

## PORTUGAL

### DELOS GUIDE TO ARBITRATION PLACES (GAP)

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#### JURISDICTION INDICATIVE TRAFFIC LIGHTS

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

## IN-HOUSE AND CORPORATE COUNSEL SUMMARY

The choice of the seat of the arbitration is one of the most consequential decisions in any arbitration agreement. The arbitration law of the arbitral seat will typically govern a wide range of issues concerning both the internal procedural conduct of the arbitral proceedings, as well as the external relationship between the arbitration and national courts. The seat may affect not only the way in which the arbitration is conducted, but also its final outcome, e.g., the possibility of enforcement. It is also a main driver of time and costs.

Portugal has a pro-arbitration and modern arbitration law, enacted in 2012, which is based on the 2006 UNCITRAL Model Law, with certain improvements mostly based on the experience of other leading jurisdictions and/or on demands by users (e.g., providing specific rules governing multi-party and multi-contract arbitrations, expressly allowing for interim measures and preliminary orders, prohibiting state entities from relying on domestic law to evade from arbitration agreements and enshrining a liberal attitude towards the validity of arbitration agreements).

Key places of arbitration in the jurisdiction?	Lisbon and Porto.
Civil law / Common law environment?	The Portuguese legal system is a civil law jurisdiction with a significant influence in other Portuguese-speaking jurisdictions such as Angola, Brazil, Cabo Verde, Guinea-Bissau, Macau, Mozambique, S. Tomé e Príncipe and East Timor, and a long-lasting tradition in international arbitration.
Confidentiality of arbitrations?	Yes.
Requirement to retain (local) counsel?	The issue is not regulated by the Portuguese Voluntary Arbitration Law (“ <b>PAL</b> ”) and is not entirely settled. Some authors consider that, unlike in court litigation, representation by counsel is not mandatory, unless the parties agreed otherwise and, thus, according to this understanding, absent agreement by the parties on the matter, each of them is free to decide whether they wish to be represented by counsel or not.
Ability to present party employee witness testimony?	Yes.
Ability to hold meetings and/or hearings outside of the seat?	Yes. Under Article 31(2) of the PAL the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it deems appropriate to hold hearings, to allow the production of evidence, or to deliberate.
Availability of interest as a remedy?	Yes. The PAL does not prescribe any rules governing the award of interest as, under Portuguese law, that is a substantive matter.
Ability to claim for reasonable costs incurred for the arbitration?	Yes. According to Article 42(5) of the PAL, unless otherwise agreed by the parties, the award shall determine the proportions in which the parties shall bear the costs directly resulting from the arbitration.

Restrictions regarding contingency fee arrangements and/or third-party funding?	<p>The Code of Ethics of the Portuguese Bar Association expressly prohibits the use of fee arrangements where the lawyers' fees are dependent on the success of the claim ("<i>quota litis</i>").</p> <p>Third-party funding is not specifically regulated and there are no particular restrictions to its use.</p>
Party to the New York Convention?	<p>Portugal is a party to the most important international treaties governing international arbitration, including the 1968 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the 1923 Geneva Protocol on Arbitration Agreements, the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards and the Inter-American Convention on International Commercial Arbitration, thus making arbitral awards rendered in Portugal readily enforceable worldwide.</p>
Other key points to note?	<p>Portuguese Courts are renowned for their independence and impartiality and are generally supportive of arbitration.</p> <p>Portugal has a highly committed, specialized, experienced, multilingual and culturally diverse arbitration community capable of conducting all kinds of arbitration. Portugal has a unique geographical location at the cross-roads of Europe, America and Africa. Portugal is a relatively less expensive jurisdiction when compared to other major international seats, while offering all the necessary equipment and infrastructures.</p>
WJP Civil Justice score (2019)	0.69

## ARBITRATION PRACTITIONER SUMMARY

The current Portuguese Voluntary Arbitration Law ("**PAL**") is the result of an extensive debate and peer-review process and it materializes the efforts of the Portuguese government to equip Portugal with a more competitive, effective and modern arbitration law, thereby rendering the country truly arbitration-friendly.

