragraphs 3, 4 and 5, and Article 11, paragraph 1, of the PAL.

In appointing an arbitrator, the Court of Appeal or the Central Administrative Court shall have due regard to the following:

- any qualifications required by the agreement of the parties;
- such considerations as are likely to secure the appointment of an independent and impartial arbitrator; and
- in the case of international arbitration, the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties (Article 10, paragraph 6, of the PAL).

Although Article 10 does not expressly mention it, the requirement in Article 9(1) of the PAL also applies to the selection of arbitrators by State courts, meaning that the competent court can only select an individual who has full legal capacity.

The decisions made by the competent State court under Article 10 shall be subject to no appeal (Article 10, paragraph 7, of the PAL).

4.4 Challenge and Removal of Arbitrators

Articles 13 to 15 of the PAL govern the challenge and removal of arbitrators.

Under Article 13(3) of the PAL, an arbitrator may be challenged by any party if circumstances exist that give rise to justifiable doubts as to its impartiality or independence, or if the arbitrator does not possess the qualifications agreed by the parties. This is without prejudice to the limitation provided under paragraph 3 and to the challenge procedure agreed to by the parties or otherwise applicable under Article 14.

Pursuant to Article 15, the parties may agree or request the competent State court to remove an arbitrator on the ground of his or her impossibility or failure to perform his or her functions without undue delay.

The Court of Appeal ("*Tribunal da Relação*") or the Central Administrative Court ("*Tribunal Central Administrativo*") in whose district the place of the arbitration is located shall, depending on the nature of the dispute, be competent to decide on a challenge made against an arbitrator who has not accepted such challenge, under Article 14, paragraphs 2 and 3 of the PAL, and on the removal of an arbitrator under Article 15. The decisions made by the competent State court under Articles 14(3) and 15(3) shall be subject to no appeal.

4.5 Arbitrator Requirements

Under the PAL, arbitrators must be independent and impartial, and always remain so. In this context, Article 13 of the PAL expressly requires prospective arbitrators to disclose any circumstances likely to give rise to justifiable doubts as to their impartiality and independence (paragraph 1), and

further requires arbitrators to always disclose, throughout the proceedings and without delay, any such circumstances that may arise or of which the arbitrator may only become aware after accepting his or her mandate (paragraph 2).

The Rules of Arbitration of the Arbitration Centre of the Portuguese Chamber of Commerce and Industry (CAC-CCIP) also provide that arbitrators shall be and remain independent and impartial (Article 11(1) of the Rules), and expressly mention the arbitrator's duty to disclose any *"circumstances that may, in the parties' perspective, give rise to reasoned doubts as to an arbitrator's independence and impartiality"* (Article 11(2) of the Rules).

Neither the PAL nor the Rules of Arbitration of the CAC-CCIP provide examples of circumstances that may give rise to justifiable doubts as to an arbitrator's impartiality and independence. However, the ethical codes of important Portuguese arbitral institutions and associations (including the Arbitration Centre of the Portuguese Chamber of Commerce and Industry) provide that its provisions shall be construed in accordance with the IBA Guidelines on Conflicts of Interest in International Arbitration and, although Portuguese courts are not bound to apply the IBA Guidelines on independence and impartiality, recent case law has admitted the reference to such Guidelines, particularly in the context of international arbitration proceedings.

5. Jurisdiction

5.1 Matters Excluded from Arbitration

Article 1 of the PAL states that, unless exclusively submitted by a special law to the jurisdiction of State courts (eg, criminal and insolvency matters) or to compulsory arbitration (eg, certain labour disputes), the parties may only submit disputes involving economic interests to arbitration or, in the case of disputes that do not involve (solely) economic interests, those rights that the parties are entitled to settle by way of an agreement.

Accordingly, in addition to those disputes that are exclusively submitted by a special law to State courts or compulsory arbitration, the parties cannot generally submit disputes relating to their "rights of personality" and family law matters that cannot be settled by way of an agreement to arbitration.

5.2 Challenges to Jurisdiction

The principle of competence-competence is regulated in Articles 5 and 18 of the PAL.

Article 18(1) recognises the positive effect of competence-competence, by stating that the arbitral tribunal may rule on its own jurisdiction.

