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The International Comparative Legal Guide to:

International Arbitration 2007

A practical insight to cross-border International Arbitration work

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your country?

All matters related to voluntary arbitration are regulated by Law no 31/86, of 29 August 1986, as amended by Decree-law no. 38/2003, of 8 March 2003 (hereinafter, the "Arbitration Act").

Article 2 (1) of this Act provides that the arbitration agreement must be made in writing. An agreement is deemed to have been made in writing when it is inserted in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication of which a written record can be kept, whether these instruments directly contain the arbitration agreement or they include a reference clause to another document containing such agreement (article 2 (2)).

1.2 Are there any special requirements or formalities required if an individual person is a party to a commercial transaction which includes an arbitration agreement?

The Arbitration Act does not set any special requirements or formalities for the situation contemplated in the question.

However, arbitration agreements included in standard terms contracts for the supply of goods or services are subject to more stringent conditions and requirements, particularly when one of the parties of such contracts is consumer.

Under the applicable legislation, the standard terms to be agreed should be entirely communicated in an adequate and timely manner by the party which drafted them to the other party, together with all the specific information or clarification which may be required. Failure to meet these requirements will entail the writing out of respective terms or clauses. More stringent requirements are set forth for standard terms contracts made with consumers in respect of which the number of the black-listed terms or clauses is larger and its scope is more comprehensive.

In connection with arbitration agreements, the following black listed clauses should be mentioned: (a) regarding contracts where both parties are professional operators, the clauses which provide for the competence of a forum (comprehending also arbitral tribunals) which entails serious inconvenience for one of the parties, without being justified by the interests of the other party; (b) regarding contracts where one of parties is a consumer, the clauses which exclude or limit beforehand the possibility of seeking relief from courts for disputes that may arise between the parties or which contemplate forms of arbitration that do not assure the procedural guarantees provided by the law.

1.3 What other elements ought to be incorporated in an arbitration agreement?

If the arbitration agreement refers to a present dispute, it should define, in a precise manner, the object of the dispute. If the arbitration agreement refers to future disputes, it should specify the legal relationship that the future disputes may concern (article 2 (3)).

The parties should also incorporate in the arbitration: (i) the determination of the arbitrator's fees and the way of providing for other costs of the arbitration; and (ii) the designation of the place of the arbitration. Well-advised parties would also set a time-limit for the rendering of final award longer than the unreasonably short suppletive period provided in the Arbitration Act (see questions 2.3 and 5.4 below) and empower the arbitral tribunal to order interim or conservatory measures.

1.4 What has been the approach of the national courts to the enforcement of arbitration agreements?

The approach of Portuguese courts to the enforcement of arbitration agreements can be characterised as "friendly", as they do not hesitate to decline jurisdiction and to refer the parties to arbitration, whenever the existence of a written (see question 1.1 above) arbitration agreement regarding arbitrable matters is raised by one of the parties.

1.5 What has been the approach of the national courts to the enforcement of ADR agreements?

Portugal courts have limited experience regarding means of ADR. However, as the knowledge about ADR is increasing in this country, one may assume that Portuguese courts will enforce any ADR agreements, whenever their existence is raised before them by one of the parties. There is, however, no known case law in this respect.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration agreements in your country?

Law no. 31/86, of 29 August 1986, as amended by Decree-law no. 38/2003, of 8 March 2003 (the "Arbitration Act) is the statute which governs most of the matters related to arbitration.

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2.2 Does the same Arbitration Act govern both domestic and international arbitration proceedings? If not, how do the laws differ?

The Arbitration Act applies both to domestic (chapters I to VI) and international (chapter VII) arbitration proceedings that take place in Portugal (article 37).

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the governing law and the Model Law?

Although the UNCITRAL Model law, then recently approved, had some influence in the Government Draft which was at the origin of the Arbitration Act approved by the Parliament in 1986, one cannot say that this Act is based in the Model Law. In addition to the fact that the former governs both internal and international arbitrations, while the latter refers only to international commercial arbitration, the following differences may be pointed out between them:

- Article 9 of the Model Law expressly authorises a party to an arbitration agreement to apply to courts for the ordering of interim or conservatory relief, while the Arbitration Act has no expressed rule on that (but the Portuguese courts do not usually refuse to grant interim or conservatory relief to the benefit of parties involved in arbitration proceedings).
- Article 17 of the Model Law allows the arbitral tribunal to order one party to take such interim measures of protection, at the request of the other party, as the tribunal may consider necessary in respect of the subject matter of the dispute, while the Arbitration Act is totally silent on the issue (the possibility for the arbitral tribunal to order such measures is debated among the legal commentators, at least, whenever the arbitration agreement makes no mention to it).
- Under the Model Law, the parties are free to determine the number of arbitrators (article 10 (1)), which allows an even number of arbitrators, while under the Arbitration Act the arbitrators must be in odd number (article 6 (1)).
- Under article 16(3) of the Model Law, the decision rendered by the arbitral tribunal on its competence to decide the dispute (*competence-competence*) may be appealed to a State court within 30 days from the notification thereof, while under the Arbitration Act such decision can only be challenged before the State courts together with the challenging of the final decision rendered by the arbitral tribunal (article 21(4)).
- Article 17 of the Model Law states that the arbitral tribunal may order interim measures of protection, while the Arbitration Act has no legal provision addressing that issue (such possibility is debated among Portuguese legal commentators).
- The Model Law contains suppletive rules concerning the development of arbitration proceedings (articles 23, 24 and 25), while the Arbitration Act only sets forth the fundamental principles which must be complied with in any arbitration (absolute equality of treatment of the parties, necessary defendant's summoning to the arbitral proceedings, right of the parties to be heard in an adversarial manner throughout the arbitration proceedings), and leaves to the parties or to the arbitrators the issuing of any other rules which may me considered as adequate or convenient to regulate the proceedings (articles 15(3) and 16).
- Article 28 (2) of the Model Law provides that, whenever the parties have not chosen the law applicable to the substance of the dispute, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable, while article 33 (2) of the Arbitration Act provides that the arbitral tribunal shall apply the law which is most appropriate to the dispute.
- Article 31 (2) of the Model Law allows the parties to agree that no reasons are to be stated in the award, while article 23 (3) of the Arbitration Act provides that the final decision of the arbitral tribunal should be reasoned.
- Article 33 (3) of the Model Law allows any of the parties to request to the arbitral tribunal to render an additional award as to claims presented in the arbitral proceedings but omitted from the award, while the Arbitration Act does not contemplate such possibility and provides, instead, that such omission is a ground for the annulment of the arbitral award by State courts, at the request of a party (article 27 (1) (e)).
- The Model law does not set any time-limit within which the arbitral tribunal must render its award, while the Arbitration Act sets a suppletive limit of six months to that effect, counted from the appointment of the last selected arbitrator, an extension of this time-limit being only possible by agreement of both parties, up to the double of the period initially set by the parties (such too short duration of this suppletive time-limit and the fact that an extension of the same cannot be granted by the courts being criticised by Portuguese legal commentators and practitioners).
- Chapter VII of the Model Law provides that the application for setting aside the arbitral award is the exclusive recourse against it, while articles 27, 28 and 29 of the Arbitration Act allow for two different ways of challenging the arbitral award: two degrees of appeals to State higher courts (unless, in domestic arbitrations, the parties have waived, totally or partially, such right of appeal; these appeals are in principle excluded in international arbitrations) and a legal action before State courts to set aside the award.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your country? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Article 1 (1) of the Arbitration Act provides that any dispute which does not concern inalienable rights may be submitted to voluntary arbitration, provided that such matter is not reserved to the courts or to mandatory arbitral tribunals by a specific law.

This criterion of arbitrability of disputes gives rise to some doubts and difficulties when applied in practice and, because of that, it has been criticised by some commentators. Although such criterion would point to excluding the arbitrability of issues of Public law, the following administrative law matters are declared to be arbitrable by express determination of some administrative law statutes: (i) issues concerning administrative contracts, including the assessment of the validity of administrative acts related to their performance; (ii) issues concerning the civil extra-contractual liability of the Public Administration; and (iii) issues related to administrative acts which may be revoked under administrative law, on grounds other than their invalidity.

Under the Arbitration Act, not only contractual but also extra-contractual (i.e., tort) disputes (article 1 (2)) may be submitted to arbitration. Also according to the Arbitration Act, the parties are allowed to include in the concept of "dispute", in addition to *stricto sensu* disputes (where one party raises a claim against another who opposes to it) any other differences, notably those related to the need to clarify, complete, update or review the contracts or legal relationships which the arbitration agreement refers to (article 1 (3)).

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3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

Article 21 (1) of the Arbitration Act provides that the arbitral tribunal has the power to rule on the question of its own jurisdiction (*competence-competence* of the arbitral tribunal) even though, for that purpose, it may have to assess the existence, the validity or the effectiveness of the arbitration agreement or of the contract in which the same is included.

