ICLG

The International Comparative Legal Guide to:

International Arbitration 2016

13th Edition

A practical cross-border insight into international arbitration work

Published by Global Legal Group, in association with CDR, with contributions from:

Advokatfirman Vinge
Ali Budiardjo, Nugroho, Reksodiputro
Anderson Mori & Tomotsune
Attorneys at law Ratiolex Ltd
Baker & McKenzie
BDO LLP
BMT LAW
Boss & Young, Attorneys-at-Law
Brödermann Jahn RA GmbH
Burnet, Duckworth & Palmer LLP
Cases & Lacambra
Chiomenti Studio Legale
CMS Cameron McKenna
Costa e Tavares Paes Advogados
Cuatrecasas, Gonçalves Pereira
D'Empaire Reyna Abogados
Divjak, Topić & Bahtijarević Law firm
DLA Piper UK LLP
Dr. Colin Ong Legal Services
Eric Silwamba, Jalasi and Linyama Legal Practitioners
Freshfields Bruckhaus Deringer LLP
Holland & Knight Colombia
Homburger
Hughes Hubbard & Reed LLP
Kachwaha and Partners
König Rebholz Zechberger
Lazareff Le Bars
Lendvai Partners
Linklaters LLP
Loyens & Loeff Luxembourg S.à.r.l.
Matheson
Medina Garrigó Abogados
Moroglu Arseven
Njeri Kariuki Advocate
Olleros Abogados, S.L.P.
Patrikios Pavlou & Associates LLC
Paul, Weiss, Rifkind, Wharton & Garrison LLP
Popovici Nițu Stoica & Asociații
PUNUKA Attorneys and Solicitors
Ronen Setty & Co. Law Firm
Salazar & Asociados
Sedgwick Chudleigh Ltd
Sefrioui Law Firm
Sysouev, Bondar, Khrapoutski Law Office
Travers Thorp Alberga
Von Wobeser y Sierra, S.C.
Weber & Co.
Wilmer Cutler Pickering Hale and Dorr LLP

CDR Commercial Dispute Resolution

glg global legal group

global legal group

Contributing Editors
Steven Finizio and Charlie Caher, Wilmer Cutler Pickering Hale and Dorr LLP

Sales Director
Florjan Osmani

Account Directors
Oliver Smith, Rory Smith

Sales Support Manager
Toni Hayward

Editor
Tom McDermott

Senior Editor
Rachel Williams

Chief Operating Officer
Dror Levy

Group Consulting Editor
Alan Falach

Group Publisher
Richard Firth

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
August 2016

ISBN 978-1-911367-06-2
ISSN 1741-4970

Strategic Partners

Preface:

■ **Preface** by Gary Born, Chair, International Arbitration Practice Group, Wilmer Cutler Pickering Hale and Dorr LLP

General Chapters:

1 **Class, Collective and Mass Claims in Arbitration** – Charlie Caher & Jonathan Lim, Wilmer Cutler Pickering Hale and Dorr LLP 1

2 **Complex DCF Models and Financial Awards: The Components and Where They Go Wrong** – Gervase MacGregor & David Mitchell, BDO LLP 8

3 **The Toolbox of International Arbitration Institutions: How to Make the Best of It?** – Professor Dr. Eckart Brödermann & Dr. York Zieren, Brödermann Jahn RA GmbH 14

Asia Pacific:

4 **Overview** Dr. Colin Ong Legal Services: Dr. Colin Ong 19

5 **Brunei** Dr. Colin Ong Legal Services: Dr. Colin Ong 33

6 **China** Boss & Young, Attorneys-at-Law: Dr. Xu Guojian 42

7 **India** Kachwaha & Partners: Sumeet Kachwaha & Dharmendra Rautray 54

8 **Indonesia** Ali Budiardjo, Nugroho, Reksodiputro: Sahat A.M. Siahaan & Ulyarta Naibaho 65

9 **Japan** Anderson Mori & Tomotsune: Yoshimasa Furuta & Aoi Inoue 76

Central and Eastern Europe and CIS:

10 **Overview** Wilmer Cutler Pickering Hale and Dorr LLP: Franz T. Schwarz & Krystyna Khripkova 84