As to the negative dimension of this principle, Article 5(1) states that a State court before which an action is brought in a matter that is the subject of an arbitration agreement shall dismiss the case if the defendant so requests no later than the submission of its first statement on the substance of the dispute, unless it finds that the arbitration agreement is clearly invalid, or is or became inoperative or incapable of being performed. Furthermore, according to Article 5(2), arbitral proceedings may be commenced or continued, and an award may be made, while the issue of jurisdiction of the arbitral tribunal is still pending before State courts.

5.3 Circumstances for Court Intervention

State courts can address the issue of jurisdiction of an arbitral tribunal at the following times:

- at the request of the defendant, in the context of an action brought in a matter that is (allegedly) the subject of an arbitration agreement (Article 5(1) of the PAL);
- after a preliminary award (on jurisdiction) has been rendered, at the request of a party, in the context of challenge proceedings brought before the competent State court under Articles 18(9) and 46(3)(a)(i) and (iii), and 59(1)(f) of the PAL; or
- after a final award has been rendered, at the request of a party, in the context of setting aside or enforcement proceedings, in the case of domestic awards (Articles 46(3)(a)(i) and (iii), and 48(1) of the PAL), or in the context of recognition and enforcement proceedings, in the case of foreign awards (Articles 56(1)(a)(i) and (iii) of the PAL).

Article 5(4) of the PAL makes clear that the arbitral tribunal's jurisdiction cannot be discussed autonomously in an action brought before a State court for that effect or in the context of a request for an interim measure brought before the same court in order to prevent the constitution or operation of an arbitral tribunal.

5.4 Timing of Challenge

Other than in the context of an action brought in a matter that is (allegedly) the subject of an arbitration agreement, the jurisdiction of the arbitral tribunal can only be challenged before State courts after a preliminary or final award has been rendered.

Article 18(9) of the PAL states that a preliminary award on jurisdiction may be challenged by any party before the competent State court in the context of setting aside proceedings brought under Articles 46(3)(a)(i) and (iii), and under Article 59(1)(f), within 30 days after its notice to the parties.

After a final award has been rendered, the parties may challenge the jurisdiction of the arbitral tribunal in the following circumstances:

- in the context of setting aside or enforcement proceedings: within 60 days of the notification of the award to the interested party or the arbitral tribunal's decision on any party's request for the correction or interpretation of the award, or for an additional award (under Article 45) (Articles 46(6) and 48(2) of the PAL); or
- in the context of recognition and enforcement proceedings (foreign awards): with the opposition, to be presented within 15 days of the application for recognition (Article 57(3) of the PAL).

5.5 Standard of Judicial Review for Jurisdiction/ Admissibility

When reviewing the question of jurisdiction at the post-award stage, State courts perform a de novo review of the arbitral tribunal's jurisdiction.

5.6 Breach of Arbitration Agreement

Portuguese law recognises the negative dimension of the principle of competence-competence in Article 5(1).

National courts tend to give effect to this provision, and therefore tend to dismiss court proceedings started in breach of an arbitration agreement, where the defendant so requests no later than the submission of its first statement on the substance of the dispute and unless the arbitration agreement is manifestly invalid, inoperative or incapable of being performed.

5.7 Third Parties

The PAL contains specific provisions on the joinder of third parties, in Article 36. However, the parties may regulate this question differently in the arbitration agreement, either directly or by reference to the rules of an arbitral institution (Article 36(7)).

The general rule contained in Article 36 is that only third parties bound by the arbitration agreement can join in pending arbitral proceedings (paragraph 1).

The joinder is subject to the consent of all parties to the arbitration agreement and, if the arbitral tribunal has already been constituted, to the third party's acceptance of the composition of the arbitral tribunal (Article 36, paragraphs 1 and 2). Pursuant to the PAL, the arbitral tribunal shall only allow the joinder if it does not unduly disrupt the normal course of the arbitral proceedings and if there are relevant reasons that justify it, particularly in those situations set out in the PAL (Article 36, paragraph 3).

If the arbitral tribunal has not been constituted, the joinder of third parties can only occur in institutional arbitrations and provided that the applicable rules ensure respect for the principle of equal participation of all parties in the appointment of the arbitrators (Article 36, paragraph 6).

6. Preliminary and Interim Relief

6.1 Types of Relief

The PAL contains an entire Chapter on interim measures and preliminary orders: Chapter IV (Articles 20 to 29).

Unless otherwise agreed by the parties, an arbitral tribunal may grant interim measures and preliminary orders.