Date of arbitration law?	The PAL entered into force on 14 March 2012 and is heavily influenced by the 2006 version of the UNCITRAL Model Law, with certain improvements mostly based on the experience of other leading jurisdictions and/or on demands from users.
UNCITRAL Model Law? If so, any key changes thereto?	Yes, with the most significant deviations discussed below.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Portuguese Courts are renowned for their independence and impartiality and are generally supportive of arbitration. Notwithstanding, there is no specific judicial body devoted to handling arbitration-related matters.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes, in the appropriate circumstances.
Courts' attitude towards the competence-competence principle?	In Article 5 of the PAL, both the positive and negative effects of the competence-competence principle are recognized.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Parties may request annulment of awards by means of a set aside application under Article 46 of the PAL. In this regard, the Portuguese law significantly reflects, but does not absolutely mirror, the UNCITRAL Model Law, as it sets narrower grounds to set aside the award and does not allow for a review of the merits of the arbitral decision.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The PAL has a pro-arbitration stance in respect to the enforcement of arbitration agreements.  To the best of our knowledge, Portuguese courts have not yet had the opportunity to address the question of whether an award that has been annulled at the seat may be recognized and enforced in Portugal.
Other key points to note?	<ul style="list-style-type: none"> <li>– The PAL provides for specific rules governing multi-party arbitrations and the joinder and intervention of third parties in pending arbitrations. It also expressly allows for the granting of interim measures and preliminary orders by arbitral tribunals.</li> <li>– The PAL provides a general principle of confidentiality of the arbitration proceedings.</li> </ul>

## JURISDICTION DETAILED ANALYSIS

### 1. The legal framework of the jurisdiction

#### 1.1 Is the arbitration law based on the UNCITRAL Model Law?

Yes. The current Portuguese Voluntary Arbitration Law<sup>1</sup> ("PAL") entered into force on 14 March 2012. This Law confirms Portugal as a friendly jurisdiction towards arbitration, integrated in the universe of legislations that were based on the 2006 version of the UNCITRAL Model Law ("Model Law").

Despite its overall proximity to the Model Law, the PAL has its own specificities and deviations from that matrix which, reflect not only the aim to take into account the experience gathered under the preceding Portuguese arbitration law (dated of 1986) but also the fact that it was enacted in 2012 and, thus, took into account subsequent developments in other key jurisdictions:

- Article 5 of the PAL adopted the competence-competence principle establishing not only its positive effect, but also its negative effect, limiting the powers of a Court seized with a matter subject to an arbitration agreement to a mere *prima facie* control of the validity and applicability of the arbitration agreement, thereby adopting a similar solution, although not identical, to the one provided by French law.
- Articles 11 and 36 of the PAL contain provisions dealing with the constitution of the arbitral tribunal in the case of multiparty arbitration, as well as provisions regulating the joinder and the intervention of third parties in pending arbitral proceedings.
- Article 43(1) of the PAL establishes a flexible time-limit for the rendering of the award: unless the parties have agreed on a different time-limit up to the acceptance by the first arbitrator, the arbitrators shall render the final award within twelve months from the date of acceptance of the last arbitrator. However, the parties may subsequently agree on extensions of this time-limit, and the tribunal may also, through a duly reasoned decision, determine such extension, except if all parties oppose to it.
- Article 46(3) of the PAL establishes that with regards to public policy as a ground for setting aside an arbitral award, only the contrariness to "*international public policy*" of the Portuguese State may lead to the annulment of the award (regardless of whether it is a foreign or a domestic arbitral award).
- Article 49 of the PAL, under the influence of French law, adopted a substantive/economic criterion to define international arbitration, providing that "*[a]n arbitration is considered international when it involves interests of international trade interests*".
- Article 50 of the PAL, provides that, if the arbitration is international and one of the parties to the arbitration agreement is a State, a State-controlled organization or a State-controlled company, this party may not invoke its domestic law to challenge the arbitrability of the dispute or its capacity to be a party to the arbitration, nor to evade its obligations arising from such agreement.
- Article 51 of the PAL provides for a specific *in favorem valitatis* regime applicable to the validity of the arbitration agreement, according to which the arbitration agreement shall be deemed valid if its validity is recognized by one of the following laws: (i) the law selected by the parties to govern their arbitration agreement, (ii) the law applicable to the underlying contract, or (iii) Portuguese law.

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<sup>1</sup> Law No. 63/2011, of 14 December.

- Article 52(2) of the PAL provides that, when the parties have not chosen the rules of law applicable to the substance of the dispute, the arbitral tribunal shall apply the law of the State with which the subject matter of the dispute has the closest connection.

## 1.2 When was the arbitration law last revised?

The PAL currently in force was approved in 2011 and has not been revised since.

## 2. The arbitration agreement

### 2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

In determining the law applicable to the substantive validity of the arbitration agreement, the PAL<sup>2</sup> adopts a specific *in favour of validity* provision, which has no parallel in the Model Law, but was inspired by Swiss law. This rule constitutes an important embodiment of the principle in *favorem validitatis* (of the arbitration agreement) in the PAL.<sup>3</sup>

Under article 51(1) of the PAL, arbitration agreements providing for arbitration in Portugal will be deemed valid if they satisfy any one of the following potentially-applicable national laws: (i) the law selected by the parties to govern their arbitration agreement, (ii) the law applicable to the underlying contract, or (iii) Portuguese law.

### 2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Article 18(2) of the PAL lays down the principle of separability, stating expressly that the arbitration agreement is separable from the contract in which it is set forth. This provision is modelled after article 16 (1) of the Model Law.