11 **Austria** Weber & Co.: Stefan Weber & Katharina Kitzberger 91

12 **Belarus** Sysouev, Bondar, Khrapoutski Law Office: Timour Sysouev & Alexandre Khrapoutski 100

13 **Croatia** Divjak, Topić & Bahtijarević Law Firm: Linda Križić & Sara Al Hamad 112

14 **Hungary** Lendvai Partners: András Lendvai & Gergely Horváth 119

15 **Romania** Popovici Nițu Stoica & Asociații: Florian Nițu & Raluca Petrescu 127

16 **Russia** Freshfields Bruckhaus Deringer LLP: Noah Rubins & Alexey Yadykin 137

17 **Turkey** Moroglu Arseven: Orçun Çetinkaya 153

18 **Ukraine** CMS Cameron McKenna: Olexander Martinenko & Olga Shenk 162

Western Europe:

19 **Overview** DLA Piper UK LLP: Ben Sanderson 171

20 **Andorra** Cases & Lacambra: Sheila Muñoz Muñoz 175

21 **Belgium** Linklaters LLP: Joost Verlinden 185

22 **Cyprus** Patrikios Pavlou & Associates LLC: Stavros Pavlou & Eleana Christofi 195

23 **England & Wales** Wilmer Cutler Pickering Hale and Dorr LLP: Charlie Caher & John McMillan 204

24 **Finland** Attorneys at law Ratiolex Ltd: Timo Ylikantola & Tiina Ruohonen 220

25 **France** Lazareff Le Bars: Benoit Le Bars & Joseph Dalmasso 228

26 **Germany** DLA Piper UK LLP: Dr. Frank Roth & Dr. Daniel H. Sharma 238

27 **Ireland** Matheson: Nicola Dunleavy & Gearóid Carey 248

28 **Italy** Chiomenti Studio Legale: Andrea Bernava & Silvio Martuccelli 258

29 **Liechtenstein** König Rebholz Zechberger: MMag. Benedikt König & Dr. Helene Rebholz 268

30 **Luxembourg** Loyens & Loeff Luxembourg S.à r.l.: Véronique Hoffeld 277

31 **Portugal** Cuatrecasas, Gonçalves Pereira: Rita Gouveia & Frederico Bettencourt Ferreira 286

Continued Overleaf →

Western Europe, cont.:

32	**Spain**	Olleros Abogados, S.L.P.: Iñigo Rodríguez-Sastre & Elena Sevila Sánchez	295
33	**Sweden**	Advokatfirman Vinge: Krister Azelius & Lina Bergqvist	303
34	**Switzerland**	Homburger: Felix Dasser & Balz Gross	311

Latin America:

35	**Overview**	Baker & McKenzie LLP: Luis M. O'Naghten	322
36	**Bolivia**	Salazar & Asociados: Ronald Martin-Alarcon & Sergio Salazar-Machicado	334
37	**Brazil**	Costa e Tavares Paes Advogados: Vamilson José Costa & Antonio Tavares Paes Jr.	341
38	**Colombia**	Holland & Knight Colombia: Enrique Gómez-Pinzón & Daniel Fajardo Villada	349
39	**Dominican Republic**	Medina Garrigó Abogados: Fabiola Medina Garnes & Jesús Francos Rodríguez	356
40	**Mexico**	Von Wobeser y Sierra, S.C.: Diego Sierra & Adrián Magallanes	365
41	**Venezuela**	D'Empaire Reyna Abogados: Pedro Perera & Jose Humberto Frías	376

Middle East / Africa:

42	**Overview – MENA**	Freshfields Bruckhaus Deringer LLP: Sami Tannous & Seema Bono	383
43	**Overview – Sub-Saharan Africa**	Baker & McKenzie: Gerhard Rudolph & Michelle Wright	389
44	**Israel**	Ronen Setty & Co. Law Firm: Ronen Setty	392
45	**Kenya**	Njeri Kariuki Advocate: Njeri Kariuki	401
46	**Libya**	Sefrioui Law Firm: Kamal Sefrioui	408
47	**Nigeria**	PUNUKA Attorneys and Solicitors: Anthony Idigbe & Emuobonuvie Majemite	417
48	**Qatar**	Sefrioui Law Firm: Kamal Sefrioui	433
49	**Sierra Leone**	BMT LAW: Glenna Thompson & Selvina Bell	445
50	**South Africa**	Baker & McKenzie: Gerhard Rudolph & Darryl Bernstein	453
51	**UAE**	Freshfields Bruckhaus Deringer LLP: Sami Tannous & Seema Bono	464
52	**Zambia**	Eric Silwamba, Jalasi and Linyama Legal Practitioners: Eric Suwilanji Silwamba, SC & Joseph Alexander Jalasi	476