Under an interim measure, an arbitral tribunal may order a party to:

- maintain or restore the status quo pending determination of the dispute;
- take action that would prevent harm or prejudice to the arbitral process itself, or refrain from taking action that is likely to cause such harm or prejudice;
- provide a means of preserving assets out of which a subsequent award may be satisfied; or
- preserve evidence that may be relevant and material to the resolution of the dispute.

Together with the request for an interim measure, the parties may request a preliminary order directing a party not to frustrate the purpose of the interim measure requested, without providing notice to any other party (particularly the party against whom it is invoked).

Both preliminary orders and interim measures shall be binding on the parties, but only the latter may be enforced (Articles 23(5) and 27(1) of the PAL).

6.2 Role of Courts

Under Article 29 of the PAL, State courts retain the power to issue interim measures in relation to arbitration proceedings, irrespective of where their seat is (paragraph 1).

Pursuant to the same Article, State courts shall exercise that power in the same way as they should exercise their power to order interim relief in relation to court proceedings, but taking the specific features of international arbitration into consideration (paragraph 2).

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

Considering that the PAL does not expressly prevent or limit the possibility of appointing an emergency arbitrator prior to the constitution of the arbitral tribunal (provided that the parties agreed on that possibility) and that an emergency arbitrator can generally be regarded as an arbitrator empowered to issue interim measures, it may be argued that

the provisions of the PAL on interim measures shall also be applicable to emergency arbitrator proceedings.

6.3 Security for Costs

According to the PAL, the arbitral tribunal may require the party requesting an interim measure to provide appropriate security (Article 24(2)), whereas in the case of preliminary orders the arbitral tribunal shall, as a rule, require the requesting party to provide appropriate security, unless it considers it inappropriate or unnecessary to do so (Article 24(3)).

Considering that the PAL does not expressly prevent or limit the possibility of asking for security for costs, it may be argued that a party may also request security for costs in other cases – in particular, under the general provisions applicable to interim measures.

7. Procedure

7.1 Governing Rules

In conducting the arbitral proceedings, the parties and the arbitral tribunal must respect and apply the following:

- the procedure agreed to by the parties, until the acceptance by the first arbitrator, with the limitations arising from the fundamental principles and the mandatory provisions of the PAL;
- failing such agreement, the applicable provisions of the PAL; and
- failing any agreement between the parties and in the absence of applicable provisions in the PAL, the procedural rules defined by the arbitral tribunal.

Under Article 30(1) of the PAL, the arbitral proceedings shall always comply with the following principles:

- the respondent shall be summoned to present its defence;
- the parties shall be treated equally and given a reasonable opportunity to present their case, in writing or orally, before the award is issued; and
- the adversarial principle.

7.2 Procedural Steps

The parties and the arbitral tribunal must respect the procedure agreed to by the parties (including, if that is the case, the rules of any selected institution), which, in any event, shall always respect the fundamental principles set out in Article 30(1) of the PAL and the mandatory provisions of this law.

7.3 Powers and Duties of Arbitrators

The PAL does not contain any provision or provisions dealing specifically with the powers and duties of arbitrators.

In any event, the following powers and duties can be found in separate provisions of the PAL:

- Arbitrators have the power to:
  - (a) decide on their own jurisdiction;
  - (b) grant interim measures and preliminary orders;
  - (c) determine the applicable procedure in the absence of an agreement by the parties and other applicable provision; and
  - (d) determine the admissibility, relevance, materiality and weight of any evidence presented or to be presented.
- Arbitrators have the duty to:
  - (a) be and always remain independent and impartial, including the duty to disclose circumstances that are likely to give rise to justifiable doubts as to their impartiality and independence;
  - (b) respect the fundamental principles set out in Article 30(1) of the PAL, including, eg, the principle of equal treatment of parties;
  - (c) keep confidential all information and documents brought to their attention in the course of the arbitral proceedings;
  - (d) decide the dispute in accordance with the law, unless the parties agree that they shall decide ex aequo et bono;
  - (e) comply with requirements regarding the form, content and effectiveness of the award; and
  - (f) deliver the final award within the applicable time limits – ie, the time limit agreed to by the parties, until the acceptance by the first arbitrator, or the time limits set in accordance with Article 43 of the PAL.

