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Portugal: Trends & Developments

Guilherme Santos Silva, Alexandra Nascimento Correia, Gonçalo Malheiro and Mariana de Melo Jorge
Abreu Advogados

Trends and Developments

Contributed by:
Guilherme Santos Silva, Alexandra Nascimento Correia, Gonçalo Malheiro and Mariana de Melo Jorge
Abreu Advogados

Abreu Advogados is an independent law firm with over 30 years of experience in the Portuguese market and present in ten locations. It is a full-service law firm and one of the largest law firms in Portugal, working with the most prestigious firms around the world in cross-border projects. The firm's litigation practice is extensively experienced in assisting domestic and international clients. It is particularly efficient in providing mediation and pre-litigation advice and guidance on the risks inherent to court proceedings, and guarantees the necessary assistance in civil, commercial and criminal litigation. Abreu Advogados assisted PT Ventures regarding its shareholding in Unitel; in co-ordination with law firms from several jurisdictions (Angola, France, the Netherlands, the UK and the BVI), Abreu assisted in various judicial proceedings on the annulment of resolutions taken in general meetings, dividends' collection, injunctions, etc, in addition to arbitration proceedings.

Authors

Guilherme Santos Silva is a partner at Abreu Advogados, working primarily on matters related to commercial litigation and arbitration and commercial, corporate, telecommunications, energy and maritime and transportation law. He focuses particularly on issues related to international and multi-jurisdictional commercial litigation, working on national and international judicial and arbitration proceedings. Guilherme has supported large international litigation proceedings linked to multiple jurisdictions, such as the United Kingdom, China, Switzerland, Angola, France, Israel, Italy and Holland.

Alexandra Nascimento Correia has been a partner at Abreu Advogados since 2016, working primarily in conflict resolution, with a particular focus on civil and commercial litigation. Her work features a strong national and international arbitration component. She has been advising national and foreign clients on numerous disputes relating to breaches of contract, civil liability and debt recovery. Due to the diverse issues she has dealt with, Alexandra's advice covers many markets and sectors, such as financial investment in venture capital, energy sector opportunities for foreign investors, contracts for hotel developments, and international distribution agreements for the electronics and food industries.

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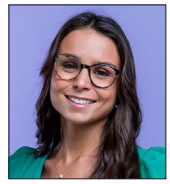
Gonçalo Malheiro is a partner at Abreu Advogados, working primarily in the areas of litigation and arbitration. He has vast experience in participating in juridical proceedings before common, civil, commercial, criminal and intellectual property courts, as well as arbitration courts, using the different procedural means available. He also provides support throughout the pre-litigation and negotiation phases. Gonçalo is a Member of the Chartered Institute of Arbitrators, Director and founder of the publication Young Arbitration Review and a registered Arbitrator at the Arbitration Center of the Portuguese Chamber of Commerce of São Paulo.



Mariana de Melo Jorge joined Abreu Advogados in 2023. She holds a law degree and a Postgraduate Diploma in Arbitration Law from Faculdade de Direito da Universidade de Lisboa. She is currently also attending the Master's Degree in Forensic Law and Arbitration at NOVA School of Law. Her traineeship has a special emphasis on litigation and arbitration proceedings in different areas of Law.

Abreu Advogados

Av. Infante D. Henrique, 26
1149-096 Lisboa
Portugal

Tel: +351 21 723 18 00
Fax: +351 21 723 18 99
Email: lisboa@abreuadvogados.com
Web: www.abreuadvogados.com

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Arbitration in Portugal – Why Lisbon?

Arbitration has grown significantly as an alternative dispute resolution mechanism over the years. It is increasingly common for arbitration clauses to be included in contracts, due to globalisation and the existence of an international connection element, resulting in even more complex and high-volume transactions at a global level.

Portugal has proven to be an arbitration destination of choice, with a growing number of arbitration cases in the country; more than 12,400 arbitration proceedings have been initiated before the national arbitration institutions since 2022.

Therefore, the question that arises is how Lisbon has become one of the main European capitals as a seat of arbitration.

The answer to this question can be found by considering three main topics:

- legislative developments in arbitration;
- the pro-arbitration stance adopted by Portuguese courts; and
- the expansion of the arbitration community in Portugal.