3.3 What is the approach of the national courts in your country towards a party who commences court proceedings in apparent breach of an arbitration agreement?

When a party commences court proceedings in breach of an arbitration agreement and the other party raises an objection (*exceptio*) on this ground - the court cannot *ex officio* assess and decide on such *exceptio* - the court shall verify the existence and the validity of the alleged arbitration agreement and, if it finds that such agreement exists and is valid, it should decline to adjudicate on the subject matter of such court proceedings (which should then be dismissed) and should refer the case to the arbitral tribunal.

It is debated among Portuguese legal commentators whether the court, in order to render the above-mentioned decision on the possible breach of an arbitration agreement, should fully address the question of this agreement's existence validity or effectiveness or should instead restrict its review to a *prima facie* verification of the same (meaning that the court should decline jurisdiction unless the arbitration is "patently" null and void). The latter opinion seems to be prevailing.

3.4 Under what circumstances can a court address the issue of the jurisdiction and competence of the national arbitral tribunal?

The decision of the arbitral tribunal declaring its competence to decide the dispute may only be reviewed by Portuguese courts after an award on the substance of the dispute has been made. This review can only take place in the context of an appeal filed against the award (if this was not excluded by the parties or disallowed by law) or of a legal action aiming at having the award annulled or of an opposition to its enforcement (article 21 (4)).

3.5 Under what, if any, circumstances does the national law of your country allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

The Arbitration Act does not contemplate the possibility of an arbitral tribunal assuming jurisdiction over persons who are not parties to an arbitration agreement. On the other hand, in Portuguese courts' jurisprudence (case law) the issue of the possible extension of the arbitration agreement *ratione personae* (i.e., to entities other than its signatories) was not yet raised nor decided upon.

4 Selection of Arbitral Tribunal

4.1 Are there any limits to the parties' autonomy to select arbitrators?

The parties may agree on a sole arbitrator or an odd number of arbitrators (article 6 (1)). Arbitrators must be independent and have full legal capacity (article 8). No other limits are set to the parties' autonomy to select arbitrators.

4.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

If the parties fail to appoint the arbitrators or to agree on a method for that purpose, then the courts shall intervene to make up for this failure (article 12(2)). In case of institutional arbitrations, this failure shall be remedied by the administering institution.

4.3 Can a court intervene in the selection of arbitrators? If so, how?

Whenever the parties or one of them fail to appoint one or several of the members of the arbitral tribunal, the appointment will be made, upon the request of a party, by the President of the Court of Appeal of the place of arbitration or, if no place is established, of the applicant's domicile (article 12 (1)). This appointment may be requested after one month has elapsed from the date on which the party who intends to commence the arbitral proceedings gave notice thereof to the other party, notably for the appointment of the arbitrator or arbitrators that the latter is entitled to select or for consideration of the proposed name of the sole arbitrator (if the parties had so agreed) or, if a name has been proposed by one party to be selected a third arbitrator, within one month from the date of the appointment of the last selected of the arbitrators that should select the arbitrator who would complete the composition of the tribunal (article 12 (2)). If the parties or the arbitrators (appointed as said above) cannot agree on the designation of the chairman of the arbitral tribunal, that designation shall be made by the President of the Court of Appeal (article 14 (2)).

4.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality?

According to article 10 (1) of the Arbitration Act, arbitrators who are not appointed by both parties are subject to the same regime of impediments and grounds for possible challenge as those on which objection may be made to a judge in court proceedings, as provided for in articles 122 to 136 of the Code of Civil Procedure. A party may not challenge an arbitrator appointed by it, or in whose appointment he has participated, except for reasons of which he becomes aware after the appointment has been made (article 10 (2)).

From these provisions the legal commentators infer the principle that the arbitrators should be independent and impartial in the eyes of the parties.

5 Procedural Rules

5.1 Are there laws or rules governing the procedure of arbitration in your country? If so, do those laws or rules apply to all arbitral proceedings sited in your country?

The Arbitration Act is applicable to all voluntary arbitrations, whether of internal or international nature (this meaning "those which involve the interest of international trade" - article 32), that take place in the Portuguese territory (article 37).

The Act sets forth the fundamental principles which must be complied throughout the arbitral proceedings (absolute equality of treatment of the parties, necessary defendant's summoning to the arbitral proceedings, right of the parties to be heard in an adversarial

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manner throughout the arbitration proceedings), but leaves to the parties or to the arbitrators the issuing of any other rules which may be considered as adequate or convenient (articles 15(3) and 16).