North America:

53	**Overview**	Paul, Weiss, Rifkind, Wharton & Garrison LLP: H. Christopher Boehning & Julie S. Romm	485
54	**Bermuda**	Sedgwick Chudleigh Ltd.: Mark Chudleigh & Alex Potts	493
55	**Canada**	Burnet, Duckworth & Palmer LLP: Louise Novinger Grant & Romeo A. Rojas	503
56	**Cayman Islands**	Travers Thorp Alberga: Anna Peccarino & Ian Huskisson	511
57	**USA**	Hughes Hubbard & Reed LLP: John Fellas & Hagit Muriel Elul	525

Chapter 31

Portugal

Rita Gouveia

Frederico Bettencourt Ferreira

Cuatrecasas, Gonçalves Pereira

1 Arbitration Agreements

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

The parties shall determine whether the agreement concerns a current dispute ("submission agreement") or to disputes that might arise from certain contractual or non-contractual obligations entered into between the parties ("arbitration clause"). The submission agreement shall determine the subject matter of the dispute, whereas the arbitration clause shall specify the legal relationship to which the dispute concerns.

Secondly, the arbitration agreement shall be in writing, being this requirement dully complied with when the agreement is drafted in a written document signed by the parties or by other means of communication, which provide a written record of the agreement. Likewise, that requirement is met if the agreement is recorded on electronic, magnetic, optical or any other type of support that offers the same guarantees of reliability, comprehensiveness and preservation. Also, and without prejudice to the legal regime on general contract clauses, the reference made in a contract to a document containing an arbitration clause is an arbitration agreement, provided that said contract is in writing and that the reference is such as to make that clause part of that contract. That requirement is also met when 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.

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

If parties want to deviate from certain default legal provisions, such as the one that provides for the inadmissibility of appeals on the merits of arbitral awards, they should do so expressly in the arbitration agreement.

Although not mandatory, it is advisable, for practical reasons, to include in the arbitration agreement provisions regarding, at least, the place of the arbitration, the applicable law and the language of the proceedings.

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

Overall, the approach of the national courts towards the enforcement of arbitration agreements can be described as favourable and friendly. Generally, state courts are aware of the specific features and characteristics of arbitration agreements, namely the substantive and formal requirements concerning the latter.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The primary source of statutory law is Law n.º 63/2011 of 14 December 2011, which approved the Voluntary Arbitration Law (hereinafter "VAL"). The VAL sets out a specific chapter for the enforcement of domestic arbitration awards (Chapter VIII) and another for the recognition and enforcement of foreign arbitral awards (Chapter X).

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The VAL governs both domestic and international arbitration proceedings.

However, there is a chapter in the VAL dedicated to international arbitration which sets forth certain specific rules, namely:

(i) the inadmissibility of pleas based on domestic law of a party that is a State, a State-controlled organisation or a State-controlled company;

(ii) a more "pro-validity" rule regarding the substantial validity of the arbitration agreement;

(iii) the possibility of choosing the rules of law to be applied by the arbitrators, if they have not authorised them to decide *ex aequo et bono*;

(iv) a more restrictive approach regarding appeals, pursuant to which the award is not appealable unless the parties have expressly agreed on the possibility of an appeal to another arbitral tribunal and regulated its terms; and

(v) the possibility of setting aside an award made in Portugal, in an international arbitration in which non-Portuguese law has been applied to the merits of the dispute, if such award is to be enforced or produce other effects in national territory, whenever such enforcement leads to a result that is manifestly incompatible with the principles of international public policy.

Notwithstanding what is provided in that chapter, the provisions on domestic arbitration also apply to international arbitration, with the necessary adjustments.