Legislative developments

Law No 31/86, of 29 August, was the first arbitration law in Portugal, but it suffered from several loopholes and incompleteness. The Portuguese legislature suppressed these irregularities by creating a new arbitration law, revoking the previous one, 25 years after Law No 31/86 came into force. Law No 63/2011, of 14 December – the Voluntary Arbitration Law (LAV) – is now in force. It has its foundation in the arbitration rules set out in the UNCITRAL Model Law, following the European trends for innovation and modernisation of arbitration, making Portugala competitive seat for international arbitrations.

One of the most important aspects to emphasise with the entry into force of the new arbitration law is the enshrinement of the competence-competence principle, in Article 18. In this article, the Portuguese legislature established that the Arbitral Tribunal is competent to decide on its own jurisdiction, expanding the scope of jurisdiction in the national territory.

This competence-competence principle is further reinforced by Article 5, which sets out the negative effect of an arbitration agreement. This effect translates into the automatic waiver of the right to legal action after an arbitration clause has been signed, declaring arbitration to be private and independent of the Portuguese judicial system.

Article 39 of the LAV is also an innovation compared to the previous arbitration law. This article establishes the non-appealability of the arbitration award, with the right to appeal being cumulatively dependent on an express agreement by the parties and on the award not being given on equitable judgments.

It is also important to note that Portugal ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1994. This ratification contributed to increasing Portugal's legal certainty and security in the international dispute resolution community.

In this respect, the current arbitration law introduces a new Chapter X, which is dedicated exclusively to the recognition and enforcement of foreign arbitral awards. Currently, Article 56 of the LAV lists all the existing grounds for refusal that may be obstacles to the recognition and

enforcement of a foreign award, contributing to the predictability of the applicable law.

A further note on the jurisdiction of the courts is that the new arbitration law establishes that competence in this matter lies with the Portuguese courts of second instance (namely, the Courts of Appeal), ruling out any intervention by the courts of first instance.

National courts' position

State institutions' recognition that arbitration is a genuine and legitimate resolution mechanism is a contributory factor to the increase in the number of cases in Portugal.

In recent years, there has been a pro-arbitration stand in the judicial courts, which has contributed considerably to increasing the credibility of this dispute resolution mechanism. This attitude is in line with the disposition of Article 19 of the LAV, which expressly provides that judicial courts can only intervene in arbitration proceedings in those cases provided for by law.

In this regard, see the decision of the Supreme Court of Justice of 20 March 2018, case no 1149/14.8T8LRS.L1. S1, as quoted below.

"It is in this context that the case law of the Supreme Court of Justice has pronounced itself, deciding that, in view of the principle enshrined in Article 18(1) of the LAV, according to which it is primarily for the arbitral tribunal to rule on its own jurisdiction, assessing for this purpose the assumptions that condition it – validity, effectiveness and applicability to the dispute of the arbitration agreement – the judicial courts should only reject a dilatory plea that an arbitral tribunal has been bypassed, brought by one of the parties, and order the case to be continued before the State Court, when it is clear and incontrovertible that the agreement invoked is null and void or ineffective, or that the dispute clearly does not fall within its scope."

"Thus, with the necessary legal backing, a compromise solution between the principle of private autonomy, embodied in the legitimate choice of the parties to de-court disputes (by resorting to arbitration), and the possibility of the courts assessing the manifest non-existence or invalidity of the arbitration agreement is reached when faced with a claim in which such an agreement exists."

Furthermore, and also as an example, see the decision of the Supreme Court of Justice, dated 12 November 2019, case no 8927/18.7T8LSB-A.L1. S1, arguing as follows.

"Thus, the State Court should only intervene, establishing its jurisdiction, when the nullity, ineffectiveness and unenforceability of the arbitration agreement is manifested and not open to serious dispute, where manifest is that which does not require further evidence to be assessed, that is, when it is ascertainable regardless of the production of additional evidence."

Complementarily to the arbitral position of the state courts, it is important to emphasise that they are aware of the reduced scope of their intervention.

In this sense, the Supreme Court of Justice's decision on the annulment of the arbitral award in case no 661/18.4YRLSB.S1, dated 20 September 2020, states the following.

"It should also be emphasised that the profoundly restrictive nature of the legal grounds for asking the State Court to annul the decision handed down by the arbitral tribunal is precisely

an affirmation of the very independence and autonomy of the arbitral jurisdiction."