### 2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

Similarly to article 7(2) of the Model Law and in line with article II(1) of the NY Convention, article 2(1) of the PAL requires the arbitration agreement to be in writing.

Article 2 of the PAL deals with what is the meaning of “writing”, for the purposes of this law. It provides that this requirement is met “*if the agreement is recorded in a written document signed by the parties, in an exchange of letters, telegrams, faxes or other means of telecommunications which provide a written record of the agreement, including electronic means of communication*” or if “*it is recorded on an electronic, magnetic, optical or any other type of support, as long as it offers the same guarantees of reliability, comprehensiveness and preservation*”.

Importantly, a reference made in a contract to any document containing an arbitration agreement satisfies the requirement of article 2, provided that such contract is in writing and that the reference is such as to make that clause part of the contract.<sup>4</sup>

Furthermore, this requirement is also met if there is “*an exchange of statements of claim and defence in arbitral proceedings, in which the existence of such an agreement is invoked by one party and not denied by the other*”.<sup>5</sup>

<sup>2</sup> Article 51(1) of the PAL. It is important to note that this provision is only applicable to international arbitration agreements.

<sup>3</sup> Dário Moura Vicente, Annotation to article 51 of the PAL, in *Lei da Arbitragem Voluntária Anotada*, Third Edition, Almedina, 2017.

<sup>4</sup> Article 2(4) of the PAL. See, also, Decision by the Oporto Court of Appeal, 13 April 2015, process 471/14.8TVPR.T.P1. In this case, the court upheld an arbitration clause inserted in a standard form contract. Specifically, it stated that the clause inserted in the standard form contract was deemed integrated in the separate swap confirmation contract concluded by the parties pursuant to the former.

<sup>5</sup> Article 2(5) of the PAL. This provision did not exist in the former version of the arbitration law, and it takes inspiration from article 7(5) of the Model Law.

Finally, it is worth noting that, under article 3 of the PAL, the failure to satisfy this requirement renders the putative arbitration agreement null.

#### **2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?**

The PAL does not have any specific rule governing this matter. The starting point for this discussion is the premises that arbitration is consensual by nature and that such consensus should be expressed in writing. The source of legitimacy of the arbitral tribunal's existence and jurisdiction is the will of the parties, materialized in their written agreement to submit certain disputes to arbitration. A corollary of the consensual nature of the arbitration agreement is, in turn, the fact that, as a matter of principle, it binds only the parties that agreed to it.

Nevertheless, there are particular cases in which, through certain legal institutes, arbitration agreements may be found to bind parties other than those who formally signed them. Below are some examples of such cases, notwithstanding the fact that it is always necessary to conduct a careful examination of all characteristics of each case in order to reach a definitive conclusion.

One first example in which extension may occur is where there is an assignment of a contract or the transfer of a debt that is subject to an arbitration clause. In these cases, as all the involved parties had to give their consent to the assignment or transfer, the person that was not originally a party to the assigned contract or transferred debt will ordinarily become bound by the arbitration clause *vis-à-vis* the original counterparty or creditor.<sup>6</sup>

When it comes to the assignment of a credit right, although the agreement of the debtor is not required, some authors deem the arbitration clause as accessory to the assigned right and thus consider the new creditor to be bound towards the debtor by the arbitration clause.<sup>7</sup> However, although accepting the same practical result, some other authors do not construe the arbitration clause as an accessory to the assigned right. Instead, they prefer the view according to which when an arbitral clause is inserted in a contract the credits and other rights arising therefrom are *configured* so as to render the exercise of the corresponding claims only possible through arbitration.<sup>8</sup>

Further to this, third party beneficiary contracts also typically give rise to the question of whether the arbitration clause may bind the beneficiary. Some authors hold the view that, if the beneficiary seeks to enforce a substantive right conferred by the parties to the contract, then he must do so in compliance with the framework the parties agreed on for the conferral of such right. Thus, the beneficiary may be bound by the arbitration agreement contained in the contract.<sup>9</sup> However, it is important to note that courts have reached contradicting conclusions on this issue.<sup>10</sup>

Finally, in some particular instances, it may be possible to resort to general principles of good faith to lift the corporate veil of the signatory of the arbitration agreement to bind a non-signatory party, typically a controlling shareholder. This possibility faces specific challenges in the Portuguese jurisdiction, as the PAL expressly imposes that the agreement to arbitrate be made in writing.

<sup>6</sup> Mariana França Gouveia, *Curso de Resolução Alternativa de Litígios*, Third Edition, 2014, p.155-159.

<sup>7</sup> Mariana França Gouveia, *Curso de Resolução Alternativa de Litígios*, Third Edition, 2014, p.155-159.

<sup>8</sup> António Sampaio Caramelo, "Autonomia" da cláusula compromissória e a competência da competência do tribunal arbitral, in *Temas de Direito da Arbitragem*, Coimbra Editora, Coimbra, 2013, pp. 115-116.