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

The VAL is largely based on the UNCITRAL Model Law. However, there are a few relevant differences, such as rules regarding the appointment of arbitrators when there are multiple claimants or respondents; rules regarding third party joinder and the existence of a default 12-month time limit (which may generally be extended) for issuing the award from the date of acceptance of the last arbitrator.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

Apart from the aforementioned rules governing international arbitration (see question 2.2 above), the VAL establishes a few mandatory rules applicable to any arbitration sited in Portugal, such as the need to treat the parties equally and to give them a reasonable opportunity to present their case.

3 Jurisdiction

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

According to the VAL, any dispute involving economic interests may be submitted to arbitration, unless it is exclusively submitted by a special law to the State courts or to compulsory arbitration. In addition, an arbitration agreement regarding disputes that do not involve economic interests is also valid, provided that the parties are entitled to conclude a settlement on the right in dispute.

Examples of special laws subjecting certain disputes to State courts can be found in labour legislation. Compulsory arbitration is provided, for instance, for disputes concerning reference to pharmaceutical products and generics.

Regarding international arbitration, the arbitration agreement is valid as to its substance and the dispute it governs may be submitted to arbitration if the requirements set out either by the law chosen by the parties to govern the arbitration agreement, by the law applicable to the subject matter of the dispute or by Portuguese law are met.

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

Portuguese Law acknowledges the positive effect of the *Kompetenz-Kompetenz* principle, i.e., the rule that the arbitrators are entitled to rule or decide on their own jurisdiction. This decision can be rendered either through an interlocutory decision or in the final award.

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

If a court case comprised within the scope of an arbitration agreement is brought before a national court, the latter shall, at the request of the defendant, dismiss the proceedings, in which case the arbitral proceeding may be initiated or continue.

3.4 Under what circumstances can a court address the issue of the jurisdiction and competence of the national arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

State courts are only entitled to assert their jurisdiction before the arbitral tribunal issues a decision regarding its jurisdiction in exceptional cases where the inexistence, invalidity or unenforceability of the arbitration agreement in manifest. The standard of review consists of a *prima facie* analysis.

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

The VAL provides that only third parties bound by the arbitration agreement, whether from the date of such agreement or by having subsequently adhered to it, are allowed to join ongoing arbitral proceedings. Furthermore, such adhesion requires the consent of all parties to the arbitration agreement and may take place only in respect of the arbitration in question. In addition to other requirements, the tribunal shall only admit third party intervention provided the same does not improperly disrupt the normal conduct of the arbitration and there are prominent reasons justifying said intervention, e.g., when the third party has, in relation to the substance of the dispute, an interest equal to the one of the plaintiff or the respondent. The arbitration agreement may regulate third party joinder in ongoing arbitrations differently from the default provisions of the VAL.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

There are no special laws or rules prescribing limitation periods for the commencement of arbitrations.

However, general limitation periods do exist in Portuguese law and they may affect the outcome of arbitrations in which said law is applicable to the merits of the dispute. For instance, there is a general statutory limitation period of 20 years for contractual liability.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

In general, the declaration of insolvency of one of the parties to the arbitration entails the suspension of the effectiveness of the arbitration agreements of which the insolvent is a part, whenever the outcome of the disputes may influence the value of the insolvent state. However, the arbitral proceedings pending when the insolvency is declared do continue and the insolvent party is replaced by the insolvency administrator.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

For domestic arbitration, the VAL provides that the arbitrators shall decide the dispute in accordance with the law, unless the parties agree that they shall decide *ex aequo et bono*. The mechanisms of determination of the applicable law are not set forth in the VAL and can be found, for instance, in the Rome I and Rome II regulations, if applicable, or in the Portuguese Civil Code.

For international arbitration, the VAL explicitly provides that the parties may choose the rules of law to be applied by the arbitrators, if they have not authorised them to decide *ex aequo et bono*, and that failing any choice by the parties, the arbitral tribunal shall apply the law of the State with which the subject matter of the dispute has the closest connection. It adds that the tribunal shall take into consideration the contractual terms agreed by the parties and the relevant trade usages.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Certain mandatory laws may, if breached, affect the validity and enforceability of an award.