"Basically, the special action for annulment only deals with the detection of serious procedural defects that could have a decisive influence on the resolution of the dispute. It is therefore only necessary to consider (possible) serious violations of the basic and structuring principles of any process for the composition of interests, especially those that have to do with the principles of equality of the parties and the adversarial process."

"In this type of action for annulment, a review of the merits of the case by the arbitral tribunal and, in general, the assessment of the procedural terms that were previously established in the arbitration agreement and voluntarily accepted by both parties is absolutely ruled out."

However, it should be noted that this non-interventionist stance on arbitration is synonymous not with inertia, but rather with the independence and recognition of the arbitration courts, considering them to be genuine courts that are legitimate in the Portuguese legal system, with equally broad powers in the pursuit and realisation of justice.

In this way, as is clear from Article 19 of the LAV, the state courts retain jurisdiction in matters relating to the defence of the legal system, vigilant, for example, to any offence against Portuguese public order. In this regard, see the decision of the Supreme Court of Justice dated 21 March 2023, case no 2863/21.7YRLSB.S1, which holds as follows.

"4. Considering that the present review is admissible, its object is limited to the question of whether the confirmation of the arbitral award rendered in the dispute between the litigants leads to a result that is manifestly incompatible with the international public order of the Portuguese State.

5. After comparing the arbitral award and the logical legal path followed in it, we do not recognise the alleged nullity of the arbitral award.

6. In view of the terms of the annulment claim that is the subject of this appeal, in conjunction with the provisions of Article 46(3)(b)(ii) of the Voluntary Arbitration Act approved by Law No 63/2011, of 14 December (LA 63/2011), we distinguish that the arbitral award may be annulled if the competent state court finds that the content of the arbitral award clearly offends the principles of international public order of the Portuguese State, namely with the putative violation of the principle of autonomy of will, arrogated by the appellants.

7. Regarding the annulment of the arbitration award by the state court under Article 46(3)(b)(ii) of the Voluntary Arbitration Law approved by Law 63/2011 of 14 December (LAV), we refer to the Judgment of the Supreme Court of Justice of 26 September 2017 (Case 1008/14.4YRLSB.L1.S1), which we endorse and advance as follows: '(...) the principle of private autonomy refers to a generic authorisation of conduct for all subjects of the legal order, enabling them to establish the legal effects that will have repercussions on their legal sphere, through freedom to enter into a contract and establish its content'. However, when private autonomy is found to have been abused or overused, it is recognised that the contract was not based on legal and economic equality, in other words, on such autonomy, which leads to the containment of contractual freedom, through the intervention of the state, in the collective interest, armed with the commands

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resulting from both the so-called "public order" clause and those of good faith and "good uses".

"The fact that arbitration in itself has as its corollary the principle of private autonomy – which governs private individuals' relationship between them, based on their legal equality and self-determination – does not conflict with the application of such clause to the outcome of an arbitration award intended to resolve a dispute arising from a real-life situation, since the reservation it imposes is precisely intended to establish limits to this autonomy in the face of other principles or values that the legal system wants to preserve."

"In effect, public order is an element that limits the parties' freedom to contract."

Portugal's arbitration community

This justified recognition has resulted in a larger arbitration community composed of various institutions, with a growing number of experienced arbitrators and arbitration professionals. All the Portuguese institutions that form this community are committed to innovation, efficiency and the modernisation of arbitration at a national level.

One example is the *Centro de Arbitragem Comercial da Câmara de Comércio e Indústria Portuguesa* (CAC), which is the oldest arbitration centre in the country. Its commitment to these values is evidenced by the publication of four new rules in 2021:

- the Arbitration Rules;
- the Rapid Arbitration Rules;
- the Corporate Arbitration Rules; and
- the Dispute Boards Rules.

Along the same lines, the *Associação Portuguesa de Arbitragem* (APA) published two fundamental codes for arbitration in 2020, certifying the quality of arbitration experts:

- the Code of Ethics; and
- the Code of Best Practice for arbitration professionals.

There are currently 38 authorised arbitration centres in Portugal, which are active in arbitration in various areas, such as sports, insurance, public administration, tourism, intellectual property and real estate. All these centres are governed by their own statutes and rules, drafted in accordance with and based on the most recent and modern international legislation.

