



GUIDE TO PORTUGUESE ARBITRATION

BCH LAWYERS

LISBON | 2018

GUIDE TO PORTUGUESE ARBITRATION

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A title of the book : Guide to Portuguese Arbitration / BCH Lawyers ; with Duarte G Henriques.



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FOREWORD

This Guide to Portuguese Arbitration aims at providing information and high-level advice on arbitration in Portugal or any arbitration with a Portuguese element.

It takes into consideration the nuances and specificities of the Portuguese jurisdiction and the legal framework applicable to this mechanism of dispute resolution, particularly as set out in the Portuguese Voluntary Arbitration Law (PAL - Law 63/2011 of 14 December 2011).

The Guide addresses a lack of information related to arbitration in Portugal or involving a Portuguese element. In our view, arbitration in Portugal needs more and a different promotion.

“Arbitration in Portugal needs more and a different promotion”

For sure, a guide on arbitration is an on-going work, that needs constant update and permanent feedback from readers. Therefore, we welcome any input, suggestion and remark, so that this work can be improved and keep up-to-date. Further, the Guide does not pretend to be a full compendium, but merely an introduction to Portuguese arbitration.

On the other hand, the Guide to Portuguese Arbitration is mainly focused on commercial arbitration, and commercial disputes (including, inter alia, real estate, IP, corporate, post-M&A, and the like). According to Portuguese law, arbitration may also be used to solve employment, consumer, tax disputes and disputes involving administrative matters and / or public entities, which are excluded from this Guide.

Lastly, nothing on this Guide constitutes legal advice or gives rise to a solicitor/client relationship. Specialist legal advice should be taken in relation to specific circumstances. Some of the material on this site may have been prepared some time ago. Please contact us if you need a comprehensive and up-to-date statement of the relevant law.

We hope that this will be a useful tool.

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Lisbon, August 2018



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INTRODUCTION

The new Portuguese Voluntary Arbitration Law, Law 63/2011 (the PAL) was published in the Portuguese Official Gazette on 14 December 2011 and entered into force on 14 March 2012. It revoked the former Portuguese arbitration law (Law No. 31/86 of 29 August 1986, amended by Decree-Law No. 38/2003 of 8 March 2003).

The PAL aims to introduce a more modern arbitration regime and promote Portugal as a seat for international arbitrations. Portuguese Arbitration Law has been

adapted to accommodate new trends in arbitration. The general principles underlying the PAL are:

- Party autonomy.
- Kompetenz-kompetenz. The PAL confers jurisdiction on state courts to rule on the competence of arbitral tribunals only where the arbitration agreement is manifestly null and void, inoperative or incapable of being performed.
- Adhering to procedural principles, such as, equality of the parties, due and fair process and the adversarial principle.

*“Portugal a more
attractive arbitral venue
for both national and
foreign parties.”*

The main arbitration institutions are also devoted to promoting Lisbon and Portugal as an arbitration hub, connecting all Portuguese-speaking countries. However, in spite of all these efforts, arbitration in Portugal remains mostly ad hoc. Indeed, although the Portuguese Parliament enacted a new law providing for compulsory arbitration in relation to disputes arising from reference medicines and generic medicines, it did not compel the litigants to use institutional arbitration.

The PAL was inspired by:

- The provisions and principles of the UNCITRAL Model Law.
- The legal solutions of other European arbitration laws such as the Arbitration Laws of Germany, Switzerland and France.

This has made Portugal a more attractive arbitral venue for both national and foreign parties.



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SOURCES OF THE PORTUGUESE ARBITRATION LAW

The overarching legal setting applicable to arbitration is composed of the *Magna Carta* (Constitution of the Portuguese Republic), international instruments, and national laws.

A. Constitution of the Portuguese Republic

The Constitution of the Portuguese Republic (CPR) clearly states that "arbitration tribunals" are considered as jurisdictional bodies (Art. 209(2) CPR).

Thus, arbitration in Portugal enjoys a constitutional status, being considered as a jurisdictional means for resolving disputes, in tandem with judicial courts. Accordingly, arbitral awards have the same “res judicata” effects as courts judgements.

The legal system of Portugal is also composed of the "norms and principles of general or common international law", which "form an integral part of Portuguese law" (Art. 8(1) CPR).

Moreover, "the norms contained in duly ratified or approved international conventions come into force in Portuguese internal law once they have been officially published, and remain so for as long as they are internationally binding on the Portuguese state." (Art. 8(2) CPR).

B. International Instruments and National Legislation

In accordance with the CPR, the Civil Code of Procedure (CCP) and the New York Convention (applied in Portugal since 1995), awards rendered in a foreign country must be recognized by the Portuguese courts before they can be enforced in Portugal. Portugal is also a party to the ICSID Convention.

The PAL is the main source of arbitration law in Portugal and it has

made significant changes to Portuguese arbitration. For one, the main "arbitrability" criterion shifted from the "disposability" or "alienability" nature of the interests at stake to a "patrimoniality" criterion. This means that parties may settle through arbitration disputes related to patrimonial rights over which they may dispose. (See Art. 1(1) PAL.)

“The Constitution of the Portuguese Republic (CPR) clearly states that "arbitration tribunals" are considered as jurisdictional bodies (Art. 209(2) CPR).”

The Code of Civil Procedure (CCP) sets forth the legal regime applicable to all judicial procedures related to arbitration, for instance, appointment of arbitrators, determination of arbitrators' fees, challenge of arbitrators, appeal (where admissible), setting aside, enforcement (and opposition to enforcement), and recognition of foreign arbitral awards, to name but the most relevant.

The CCP is also the basis of the legal regime applicable to compulsory arbitration (Book VI, Arts. 1082 to 1085).



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“INTERNATIONAL ARBITRATION” AND GOVERNING LAW

Arbitration is considered international whenever international trade interests are at stake (Art. 49(1) PAL).

In international arbitration, the arbitration agreement is considered valid if it is valid under either:

- The law that governs the arbitration agreement.
- The law applicable to the merits of the dispute.