7.4 Legal Representatives

The PAL does not contain any provisions on the issue of legal representation in domestic or international arbitrations, so this issue is not entirely clear.

However, there has been at least one court decision in which the Portuguese Supreme Court decided that the fact that one of the parties to arbitration proceedings had been represented by a non-lawyer did not in itself constitute a ground for refusing the recognition and enforcement of a foreign arbitral award.

8. Evidence

8.1 Collection and Submission of Evidence

Further to the power conferred upon the arbitral tribunal to determine the admissibility, relevance, materiality and weight of any evidence presented or to be presented (Article 30(4)), the PAL contains specific provisions on the submission of evidence by the parties before the arbitral tribunal, in Articles 33 and 34.

According to Article 33(2), the parties may submit all documents they consider to be relevant with their written statements, and may add a reference therein to the documents or other means of evidence they will submit.

Regarding the presentation of evidence at the hearing, Article 34 provides that, unless otherwise agreed 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 evidence. If, however, one of the parties so requests, and unless the parties had previously agreed otherwise, the arbitral tribunal shall hold one or more hearings for the presentation of evidence.

Particularly in the context of international arbitration, and unless agreed otherwise by the parties, arbitral tribunals also tend to follow the IBA Rules on the Taking of Evidence in International Arbitration. Accordingly, although the PAL does not specifically refer to the submission of witness statements and expert reports, it is common practice in international arbitrations seated in Portugal to have witness statements and expert reports presented ahead of the hearing, most usually with the parties' written submissions.

8.2 Rules of Evidence

The general rule under the PAL is that the arbitral proceedings shall follow:

- the procedure agreed by the parties (either directly or by reference to the rules of some arbitral institution); or
- failing such agreement, the applicable provisions of the PAL; or
- failing any parties' agreement and in the absence of applicable provisions in the PAL, the procedural rules defined by the arbitral tribunal.

Any of these rules must be applied in compliance with the fundamental principles set forth in Article 30(1), including the principle of equal treatment of parties and the adversarial principle.

Specifically on evidence, Article 30(4) of the PAL recognises the power of the arbitral tribunal to determine the admissibility, relevance, materiality and weight of any evidence presented or to be presented.

Particularly in the context of international arbitration, and unless otherwise agreed by the parties, arbitral tribunals often take guidance from the IBA Rules on the Taking of Evidence in International Arbitration.

8.3 Powers of Compulsion

The PAL does not specifically provide for an arbitrator's power to order the production of documents or require the attendance of witnesses, either before or at the hearing.

However, under Article 38 of the PAL, a party may, upon the authorisation of the arbitral tribunal, request from the competent State court that evidence be taken before it, when the evidence in question depends on the will of a party or non-party to the proceedings who refuses to collaborate. This provision is applicable to any requests for the taking of evidence directed at Portuguese State courts, in the case of arbitration seated in Portugal or abroad.

9. Confidentiality

9.1 Extent of Confidentiality

Article 30 of the PAL requires arbitrators, parties and arbitral institutions (if applicable) to keep all information and documents brought to their attention in the course of the arbitral proceedings confidential, with only the following exceptions:

- the right of the parties to make public procedural acts necessary to the defence of their rights;
- the duty to communicate or disclose procedural acts to the competent authorities, if so imposed by law; and
- unless otherwise indicated by any of the parties, the publication of awards and other decisions by the arbitral tribunal, which, in any event, should exclude the parties' identification details.

10. The Award

10.1 Legal Requirements

Article 42 of the PAL contains the requirements regarding the form and content of the award, whereas Article 43 prescribes the time limits to render the award.

Pursuant to Article 42(1), the award shall be made in writing and shall be signed by the arbitrator or arbitrators. If the arbitral tribunal is composed of more than one arbitrator, the signatures of the majority of all members or merely the signature of the chairman, if the award is to be made by the latter, shall suffice, provided that the reason for the omitted signature or signatures is stated in the award.

Furthermore, the award shall contain:

- the reasons upon which it is based, unless the parties agreed that no reasons are to be given or the award is an award on agreed terms under Article 41 of the PAL (Article 42, paragraph 3);
- its date and the place of arbitration, where the award shall be deemed to have been made (Article 42, paragraph 4); and
- unless otherwise agreed by the parties, the arbitral tribunal's determination on the distribution among the parties of the costs directly resulting from the arbitration (Article 42, paragraph 5).