In the education field, universities are increasingly reinforcing the legitimacy and recognition of alternative dispute resolution mechanisms. Lectures, training programmes, postgraduate courses and master's degrees dedicated to this subject in Portugal's higher education system are even more frequent, and some universities even have a curriculum plan that includes them.

Therefore, there is a clear academic interest in this area, aiming to familiarise future lawyers with the issues of coming generations, always with a commitment to innovation and modernisation in university teaching.

Portugal and arbitration across borders

Portugal is a member of the *Comunidade dos Países de Língua Portuguesa* (CPLP), which was founded in 1996 with the aim of establishing a relationship of co-operation between the nine member states, with a view to strengthening their presence on the international stage. All member states have Portuguese as their official language and collaborate in various areas, such as education, health, politics, public administration and justice. Portugal is the European con-

nection with the developing countries of Angola, Brazil, Cape Verde, Guinea-Bissau, Equatorial Guinea, Mozambique, São Tomé and Príncipe and East Timor.

In addition to the Portuguese language connection factor, the member states also have the same legal basis, drawing significant inspiration from Portuguese civil law. This inspiration has multiple repercussions, in terms of both justice and legislation in force, so most of the laws in these countries are modelled on the Portuguese legal system. The same applies to the arbitration laws of these countries, which are strongly inspired by the UNCITRAL Model Law and therefore take on many of the contours of Portuguese arbitration law.

Therefore, Portugal has a strategic position in connection with these countries, contributing to the increase in the volume of contracts signed by African and Brazilian entities with the rest of the world.

Arbitration recognition

State courts are increasingly demonstrating their accordance with the judgments of arbitral tribunals, and confirming their decisions. This pro-arbitral stance has been widely adhered to, throughout several courts of the country and in various matters. Two decisions from the Lisbon Court of Appeal provide examples. The first concerns a decision made by the arbitral tribunal based on a judgment of equity; the second relates to the unenforceability of an arbitration agreement due to the economic insufficiency of one of the parties.

Decision of the Lisbon Court of Appeal, dated 13 April 2023, case no 784/23.8YRLSB-8

Following the arbitral tribunal's decision, the claimant lodged an appeal before the Lisbon Court of Appeal, questioning the amount of compensation set by the tribunal, by virtue of the institute of civil liability for road accidents. Thus, the claimant claimed that the amount set did not reflect the seriousness of the damage suffered and that the arbitral tribunal was incorrect to decide on the quantum of compensation based on a judgment of equity.

The Lisbon Court of Appeal dismissed the appeal, endorsing the arbitration award in its entirety. Not only did it consider the quantum of compensation to be adequate to compensate for the damage suffered by the injured party, but it also adhered to all the arguments put forward by the arbitral tribunal, supporting its assessment based on equity.

Thus, the court decided as follows.

"Equity can be considered as the justice of the specific case. The resolution of cases according to equity is opposed to the resolution of cases according to strict law. There can be rules and there can be equity when the judge is authorised to depart from the legal solution and decide in harmony with the circumstances of the individual case... the rule is a rigid rule, which abstracts from circumstances not considered relevant by it. Equity, on the other hand, is a malleable rule. It can consider the circumstances of the case, such as the strength or weakness of the parties, the effects on their state of fortune, etc, which the rule disregards, in order to arrive at a solution that best suits the specific case – even if it deviates from the normal solution, established by law... in equity... there is by nature no application of the rule, but rather a creation for the individual case."

"For his part, Professor Castanheira Neves emphasises that, 'when one appeals to the criteria

of equity, the intention is to find only what, in the specific case, may be the fairest solution; equity is thus always limited by the imperatives of real justice (justice adjusted to the circumstances), as opposed to merely formal justice. This is why equity is always understood to be a form of justice... Fairness, exactly understood, does not reflect an intention distinct from the legal intention, but rather is an essential element of legality... it is therefore the expression of justice in each concrete case'."

"Thus, the decision to appeal to judgments of equity derives from case-by-case weighing, in the light of the rules of logic, practical common sense, experience and the fair measure of things."

"Therefore, the amount set by the arbitration award is accepted as fair, adequate, and proportional."