The parties may determine in the arbitration agreement or in a later written instrument to be agreed until the acceptance of the first appointed arbitrator the procedural rules to be complied with by the arbitral tribunal of their disputes (article 15 (1)). That determination may result from the choice of the rules of arbitration adopted by any arbitral institution duly authorised to administer arbitrations or from the appointment of one of such institutions to administer the arbitration in question (article 15 (2)). If the parties fail to agree on this matter, the arbitral tribunal is empowered to determine the procedural rules that should regulate the arbitral proceedings.

5.2 In arbitration proceedings conducted in your country, are there any particular procedural steps that are required by law?

The only restriction to the parties' autonomy and to the arbitrators' authority in respect of the organisation of the arbitral proceedings is the mandatory compliance with the fundamental principles referred to in question 5.1. above.

5.3 Are there any rules that govern the conduct of an arbitration hearing?

Apart from the fundamental principles referred to above, there are no legal provisions governing an arbitration hearing.

5.4 What powers and duties does the national law of your country impose upon arbitrators?

The arbitrators have the powers which are necessary to decide the case submitted to them, similarly to the powers that judges have, except powers to issue any orders whose implementation would require *jus imperii* authority (which they do not have) or to demand any action or omission from any entity which is not a party to the arbitration. The chairman of the arbitral tribunal is empowered to prepare the proceedings, to direct the production of evidence, to conduct the working of the hearings and to organise the debates of the parties, unless the parties have vested these powers in the arbitral tribunal as a *collegium* (article 14 (3) of the Arbitration Act).

As to the arbitrators' duties, the following are worth mentioning (i): if the arbitrator accepts the appointment, he may only withdraw if a new circumstance disables him from performing his functions (article 9, no. 1); (ii) arbitrators should render the award within 6 (six) months, counted from the date of the appointment of the last selected arbitrator or within the time extension which may have been approved by both parties to that effect and, if they fail do to that without due justification, they will be liable for the damages arising out of any delay (article 19 (5)); (iii) the arbitrators shall decide according to the law, unless they were authorised to decide ex aequo et bono (article 22); (iv) when rendering the award, the arbitrators should comply with some formal requirements stated in article 23 (see question 8.1 below).

5.5 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

The courts do not have jurisdiction to deal with procedural issues arising during an arbitration but the parties may request, after being authorised by the arbitral tribunal, the assistance of the courts in respect of the production of evidence which is dependent of the will of a party or a third person who may be unwilling to cooperate with the arbitral tribunal.

5.6 Are there any special considerations for conducting multiparty arbitrations in your country (including in the appointment of arbitrators)? Under what circumstances, if any, can multiple arbitrations (either arising under the same agreement or different agreements) be consolidated in one proceeding? Under what circumstances, if any, can third parties intervene in or join an arbitration proceeding?

The Arbitration Act does not contain any rules providing for multiparty arbitrations, whether in respect of the selection of arbitrators or the conduct of the proceedings. Although the Portuguese courts have already been confronted with cases that should have been handled as multiparty arbitrations, they have not treated them in that manner. This issue is not addressed in the rules of arbitration of the most used Portuguese arbitration centres.

The Arbitration Act and the rules of arbitration of the most used Portuguese arbitration centres do not contain any provisions providing for the consolidation of multiple arbitrations in one proceeding. Therefore, one should assume that such consolidation could only take pace in case all the involved parties agree to that consolidation (provided that all of them are signatories of the same or identical arbitration agreement).

The Arbitration Act and the rules of arbitration of the most used Portuguese arbitration centres do not contain any rules providing for the possible intervention or joinder of third parties. Therefore, one should assume that such intervention or joinder could only take place in case all the involved parties agree to that consolidation (provided that all of them are or become later signatories of the same arbitration agreement).

5.7 What is the approach of the national courts in your country towards ex parte procedures in the context of international arbitration?

Portuguese courts may order, under certain conditions, *ex parte* interim or conservatory measures and they have done that in assistance to pending international arbitrations.

As regards the adoption of *ex parte* procedures within the arbitration proceedings, one may assume that it would be considered as a very serious violation of one fundamental principle governing any arbitration ("right of the parties to be heard in an adversarial manner throughout the arbitration proceedings") and would constitute a likely ground for the challenge of the final award rendered in those proceedings.