<sup>9</sup> Mariana França Gouveia, *Curso de Resolução Alternativa de Litígios*, Third Edition, 2014, p.161.

<sup>10</sup> See, for instance, Supreme Court Decision of 27 November 2008, Process 08B3522. In this case, the Supreme Court held that the arbitration clause inserted in an insurance contract concluded between the insurance company and the employer, the employee being the third-party beneficiary of such contract, was not binding on the employee.

In general, courts usually engage in a highly fact-specific analysis of this topic, making it difficult to draw general conclusions on the extent to which an arbitration agreement may be binding on non-signatory parties.

## 2.5 Are there restrictions to arbitrability? In the affirmative:

Article 1(1) of the PAL provides that any dispute concerning patrimonial interests may be referred by the parties to arbitration. Further to this, the parties may also refer to arbitration disputes involving non-patrimonial interests, so long as they are entitled to conclude a settlement on the right in dispute, that is, as long as the rights in dispute can be disposed of (*i.e.*, are alienable).<sup>11</sup>

With regards to employment disputes, the criterion based on the disposability/alienability of the rights in dispute shall apply exclusively until a new law governing the submission to arbitration of employment disputes is approved. Since such law is yet to be approved, the question of whether a labour dispute is arbitrable shall be answered only according to whether the rights in dispute are disposable or not (regardless of whether such rights are patrimonial in nature).<sup>12</sup>

Finally, in addition to the general arbitrability criteria, it is important to keep in mind that there are specific restrictions to arbitrability both related to specific domains of the law and to specific parties.

### 2.5.1 Do these restrictions relate to specific domains (such as IP, corporate law etc.)?

The PAL provides that disputes subject to mandatory arbitration or to the exclusive jurisdiction of national courts cannot be submitted to voluntary arbitration.

The following kinds of disputes are subject to mandatory arbitration, and are therefore subject to a different set of rules:

- Particular issues concerning sports federations, leagues and other sports entities, as well as disputes related to doping in sports;<sup>13</sup>
- Particular issues of collective bargaining (Portuguese Labour Code).
- Issues relating to copyright and intellectual property, namely those involving:<sup>14</sup> rewards for the lease of works protected by copyrights;<sup>15</sup> rights to authorize or prohibit cable retransmission of works protected by copyright;<sup>16</sup> compensation for the recording or reproduction of works<sup>17</sup>; and technological protection measures.<sup>18</sup>

In addition to the disputes that are subject to mandatory arbitration in Portugal, there are disputes that cannot be submitted to arbitration and are under the exclusive jurisdiction of national courts.

First, with regards to industrial property disputes, one distinction must be drawn. Disputes concerning the validity of industrial property titles subject to registration (such as patents and trademarks) cannot be arbitrated.<sup>19</sup> However, disputes concerning the granting or refusal of a patent or of the registration of a

<sup>11</sup> Article 1(2) of the PAL.

<sup>12</sup> See Article 4(4) of the Law No. 63/2011, that approves the PAL.

<sup>13</sup> Law No. 74/2013 of 6 September 2013.

<sup>14</sup> Please note that all other copyrights disputes that are not on the list and that do not relate to “undisposable” rights may be referred to arbitration. See Article 229 of the Portuguese Code on Copyright and Related Rights 1995, Decree-Law No. 63/85 of 14 March 1985.

<sup>15</sup> Decree-Law No. 332/97 of 27 November 1997.

<sup>16</sup> Article 7, Decree Law n.º 333/97 of 27 November.

<sup>17</sup> Decree-Law No. 62/98 of 1 September 1998.

<sup>18</sup> Article 221 of the Portuguese Code on Copyright and Related Rights 1995, Decree-Law No. 63/85 of 14 March 1985.

<sup>19</sup> António Sampaio Caramelo, Critérios de Arbitrabilidade dos Litígios. Revisitando o Tema, in *IV Congresso do Centro de Arbitragem da Câmara de Comércio e Indústria*, Almedina, 2011, p. 38.



trademark may, as a matter of principle, be arbitrated, provided that all concerned interested parties adhere to the arbitration agreement.<sup>20</sup> The reasoning behind this legal regime lies in the fact that these disputes may involve and affect the interests of third parties who may not be signatories of the arbitration agreement. In this case, the resolution of the dispute through arbitration is only allowed when such third parties adhere to the arbitration agreement.

Secondly, core bankruptcy issues are also typically non-arbitrable, for the same reasons mentioned above. Indeed, all creditors of the insolvent debtor are directly affected by the resolution of most core bankruptcy issues, and may not be signatories to the arbitration agreements concluded by the debtor.