Article 43(1) provides that the arbitral tribunal shall deliver the final award within the time limit agreed by the parties, until the acceptance by the first arbitrator, or, failing such agreement, within 12 months of the date of acceptance by the last arbitrator. This time limit (set in accordance with Article 43(1)) may be extended by agreement of the parties or, alternatively, by decision of the arbitral tribunal, which the parties may oppose by agreement.

10.2 Types of Remedies

The PAL does not contain any restrictions on the types of remedies that can be awarded by an arbitral tribunal. However, under the PAL, awards made in Portugal may be set aside if the court finds that the content of the award is in conflict with the principles of international public policy of the Portuguese State, and also if such award is to be enforced or produce any effects in national territory, whenever such enforcement would lead to a result that is clearly incompatible with the principles of international public policy (Articles 54 and 46(3)(b)(ii) of the PAL).

10.3 Recovering Interest and Legal Costs

The questions of whether the parties can request interest and/or the arbitral tribunal may award interest in addition to the parties' principal claims are not governed by the PAL, but rather must be determined in light of the rules of law applicable to the merits of the dispute.

As for the recovery of legal costs, Article 42(5) of the PAL expressly states that, unless otherwise agreed by the parties, the award shall determine the amount of costs to be borne by each party in relation to the costs directly resulting from the arbitration.

Furthermore, in accordance with the same provision, the arbitral tribunal may decide in the award, if it so deems fair and appropriate, that one or some of the parties shall compensate the other(s) for the whole or part of the reasonable costs and expenses that the parties can prove to have been incurred on account of their participation in the arbitration (Article 42(5)).

11. Review of an Award

11.1 Grounds for Appeal

Pursuant to Article 39(4) of the PAL, an award on the merits of the dispute, or which terminates the arbitral proceedings without a decision on the merits, cannot be appealed to State courts, unless the parties expressly agreed on that possibility in the arbitration agreement and the arbitrators did not decide ex aequo et bono or as amiable compositeur.

Moreover, pursuant to Article 53 of the PAL, in an international arbitration seated in Portugal, an award made by the arbitral tribunal can only be appealed to another arbitral tribunal if the parties expressly agreed on that possibility and regulated its terms.

Hence, according to Article 46, unless otherwise agreed by the parties, recourse to a State court against an arbitral award (rendered in an international arbitration seated in Portugal) can only be made by an application for setting aside in accordance with the provisions of this article. Under paragraph 3 of Article 46, an arbitral award may be set aside by the competent State court only if:

- the party making the application provides proof that:
  - (a) one of the parties to the arbitration agreement was under some incapacity, or the agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the PAL;
  - (b) there has been a violation within the proceedings of some of the fundamental principles of due process, with a decisive influence on the outcome of the dispute;
  - (c) the award dealt with a dispute not contemplated by the arbitration agreement or contains decisions beyond the scope of the arbitration agreement;
  - (d) 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 the PAL from which the parties cannot derogate or, failing such agreement, was not in accordance with the PAL, and, in any case, this inconformity had a decisive influence on the decision of the dispute;
  - (e) the arbitral tribunal condemned in an amount in excess of what was claimed or on a different claim from that which was presented, or dealt with issues that it should not have dealt with, or failed to decide issues that it should have decided;
  - (f) the award was made in violation of the requirements set out in Article 42, paragraphs 1 and 3, of the PAL; or
  - (g) the award was notified to the parties after the lapse of the maximum time limit set in accordance with the PAL; or
- the State court finds that:
  - (a) the subject matter of the dispute cannot be decided by arbitration under Portuguese law; or
  - (b) the content of the award is in conflict with the principles of international public policy of the Portuguese State.

11.2 Excluding/Expanding the Scope of Appeal

The parties can expressly agree on the possibility of appealing to State courts in the arbitration agreement, provided that the dispute is not to be decided ex aequo et bono or as amiable compositeur (Article 39(4) of the PAL).

The parties can also agree that an award made by the arbitral tribunal can be appealed to another arbitral tribunal, provided that they regulate the terms of such appeal (Article 53 of the PAL).

11.3 Standard of Judicial Review

Unless the parties expressly agree on the possibility of appealing to State courts or to another arbitral tribunal, under the terms of Articles 30(4) and 53 of the PAL respectively, the parties cannot have their case reviewed on the merits, but only on the grounds specified in Article 46 of the PAL.