6 Preliminary Relief and Interim Measures

6.1 Under the governing law, is an arbitrator permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

The Arbitration Act does not contain any provision concerning the ordering of preliminary relief and interim measures by the arbitrators. Although the matter is debated among Portuguese legal commentators, specially when the arbitration agreement is silent on this issue, the prevailing view seems to be that the arbitrators are permitted, under Portuguese law, to order interim or conservatory measures (even if the arbitration agreement does not expressly

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authorise them to do that) which do not require the use of *jus imperii* powers for this implementation. This issue, however, is not yet settled in the Portuguese legal doctrine. Moreover, no court decisions are known on this matter.

6.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Although the Arbitration Act does not contain any provision concerning the granting of interim relief or conservatory measures by courts, in respect to disputes that have been submitted to arbitration, several court decisions (some of them of higher courts) have admitted the granting of such measures or relief, subject to the same requirements and conditions which apply to the granting of those measures in the context of court litigation.

The majority of the commentators agree that a court is entitled to grant preliminary interim relief, at the request of a party to an arbitration, even when the arbitration agreement gave such power to the arbitrators have the power to grant the same; those commentators hold the opinion that the arbitral tribunal and the court shall have then concurrent jurisdiction to that effect.

The legal doctrine and the great majority of the courts jurisprudence agree that the existence of an arbitration agreement does not prevent one of the parties thereto to apply to courts for the granting of interim relief or conservatory measures and that such application should not be construed as a breach of the arbitration agreement nor should affect the jurisdiction of the arbitral tribunal to settle the dispute.

6.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

See the answer to question 6.2 above.

6.4 Does the national law allow for the national court and/or arbitral tribunal to order security for costs?

The Portuguese Civil Procedure Code does not grant to courts the power to order any of the parties to provide "security for costs" (we assume that these "costs" mean the legal dues that the parties are bound to pay to the State during the court proceedings). Accordingly, one may conclude that an arbitral tribunal will not be considered to have such power either.

7 Evidentiary Matters

7.1 What rules of evidence (if any) apply to arbitral proceedings in your country?

In principle, the rules of evidence applying in arbitrations are the same which apply in court proceedings, but the parties and/or arbitrators are free to agree on different rules, subject to absolute compliance with the fundamental principles set forth in article 16 of the Arbitration Act (see question 5.1 above).

7.2 Are there limits on the scope of an arbitrator's authority to order the disclosure of documents and other disclosure of discovery (including third party disclosure)?

In the context of court litigation, Portuguese Civil Procedural Law does not contemplate any procedural phase which has any similarity with the "discovery" of Anglo-Saxon systems of law. Therefore, in arbitrations located in Portugal no such "discovery" exist.

The limits to the arbitrators' authority to order the disclosure of documents and of other means of evidence are, in part, the same which the courts would face, namely privileged information or documents inherent to the exercise of some professions (lawyers, doctors, etc) or arising from State security or national defence imperatives or information related to commercial or technical confidentiality or secrecy rights. On the other hand, the arbitrators have limits of their own in this respect, because (i) they cannot force one party to disclose evidence which it refuses to disclose (as they do not have *jus imperii* prerogatives, the arbitrators can only draw adverse inferences from that refusal); and (ii) they are not empowered to issue any orders addressed to entities who are not signatories of the arbitration agreement.

7.3 Under what circumstances, if any, is a court able to intervene in matters of disclosure/discovery?

When the evidence to be produced depends on the will of one of the parties or of a third party and they refuse to cooperate, the interested party, after having been authorised by the arbitral tribunal, may request the court to order that such evidence is produced before it and the result thereof is referred to the arbitral tribunal (article 18 (2) of the Arbitration Act).

7.4 What is the general practice for disclosure / discovery in international arbitration proceedings?

In international arbitration proceedings located in Portugal, what is said in questions 7.2 and 7.3 above also applies.

7.5 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal? Is cross-examination allowed?

In addition to what was said in question 7.1, 7.2, 7.3 and 7.4 above, one should mention the following:

- Any person mentally and physically able to testify on the disputed facts may do so. However, the legal representatives of the parties (including company directors and attorneys) cannot testify as witnesses in court proceedings to which their represented entity is a party, but they can be asked by the opposing party to be questioned in a court hearing in view of the possible confession of facts which are detrimental to the entity they represent. In domestic arbitrations, it is increasingly admitted that this distinction in respect of oral testimony, between parties' representatives and any other persons, should not apply and that their statements should be evaluated by the arbitrators, having due regard to all the relevant circumstances. In international arbitrations located in Portugal such distinction is totally ignored.
- In the context of court litigation and of arbitrations, the examination of witness comprehends: direct examination by the counsel of the party who offered the witness, cross-examination by the counsel of opposing party and possible (if the judge or the arbitrators allow it) redirect examination.
- In the practice of domestic arbitrations in Portugal, the

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witness statements are usually made orally (under direct-, cross- and redirect-examination). In international arbitrations located in Portugal, written witness statements are increasingly admitted.