Thus, article 87 (1) of the Portuguese Bankruptcy Code provides that once bankruptcy is declared, the effectiveness of any existing arbitration agreements entered into by the insolvent debtor, with respect to disputes which may affect the insolvent estate, is suspended.<sup>21</sup> If, however, arbitration proceedings under such clauses are already underway, those proceedings shall be suspended for the period of time necessary for the insolvent debtor to be represented in the same by the insolvency administrator.<sup>22</sup>

Finally, one must address the arbitrability of internal corporate disputes. In this regard, it is worth noting that it is currently under discussion a draft proposal of a new law disciplining exclusively arbitration of internal corporate disputes.<sup>23</sup>

The difficulty with the arbitrability of this kind of disputes relates to the fact that arbitration is a decentralized process that only binds those who participate in it, while certain decisions on internal corporate disputes must affect all shareholders, because of their very nature.

Particularly relevant in this regard are the disputes concerning the validity of the company's resolutions. The prevailing view among Portuguese commentators<sup>24</sup> is that such disputes should only be arbitrable if (i) publicity is given to the initiation of arbitral proceedings, (ii) the tribunal provides all shareholders with the opportunity to join or intervene in the proceedings, (iii) the tribunal is not constituted through appointments from the disputing parties, but rather through appointments made by an arbitral institution, and, finally, (iv) the tribunal allows the consolidation of parallel proceedings.

### **2.5.2 Do these restrictions relate to specific persons (i.e. State entities, consumers etc.)?**

In this regard, a distinction must be drawn between private law and public law disputes.

Indeed, article 1(5) provides that the State and other legal entities governed by public law may enter into arbitration agreements as long as they concern private law disputes. Thus, for disputes arising under private law and involving the State or State entities, no particular restrictions on arbitrability apply.

However, with regards to public law disputes, article 1(5) of the PAL provides that the State and other legal entities governed by public law may only enter into arbitration agreements insofar as they are authorised to do so by law.

As an example of authorisations provided by law, article 180 of the Code of Procedure of Administrative Courts<sup>25</sup> sets out a very wide number of circumstances in which the State and other legal entities governed

<sup>20</sup> Articles 48 and 39 (a) of the Portuguese Code of Industrial Property.

<sup>21</sup> It is debatable what this means: the prevailing view is that the arbitration agreement becomes temporarily without effect. Another possible view is that it will be up to the administrator of the insolvency to accept or not the submission of the disputes to arbitration.

<sup>22</sup> Article 85(3) of the Portuguese Bankruptcy Code.

<sup>23</sup> Draft Proposal available at: <http://arbitragem.pt/projetos/arb-societaria/regime-juridico-arbitragem-societaria-v-discussao.pdf>.

<sup>24</sup> See, for instance, António Sampaio Caramelo, *Arbitragem de Litígios Societários*, in *Revista Internacional de Arbitragem e Conciliação*, Ano IV-2011.

<sup>25</sup> Decree Law n.º 214-G/2015, of 2 October 2015.

by public law are authorised to enter into arbitration agreements. They include: (i) matters related to contracts, including the annulment or nullity of administrative acts of execution of such contracts, (ii) matters related to tort liability, (iii) matters related to the validity of administrative acts, unless otherwise provided by law, (iv) matters related to legal relationships governed by public law, insofar as they do not involve undisposable rights, work-related injuries or occupational illness.

### **3. Intervention of domestic courts**

#### **3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?**

##### **3.1.1 If the place of the arbitration is inside the jurisdiction?**

Article 5(1) of the PAL expressly provides that the state court before which an action is brought, on a matter that is object of an arbitration agreement, must dismiss the case upon request of the respondent, submitted no later than when the respondent submits its first statement on the substance of the dispute.

The limited instances in which the court will not do so, are cases in which the court finds that the arbitration agreement is manifestly (i) null and void, (ii) has become inoperative, or (iii) is incapable of being performed.<sup>26</sup> This provision embodies the so-called “negative effect” of the arbitration agreement.

##### **3.1.2 If the place of the arbitration is outside of the jurisdiction?**

Portuguese courts enforce an arbitration agreement, regardless of where the arbitration is seated. Thus, the answer given to the preceding question is equally valid if the place of the arbitration is outside of the jurisdiction.

#### **3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?**

Anti-suit injunctions are not addressed in the PAL and, to the best of our knowledge, have not yet been addressed by Portuguese courts in an arbitration context.

#### **3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunction but not only)**

Article 38(2) of the PAL, unlike the Model Law, provides that state courts may assist an arbitral tribunal seated outside of the jurisdiction in the taking of evidence. Specifically, it provides that, when the evidence to be taken depends on the will of one of the parties or of third parties and the latter refuse to cooperate, a party may, with the approval of the arbitral tribunal, request from the competent State court that the evidence be taken before it, the results thereof being forwarded to the arbitral tribunal.