In this decision, the Lisbon Court of Appeal reinforced the recognition of arbitration and its awards, as a mean of resolving disputes, giving it preponderance in the Portuguese legal system. Setting a compensation amount is complex, sometimes indeterminable, and even more so when determined according to judgments of equity. The fact that the Court of Appeal fully supported the arbitral tribunal's judgment, without changing the decision at all, is proof of the Portuguese judicial system's endorsement of arbitration.

Decision of the Lisbon Court of Appeal, dated 05 March 2020, case no 415/18.8T8SNT.L1-2

The claimant appealed the decision of the court of first instance, claiming that it was in a situation of economic insufficiency due to the defendant's breach of contract.

In the concession agreement, the parties signed an arbitration agreement, excluding the jurisdiction of national courts. Faced with acquittal at first instance, the plaintiff appealed to the Lisbon Court of Appeal, basing her claim on three main arguments:

- economic insufficiency being a change in the facts;
- the arbitration agreement being unenforceable; and
- the situation being characterised as a change in circumstances.

The court held as follows.

"Moreover, as the Supreme Court of Justice has already concluded in its judgment of 20/1/2011 (reported by Álvaro Rodrigues and available at www.dgsi.pt), 'the logical and legal principle of the competence of arbitral tribunals to decide on their own competence... and which, in its negative sense, imposes the priority of the arbitral tribunal in the judgment of its own jurisdiction, obliging state courts to refrain from deciding on this matter before the arbitral tribunal has ruled', concluding that 'only in cases [where] the nullity, ineffectiveness or inapplicability of the arbitration agreement is manifest, can the judge declare it and, consequently, dismiss the exception'."

"Similarly, the Supreme Court of Justice also concluded, in its recent judgment of 12/11/2019 (reported by Pedro de Lima Gonçalves and available at www.dgsi.pt), that 'the courts should only reject the dilatory plea of pretermission of an arbitral tribunal, lodged by one of the parties, ordering the proceedings to continue before the State Court, when it is manifest and incontrovertible that the arbitration agreement/clause invoked is invalid, ineffective or unenforceable

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or that the dispute ostensibly does not fall within its scope'."

"In other words, in a case in which neither the formal validity of the arbitration agreement nor its application to the actual dispute between the parties is in question, only if it is clear from the arbitral tribunal's operating rules that the claimant's inability to bear the costs of the arbitration, due to insufficient economic means, constitutes an impediment to access to the same court, then it can be said that it is manifest and incontrovertible that the arbitration agreement is unenforceable, and that this unenforceability must then be recognised in the court of law and, furthermore, prevent the plea of non-application to the arbitral tribunal from being upheld."

"Otherwise, the court must respect the principle of the competence of arbitral tribunals to decide on their own competence (understood in a broad sense, as also including the possibility of being aware of limitations on access to arbitral justice due to the claimant's economic situation), refraining from deciding on this issue until the arbitral tribunal has ruled on it."

Thus, the Lisbon Court of Appeal sought to resolve the long-standing problem of economic insufficiency of means, which divides the legal community. In this regard, knowing that most legal systems attribute jurisdiction to the state courts, the Portuguese court sought to guide its position by an attitude in favour of arbitration, defending its competence. In this line, arbitral tribunals in Portugal have jurisdiction not only to decide the merits of the case but also to decide on procedural matters.

Conclusion

The choice of arbitration as an alternative dispute resolution method has numerous advantages, such as speed and procedural economy, confidentiality, flexibility, freedom in choosing arbitrators, and the possibility of a final decision. All these advantages are the result of an enormous effort made by the various jurisdictions and jurists by investing in arbitration as a full and valid alternative to national courts.

At the same time, it is recognised that there is strong competition at an international level between the various legal systems, which are increasingly focused on and committed to the development of arbitration.

This article has aimed to set out the general status quo of arbitration in Portugal, identifying the numerous improvements that the legal system has adopted, synonymous with care and concern for the development of arbitration practice in Portugal, with the aim of making Lisbon a strategic and more attractive place for arbitration proceedings.

Committed to the future, innovation and modernisation, Portugal is increasingly able to respond to the challenges posed by arbitration with each passing year, focusing on becoming better and better as the seat of arbitration proceedings. Thus, arbitration in Portugal has ceased to be an alternative dispute resolution mechanism, becoming an effective and trustworthy dispute resolution mechanism, operating side by side with the judicial system.

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