- Although the witnesses who testify in court proceedings held in Portugal are sworn in, it is widely understood that they should not be so in arbitration hearings, because the arbitrators are generally considered as not having the power to put anyone on oath.

7.6 Under what circumstances does the law of your Country treat documents in an arbitral proceeding as being subject to privilege? In what circumstances is privilege deemed to have been waived?

In this respect, there are no specific legal provisions for arbitral proceedings. One may add, however, that:

- the restrictions on the disclosure of information or documents connected with the professional secrecy or confidentiality duties of lawyers and doctors may be lifted (in exceptional circumstances) by the competent bodies of their professional associations, which are subject to possible review by courts;
- as regards the possible refusal of disclosure of information or documents on grounds of commercial or technical confidentiality, it is likely that the arbitral tribunal, in accordance with the procedural powers which it is vested with, will issue a ruling on such matter that will be in line with or similar to the provisions of articles 3.7, 3.9, 9.2 and 9.3 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration.

8 Making an Award

8.1 What, if any, are the legal requirements of an arbitral award?

According to article 23 of the Arbitration Act, the final arbitral award must be made in writing and contain: (i) the parties' identification; (ii) a reference to the arbitration agreement; (iii) the definition of the subject matter of the dispute; (iv) the arbitrators' identification; (v) the place of arbitration and the place where and date when the award was made; (vi) the arbitrators' signatures; (vii) the identification of the arbitrators that could not or did not want to sign the award; (viii) number of signatures, at least, equal to the majority of the arbitrators; and (ix) the dissenting opinions, if any, duly identified. The award should be reasoned and should include the determination of the arbitration costs and its splitting between the parties.

Moreover, the award should be rendered within the time-limit provided in the Act or within the longer period which the parties may have set for that purpose (see questions 1.3, 2.3 and 5.4 above).

9 Appeal of an Award

9.1 On what bases, if any, are parties entitled to appeal an arbitral award?

Under the Arbitration Act, there are two ways of challenging an arbitral award: appeals and a legal action to obtain the annulment of the award.

Appeals (to the Courts of Appeal and, with some limits, to the Supreme Court of Justice) are allowed in domestic arbitrations, unless the parties had previously excluded them, notably in the arbitration agreement. An appeal may be filed by the party who has lost the case. In international arbitrations located in Portugal, appeals are, in principle, excluded.

According to article 27 of the Arbitration Act, an arbitral award may be annulled by the court if: (i) the subject-matter of the dispute is not capable of settlement by arbitration, i.e., is not arbitrable; (ii) the arbitral tribunal did not have competence or the constitution of the arbitral tribunal was irregular, i.e., was not in accordance with the agreement of the parties or with the applicable law; (iii) there was a breach of the fundamental principles set forth in article 16; (iv) the award did not include the arbitrators' signatures or did not contain a number of signatures, at least, equal to the majority of the arbitrators or did not include the dissenting opinions, if any, duly identified or the award was not reasoned; or (v) the arbitral tribunal decided on issues which the parties had not submitted to it or failed to address all the issues which the parties had submitted to the tribunal.

9.2 Can parties agree to exclude any basis of appeal or challenge against an arbitral award that would otherwise apply as a matter of law?

The parties may agree (notably in the arbitration agreement) to exclude the right to appeal from the award to courts (this waiver may concern all appeals or just one degree of appeal). For the purposes of article 29 (2) of the Arbitration Act, an agreement to authorise the tribunal to decide ex aequo et bono will be considered as an exclusion of appeals.

In international arbitrations, appeals are only possible if the parties have agreed thereon and have regulated their terms (article 34 of the Arbitration Act).

The right to request the annulment of the arbitral award cannot be waived.

The legal commentators also stress that the extraordinary recourses of revision ad opposition of a third party (which are very rarely used against courts' decisions) cannot be waived either, because of their nature of "safety valves" of the jurisdictional system.

9.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

The parties are not entitled to agree on expanding the scope of appeals or of the action seeking the annulment of an arbitral award, beyond the grounds available in the applicable law.