### **4. The conduct of the proceedings**

#### **4.1 Can parties retain outside counsel or be self-represented?**

Parties may always be represented by counsel in arbitral proceedings. Some authors consider that, unlike in court litigation,<sup>27</sup> representation by counsel is not mandatory,<sup>28</sup> unless the parties agreed otherwise and, thus, according to this understanding, absent agreement by the parties on the matter, each of them is free to decide whether they wish to be represented by counsel or not. However, one must note that the issue is not regulated by the PAL and is not entirely settled.

<sup>26</sup> See Article 5(1) of the PAL.

<sup>27</sup> For litigation in court, article 40 of the Portuguese Code of Civil Procedure establishes a set of circumstances in which representation by counsel is mandatory, which includes cases valued in more than €5.000.

<sup>28</sup> Manuel Pereira Barrocas, *Manual de Arbitragem*, Second Edition, Almedina, p.394.

#### 4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

Article 9(3) of the PAL provides that arbitrators have a duty to remain independent and impartial throughout the arbitral proceedings.

Under article 13(1) of the PAL, arbitrators have a duty to disclose any circumstances that may give rise to justifiable doubts as to their impartiality and independence.

However, if the arbitrator fails to make such disclosure and those facts or circumstances are subsequently made known to the parties, the arbitrator may be challenged by the parties.<sup>29</sup>

The challenging party must then submit the challenge directly to the arbitral tribunal within 15 days of becoming aware of the constitution of the arbitral tribunal or after becoming aware of the facts forming the basis for the challenge. The arbitral tribunal, including the challenged arbitrator, shall decide on the challenge.

If the tribunal rejects the challenge, thus allowing the challenged arbitrator to remain as part of the tribunal, the challenging party may file a petition in state courts, requesting them to decide the challenge.

The state court engages in a fact-specific analysis of the case. An arbitrator's failure to disclose circumstances that may give rise to justifiable doubts will be considered in the analysis but does not, in itself, suffice for the court to accept a challenge. Indeed, courts have required that the undisclosed circumstances justify that outcome.<sup>30</sup>

#### 4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of ad hoc arbitration)?

Courts appoint members of the arbitral tribunal when the parties who were entitled to make those appointments have failed to do that within the time span set out by law for this purpose (1 month). The court intervenes to provide such assistance on request of one of the parties.

#### 4.4 Do courts have the power to issue interim measures in connection with arbitrations?

Yes. Under article 29 of the PAL, courts have the power to issue interim measures both prior to and during the arbitral proceedings. As article 7 of the PAL (similarly to article 9 of the Model Law) makes clear, recourse to state courts for the purposes of obtaining interim relief does not constitute a breach of the arbitration agreement.

In accordance with article 366(1) of the Portuguese Code of Civil Procedure, the court shall hear the party against whom interim measures are sought, except if such hearing puts the purpose and effectiveness of the measures at serious risk. In conclusion, Portuguese courts are willing to consider ex parte requests for interim relief in the appropriate circumstances.

<sup>29</sup> Note that, under article 13(3) of the PAL, a party may only challenge an arbitrator appointed by it, or in whose appointment it has participated, for reasons of which it becomes aware after the appointment has been made.

<sup>30</sup> Decision by the Lisbon Court of Appeal, 24 March 2015, process 1361/14.0YRLSB.L1, where the Court stated precisely that the failure to comply with the duty of disclosure does not necessarily mean that there is a lack of independence and impartiality on the part of the arbitrator. Those have to be determined based on the concrete circumstances of the case. See, also, José Miguel Júdice, Annotation to article 13 of the PAL, in *Lei da Arbitragem Voluntária Anotada*, Third Edition, Almedina, 2017.

#### **4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?**

##### **4.5.1 Does it provide for the confidentiality of arbitration proceedings?**

Article 30(5) of the PAL makes clear that the arbitrators, the parties and the arbitral institutions must maintain the confidentiality of any information obtained and any documents produced during the arbitration proceedings, without prejudice to the duty to communicate or disclose information or activities to the competent authorities, if imposed by law.

However, as stated in article 30(6) of the PAL, unless a party objects, awards and other decisions may be published, excluding details that would identify the parties.

##### **4.5.2 Does it regulate the length of arbitration proceedings?**

Under article 43(1) of the PAL, unless the parties have agreed on a different time-limit up to the acceptance by the first arbitrator, the arbitrators shall deliver the final award on the dispute brought before them within twelve months from the date of acceptance of the last arbitrator. However, the parties may subsequently agree on extensions of this time-limit, and the tribunal is also free to determine such extensions through duly reasoned decisions, unless all parties oppose.

##### **4.5.3 Does it regulate the place where hearings and/or meetings may be held?**

Under article 31(2) of the PAL the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate to hold hearings, to allow the production of evidence, or to deliberate. This provision takes inspiration from article 20(2) of the Model Law.

##### **4.5.4 Does it allow for arbitrators to issue interim measures?**

The PAL reflects the 2006 Model Law revision, providing that not only arbitral tribunals have the power to issue interim measures, but they also have the power to issue preliminary orders.