12. Enforcement of an Award

12.1 New York Convention

Portugal ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on 18 October 1994; the Convention entered into force in January 1995.

When ratifying the New York Convention, Portugal made a reservation under Article 1(3), pursuant to which, based on reciprocity, Portugal will only apply the Convention to the recognition and enforcement of awards made in the territory of another Contracting State.

Portugal has also ratified the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done in Washington on 18 March 1965, and is currently a party to more than 50 bilateral investment treaties.

12.2 Enforcement Procedure

The enforcement procedure in Portugal depends on whether the award is domestic award or foreign (ie, an award made in an arbitration taking place in a foreign country).

For domestic awards, the procedure of enforcement is basically set out in Articles 47 and 48 of the PAL, together with the general rules of procedure that apply to the recognition of court judgments (eg, under Article 705(2)).

A domestic award may be enforced before the judicial courts of first instance or the administrative court in whose jurisdiction the place of arbitration is located, depending on whether the dispute falls within the jurisdiction of the judicial courts or the administrative courts (Article 59(4) of the PAL). The applicant party shall supply the original award or a certified copy thereof, and a certified translation into Portuguese if the award is not made in Portuguese (Article 47(1) of the PAL).

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

As far as is known, there has been no decision in which a Portuguese court enforced an arbitral award set aside at its country of origin.

Regarding the issue of State immunity, Article 50 of the PAL clearly states that 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 contest the arbitrability of the dispute or its own capacity as a party in the arbitration, nor to evade its obligations arising from such agreement in any other way.

12.3 Approach of the Courts

Portuguese courts have taken a positive stance towards the enforcement of domestic and foreign arbitral awards in Portugal, namely by applying the "arbitration-friendly" legislative framework adopted in the PAL.

In this respect, it must be especially noted that, while the New York Convention and the UNCITRAL Model Law merely refer to the "public policy" of the forum as a ground for refusing enforcement, the PAL adopted a more restrictive wording when defining the "public policy" ground. Indeed, under the relevant provisions of the PAL:

- in order for an award to be set aside on public policy grounds, the competent court would have to find that the content of the award is in conflict with the principles of international public policy of the Portuguese State; and
- in order for a foreign award to be refused recognition and enforcement, the competent court would have to find that the recognition or enforcement of the award would lead to a result that was clearly incompatible with the international public policy of the Portuguese State.

Most court decisions tend to recognise the distinction between domestic and international public policy. However, considering that the law does not expressly set out which matters or principles are to be included under each of those headings, and that the New York Convention requires the competent courts to take into consideration the result of the potential recognition or enforcement of the arbitral decision in the jurisdiction, it is difficult to define, on a general basis, what would be incompatible – or would lead to a result that was clearly incompatible – with the international public policy of the Portuguese State.

13. Miscellaneous

13.1 Class-action or Group Arbitration

The Portuguese Constitution and Portuguese law (including Law no. 83/95, of 31 August, which contains the general legal framework applicable to "popular action") recognise and regulate the right to bring popular actions, particularly

to promote the prevention, cessation or judicial prosecution of offences against public health, consumer rights, quality of life or the preservation of the environment and cultural heritage. However, they do not address whether it is possible to bring popular actions in arbitration.

The PAL also does not contain any specific provision on class-action or group arbitration, nor do the rules of the main Portuguese arbitral institutions (including the Arbitration Centre of the Portuguese Chamber of Commerce and Industry).

The features of the class-action mechanism currently available under Portuguese law and the fact that there are no specific provisions on the exercise of the right of popular action in arbitration make it very difficult to foresee the exact position of Portuguese law on the possibility of bringing popular actions in arbitration.

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13.2 Ethical Codes

The PAL does not address the application of ethical codes in arbitration.

The Arbitration Centre of the Portuguese Chamber of Commerce and Industry has an Ethical Code that shall be deemed to apply to arbitrators who accept an invitation to act as arbitrators in arbitrations conducted under the Rules of that institution.

13.3 Third-party Funding

The PAL does not provide for any specific provision on third-party funding, nor do the rules of arbitration of the main Portuguese arbitral institutions.

13.4 Consolidation

The PAL does not include any specific provision on consolidation, which is generally permitted within the terms of the applicable arbitration rules.

13.5 Third Parties

Please see **5.7 Third Parties** on Article 36 of the PAL.