9.4 What is the procedure for appealing an arbitral award in your country?

If the parties have not excluded the appeals from the arbitral award, an appeal to the Court of Appeal may be filed, within ten days, on grounds of erroneous assessment of the facts or erroneous application of the law to the established facts, and from the latter's decision a further appeal may be filed, within ten days, to the Supreme Court of Justice, on grounds of erroneous application of the law. These grounds for appeals are the same as those applicable to court decisions, as provided in the Code of Civil Procedure.

A legal action for annulment of the award may be filed with the court within one month from the notification of the arbitral award (article 28(2) of the Arbitration Act).

If appeals were not excluded and are filed, any grounds for annulment of the award should be raised in the context of such appeal filed (article 27 (3)).

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10 Enforcement of an Award

10.1 Has your country signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Portugal ratified the New York Convention by Parliament Resolution no. 37/94, of 10 March 1994. When it did it, Portugal, however, made the following reservation: "on the basis of reciprocity, the Convention is applicable to the recognition and enforcement of awards made only in the territory of another Contracting State".

Without prejudice to the conditions provided for in the Convention (mainly in articles III, IV and V), articles 1094 to 1102 of the Code of Civil Procedure shall apply to the recognition of arbitral awards made abroad.

10.2 Has your country signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Portugal has ratified the Inter-American Convention on International Commercial Arbitration signed in Panama City, in 1975, as well as a number of bilateral conventions dealing with the recognition and enforcement of arbitral awards.

10.3 What is the approach of the national courts in your country towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

An arbitral award made in Portugal does not need to be recognised or confirmed; it has the same binding nature and enforceability as a court sentence (article 26 (2)of the Arbitration Act) and may be immediately enforced or executed in the state court of first instance, under the terms of the Code of Civil Procedure (article 30 of the Act).

It should be noted that the fact that an action for the annulment of the award is pending is not a cause for suspending the enforcement or execution proceedings, although the party seeking the enforcement may be required to provide adequate security, if the execution reaches the payment phase before the aforesaid action is finally decided.

After having been notified of the commencement of the enforcement or execution proceedings, the party against whom the execution is sought may file an opposition to the same, on a limited number of grounds.

Even if the period for annulment of the award has expired, the opposing party may raise the grounds for annulment in the context of its opposition to execution of the award (article 31 of the Arbitration Act).

An arbitral award made abroad must be recognised by the Court of Appeal in accordance with articles 1094 to 1102 of Code of Civil Procedure and article III (2) and V of the 1958 New York Convention, before it can be enforced in Portugal. The revision of the award is requested by the interested party and the counter-party is notified to oppose to such request within 15 days. The applicant may still answer to that opposition within 10 days after being notified thereof.

The grounds for refusing to recognise or enforce foreign arbitral awards are those provided for in the New York Convention (article V), to which the aforesaid provisions of the Code of Civil Procedure must be adapted.

10.4 What is the effect of an arbitration award in terms of res judicata in your country? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

According to article 26, no. 1 of the Arbitration Act, once the parties have been notified of the final award on the merits of the case, if it is not possible to file an appeal, it becomes final and binding and acquires the effect of *res judicata*. Notwithstanding this, it is still possible to bring an extraordinary recourse ("revision" or "opposition of a third party" - see question 9.2 above) against such decision, under the very strict terms of articles 771 to 782 of the Portuguese Code of Civil Procedure.

The effect of *res judicata* acquired by the final award on the merits impedes those issues that were submitted to arbitration to be resubmitted again to adjudication by the same parties (or their legal successors). Under Portuguese law, *res judicata* is considered to be part of public policy and the court may raise the *res judicata* issue *ex officio*.

It should be noted that, under Portuguese Civil Procedure Law, only the *dispositif* of the award (not its reasoning) has *res judicata* effect.

11 Confidentiality

11.1 Are arbitral proceedings sited in your country confidential? What, if any, law governs confidentiality?

There is no legal provision imposing confidentiality in arbitrations, although, in the practice of arbitration, the proceedings as well as the contents of the award are widely understood to be confidential, without prejudice to the right of the parties to invoke the award before the courts or any public authorities, if this may be required for the defence of their interests. The parties may provide on this matter in the arbitration agreement. Furthermore, the arbitrators and other professionals (notably, lawyers) who take part in arbitral proceedings are understood to have a confidentiality duty in respect of what happens during the arbitral proceedings.

11.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

The information disclosed in arbitral proceedings may be referred to in subsequent proceedings when it is reasonably necessary for the defence of the parties' rights (for instance, when challenging the arbitral award before courts) or pursuit of the interest of justice. Disclosure of such information for other purposes will be ill-regarded and very likely will not be relied on by courts in subsequent proceedings.