On the one hand, under article 20 of the PAL, and absent agreement of the parties to the contrary, the arbitral tribunal may, at the request of a party and after hearing the opposing party, grant the interim measures it deems necessary in relation to the subject matter of the dispute. Thus, the tribunal cannot grant interim relief *ex parte*.

On the other hand, under article 22 of the PAL, and absent agreement of the parties to the contrary, the tribunal may issue preliminary orders. These are orders necessarily requested together with a request for interim relief, directing a party not to frustrate the purpose of the interim measure sought. Preliminary orders can be granted *ex parte*.

##### **4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence? For example, are there any restrictions to the presentation of testimony by a party employee?**

Article 30(4) of the PAL makes clear that the arbitral tribunal has the power to determine the admissibility, relevance and weight of any evidence presented or to be presented.

Thus, the PAL gives the tribunal wide discretion in the exercise of such power, and it also makes clear that the arbitral tribunal is not bound, by default, by the rules of civil procedure on admissibility of evidence that apply to state court proceedings.<sup>31</sup>

<sup>31</sup> Mariana Soares David, Os Poderes do Tribunal Arbitral em Matéria de Prova, no Âmbito da Actual Lei de Arbitragem Voluntária, in *Revista Internacional de Arbitragem e Conciliação*, Anual n.º 9 – 2016, p. 59.

#### 4.5.6 Does it make it mandatory to hold a hearing?

Article 34 of the PAL provides that, subject to any contrary agreement between the parties, the tribunal shall decide whether to hold hearings, or whether the proceedings shall be conducted merely on the basis of documents and other means of proof.

However, the abovementioned provision also states that the arbitral tribunal shall hold one or more hearings for the presentation of evidence whenever that is requested by a party, except if the parties themselves had previously agreed that no hearings would be held.

#### 4.5.7 Does it prescribe principles governing the awarding of interest?

The PAL does not prescribe principles governing the awarding of interest as, under Portuguese law that is a substantive matter.

#### 4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

According to article 42(5) of the PAL, unless otherwise agreed by the parties, the award shall determine the proportions in which the parties shall bear the costs directly resulting from the arbitration.

Further to this, the abovementioned provision makes clear that the arbitrators may decide in the award, if they so deem fair and appropriate, that one or some of the parties shall compensate the other party or parties for the whole or part of the reasonable costs and expenses that they can prove to have incurred due to their participation in the arbitration. This provision is particularly relevant when tribunals seek to punish a party's negative and hindering procedural behaviour throughout the arbitration, through the allocation of costs.<sup>32</sup>

### 4.6 Liability

#### 4.6.1 Do arbitrators benefit from immunity to civil liability?

Article 9(4) of the PAL provides that arbitrators cannot be held liable for damages resulting from their decisions, save for the situations in which judges may be so held. This is due to the fact that arbitral tribunals are considered to perform a jurisdictional function.<sup>33</sup>

Article 43(4) of the PAL, however, provides for a specific case of civil liability, where the arbitrators who unjustifiably prevent the award from being rendered within the time limit set for that purpose<sup>34</sup> shall be liable for the damages caused by such failure.

#### 4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

There are no particular concerns with regards to potential criminal liability of any of the participants in the arbitral proceedings.

<sup>32</sup> José Robin de Andrade, Annotation to article 42 of the PAL, in *Lei da Arbitragem Voluntária Anotada*, Third Edition, Almedina, 2017.

<sup>33</sup> Constitution of the Portuguese Republic, article 209(2).

<sup>34</sup> Unless otherwise agreed between the parties, the arbitrators shall have twelve months, starting from the moment of designation of the last arbitrator, to render the award. See article 43(1) of the PAL.

## 5. The award

### 5.1 Can parties waive the requirement for an award to provide reasons?

Unless a settlement is reached, the arbitral proceedings will end with an award. Similarly to the Model Law,<sup>35</sup> article 42 of the PAL provides that the award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 41.<sup>36</sup>

### 5.2 Can parties waive the right to seek the annulment of the award?

#### 5.3 If yes, under what conditions?

Article 46(5) of the PAL expressly states that parties cannot waive the right to seek the annulment of the award.

### 5.4 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

There are no atypical mandatory requisites for the rendering of a valid award. As in most jurisdictions, the award must be in writing and signed by the arbitrator, in case there is a sole arbitrator, or by a majority of the arbitrators, in case there is a plural tribunal<sup>37</sup>. The award must also state the date in which it was rendered, as well as the seat of the arbitration<sup>38</sup>.

### 5.5 Is it possible to appeal an award (as opposed to seeking its annulment)?

#### 5.5.1 If yes, what are the grounds for appeal?

With respect to awards rendered in domestic arbitrations, pursuant to article 39 (4), appeals to State courts are only allowed when the parties have expressly provided for such possibility. As to awards rendered in international arbitrations, r. appeals to State courts are never permitted, as per article 53 of the PAL.

However, article 53 allows the parties, in the exercise of party autonomy, to expressly agree on the possibility of an appeal to another arbitral tribunal, provided that they regulate its terms (namely its grounds and the procedure to be followed).

#### 5.5.2 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

The procedure for obtaining the recognition and enforcement of foreign arbitral awards in Portugal is governed by the PAL, without prejudice to the provisions of the New York Convention, to which Portugal adhered in 1994. No specific time-limits apply.

The party seeking the recognition of a foreign arbitral award must file a petition before the Court of Appeal of the district in which the person against whom enforcement is sought is domiciled. The petition must be filed together with the award or a duly authenticated copy of the award, as well as the original or an authenticated copy of the agreement to arbitrate.<sup>39</sup> If such documents are not in Portuguese, a certified translation must also be provided. The opposing party is then notified and has a 15-day window to oppose such request.

<sup>35</sup> Article 31 (2) of the UNCITRAL Model Law.

<sup>36</sup> Article 41 of the PAL concerns the termination of the arbitral proceedings through settlement.

<sup>37</sup> Article 42(1) of the PAL.

<sup>38</sup> Article 42(5) of the PAL.

<sup>39</sup> Article 57(1) of the PAL.

With regards to grounds for refusal of recognition of the foreign award, the list provided by article 56 of the PAL, which in turn is inspired by article V of the New York Convention, shall apply.

Once the foreign arbitral award has been recognized by the competent court, the award constitutes an enforceable title, allowing the party to bring enforcement proceedings.

In case of a local arbitral award, recognition proceedings are not necessary. The award itself is an enforceable title and enforcement proceedings may be brought in a court of first instance, subject to no specific time-limit.

As stated in article 47(1) of the PAL, the party seeking the enforcement of a domestic arbitral award must file a petition before a court of first instance, together with the original award or a duly authenticated copy thereof and, if the award is not in Portuguese, a certified translation of the said award.

### **5.5.3 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?**

The introduction of annulment proceedings does not automatically suspend the right to enforce an award, nor does it suspend any recognition proceedings that may be underway.

However, as provided in article 47(3) of the PAL, the party seeking the annulment may request the suspension of the enforcement proceedings, provided that such party offers to provide security, such effect only being granted if and when security is effectively provided within the time limit set by the court.<sup>40</sup>

### **5.5.4 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?**

In line with Article V (1) e) of the New York Convention, Article 56(1)(a) of the PAL provides that recognition and enforcement of an arbitral award made in an arbitration taking place in a foreign country may be refused, at the request of the party against whom the award is invoked, if that party furnishes to the competent court in which recognition or enforcement is sought proof that the award has been set aside by a court of the country in which, or under the law of which, that award was made.

To the best of our knowledge, Portuguese courts have not yet had the opportunity to address the question of whether an award that has been annulled at the seat may be recognized and enforced in Portugal.

## **5.6 Are foreign awards readily enforceable in practice?**

The grounds for refusal of enforcement of foreign arbitral awards, provided by the PAL and by the New York Convention (which are substantially the same), have in common the fact that they are very limited and do not allow for a review of the merits of the arbitral decision.

The one aspect in which the PAL slightly differs from the Convention, as well as from the Model Law, is the fact that it provides, in article 56(1)(b)(ii), that enforcement may be refused if the court finds that it would lead to a result ‘manifestly’ incompatible with the international public policy of Portugal.

This provision already existed in the Portuguese Code of Civil Procedure, for the recognition and enforcement of foreign court decisions. Indeed, by introducing the word “manifestly”, the legislator restricted even more the cases in which enforcement of an arbitral award may be refused.

Thus, it can be concluded that foreign awards are readily enforceable in Portugal.

<sup>40</sup> See, also, Central Administrative Court, 18 March 2016, process 03300/14.9BEPRT, where the court stated that the request for annulment of an arbitral award does not immediately suspend enforcement proceedings based on said arbitral award.

## 6. Funding arrangements

The Code of Ethics of the Portuguese Bar Association expressly prohibits the use of contingency fee arrangements according to which the right to lawyer's fees is dependent on the success of the claim.<sup>41</sup>

Third-party funding is not specifically regulated and there are no particular restrictions to its use.

## 7. Is there likely to be any significant reform of the arbitration law in the near future?

It is not anticipated that there will be a significant reform of the PAL in the near future. However, it is currently under discussion a draft proposal of a new law disciplining exclusively arbitration of internal corporate disputes.<sup>42</sup>

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<sup>41</sup> Article 101(1) of the Code of Ethics of the Portuguese Bar Association.

<sup>42</sup> Draft Proposal available at: <http://arbitragem.pt/projetos/arb-societaria/regime-juridico-arbitragem-societaria-v-discussao.pdf>.