11.3 In what circumstances, if any, are proceedings not protected by confidentiality?

See the answers given in questions 11.1 and 11.2 above.

12 Remedies / Interests / Costs

12.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

As Portuguese courts are not allowed to award punitive damages,

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one should conclude that arbitral tribunals will not be allowed to do so either. As regards the types of remedies available, the only difference between courts and arbitral tribunals is that, whenever the remedy granted requires the use of *jus imperii* prerogatives, its implementation should be requested to courts.

12.2 What, if any, interest is available?

There are no special rules regarding the tribunal's power to award interest, which means that general rules of civil law are applicable in the same way as in court proceedings.

12.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

According to article 23 (4) of the Arbitration Act, the arbitral award shall determine the costs of proceedings and split them between the parties.

Under Portuguese law and litigation practice, when one refers to recover of fees and costs by the winning party, only the legal dues paid to State in connection with the court proceedings are to be considered (except in very rare cases of patent "bad faith" behaviour before the court); the winning party is not entitled to the reimbursement of the fees and expenses that it had to pay to its counsels or other people who helped it in the dispute. The same applies in domestic arbitrations.

As far as international arbitrations located on Portugal are concerned, the rules agreed for these arbitrations will apply (notably, the rules of the institutions who administered the arbitration; for example article 31 of ICC Rules).

12.4 Is an award subject to tax? If so, in what circumstances and on what basis?

The arbitral award is not subject to any tax.

13 Investor State Arbitrations

13.1 Has your country signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965)?

Portugal ratified the 1965 Washington Convention, in 1984.

Portugal is also a party (since 1988) to the Convention Establishing the Multilateral Investment Guarantee Agency (Parliament Resolution no. 12-A/88, of 20 May 1988)

13.2 Is your county party to a significant number of Bilateral Investment Treaties (BITs) or Multilateral Investment treaties (such as the Energy Charter Treaty) that allow for recourse to arbitration under the auspices of the International Centre for the Settlement of Investment Disputes ('ICSID')?

Portugal has entered into a great number of Bilateral Investment Treaties (BITs) that allow for recourse to arbitration under the auspices of ICSID/CIRDI as well as under other international rules of arbitration (ICC or UNCITRAL). Moreover, has Portugal ratified the Energy Charter Treaty, in 1996.

13.3 Does your country have standard terms or model language that it uses in its investment treaties and, if so, what is the intended significance of that language?

Most of the Bilateral Investment Treaties (BITs) entered into by Portugal follow the model language used in similar treaties entered into by other West European countries as well as the standard terms and model language adopted in the 1967 Draft OECD Convention on the Protection of Foreign Property.

13.4 In practice, have disputes involving your country been resolved by means of ICSID arbitration and, if so, what has the approach of national courts in your country been to the enforcement of ICSID awards?

No ICSID arbitrations involving Portugal were held or are pending.

13.5 What is the approach of the national courts in your country towards the defence of state immunity regarding jurisdiction and execution?

There are several decisions from the Portuguese Supreme Court and Courts of Appeals acknowledging State immunity from jurisdiction and/or execution, within limits. The general understanding of the courts jurisprudence is that such State immunities do only cover the private law or commercial dealings carried out by foreign states or legal bodies controlled by the same.

Portugal has ratified, in 2006, the United Nations Convention on Jurisdictional Immunities of States and their Property, signed in New York, in 2005.

14 General

14.1 Are there noteworthy trends in the use of arbitration or arbitration institutions in your country? Are certain disputes commonly being referred to arbitration?

Most commonly, commercial matters are referred to arbitration, mainly ad-hoc arbitration. Institutional arbitration is much less used, although the Arbitration Centres linked to the Commercial Associations of Lisbon and of Porto have a growing importance in this field.

Not only matters of commercial law but also some arbitrable administrative law (see question 3.1 above) are often referred to arbitration.

14.2 Are there any other noteworthy current issues affecting the use of arbitration in your country?

The Arbitration Act in force, approved in 1986 was a good law when it was enacted. However, more than 20 years have passed and, similarly to what has been done not only in Europe but also throughout the world, Portugal clearly needs a new Arbitration Act in line with the modern concepts and trends prevailing in the field of commercial arbitration.

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In our firm, domestic arbitration disputes are handled in the context of the Litigation department. International arbitrations are dealt with by a specialised practice group.

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