For instance, and in general, an arbitral award may be set aside if it is contrary to public policy, which may be the case if certain fundamental Portuguese mandatory laws are breached.

With regards to international arbitration, the VAL explicitly states that an award made in Portugal, in an international arbitration in which non-Portuguese law has been applied to the merits of the dispute, may be set aside if such award is to be enforced or produce other effects in national territory, whenever such enforcement leads to a result that is manifestly incompatible with the principles of international public policy.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

According to the VAL, in international arbitration, arbitration agreements are valid if the requirements set out either by the law chosen by the parties to govern those agreements, by the law applicable to the subject-matter of the disputes or by Portuguese law are fulfilled.

5 Selection of Arbitral Tribunal

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

There are very few limits to the parties' autonomy to select arbitrators. The arbitral tribunal may consist of a sole arbitrator or of several, in an uneven number. The arbitrators must be individuals and have full legal capacity. As expected, arbitrators must be independent and impartial.

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

Yes. Please see question 5.3.

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

A state court intervenes in the appointment of arbitrators whenever: (i) the arbitral tribunal shall consist of one single arbitrator and the parties do not agree on such appointment; (ii) a party shall appoint an arbitrator(s) and fails to do so within 30 days of receipt of the other party's request to make said appointment; (iii) the arbitrators designated by the parties fail to appoint the chairperson within 30 days of the appointment of the last arbitrator; and (iv) the parties have assigned the appointment of all or some of arbitrators to a third party and the latter fails to do so within 30 days of said assignment. While appointing the arbitrator(s), the state court should take into account the qualifications required by the agreement of the parties and all other elements deemed as relevant to ensure the appointment of an independent and impartial arbitrator.

5.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators imposed by law or issued by arbitration institutions within your jurisdiction?

Portuguese law provides that any person who is invited to act as arbitrator is obliged to disclose all circumstances that may give birth to reasonable doubts regarding his/her impartiality and independence. Thus, the arbitrator shall, during the course of the proceedings, disclose, without delay, to the parties and the remaining arbitrators all the circumstances referred to above which are supervening or of which he has otherwise become aware of only after accepting to act as arbitrator. In addition to these legal provisions, it should be noted that Portuguese courts occasionally invoke soft law (e.g., the IBA Guidelines on Conflicts of Interests in International Arbitration) when deciding cases related with independence and impartiality of arbitrators.

6 Procedural Rules

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

The VAL contains specific rules on the procedure of arbitration aimed at ensuring the compliance with certain fundamental principles. Firstly, the defendant shall be summoned in order to present his/her defence; secondly, the parties shall be treated equally and shall be given a reasonable opportunity to assert their rights, both in writing and orally, before the rendering of a final award; and lastly, the adversarial principle shall be complied with at all stages of the proceedings, except where otherwise provided by the law.

The parties may agree, before the acceptance of the first arbitrator, on the procedure to be adopted by the arbitral tribunal during the arbitration, provided the fundamental principles set out above are

duly observed. In cases where the parties do not agree on this matter, the arbitral tribunal may conduct the arbitration in the manner it deems more appropriate.

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

In general, the parties are free to establish the concrete procedure of the arbitration, provided that the fundamental principles mentioned in question 6.1 above are respected.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

In general, Portuguese lawyers are bound by the rules of conduct set forth in the Portuguese Bar Association Statute, regardless of whether they act before state courts or arbitral tribunals. Regarding counsel from other jurisdictions see question 6.5.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

Portuguese law provides that arbitrators shall be independent and impartial. Once an arbitrator accepts to act as such, it may only ask to be excused on the basis of a supervening event that prevents him/her to exercise said function.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

There are rules restricting the appearance of lawyers from other jurisdictions (particularly from outside the EU) in legal matters in Portugal. Some of those restrictions may be interpreted as applying to arbitration proceedings sited in Portugal.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Arbitrators are not liable for the damages arising from their decisions, except in the cases where state court judges may be held liable in accordance with the law.

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

In addition to challenges to awards, State courts may only intervene in very limited circumstances, such as:

- Appointment and challenges of arbitrators (see questions 5.3 and 5.4 above).
- Assistance in taking evidence (when the evidence to be taken depends on the will of one of the parties or of third parties and these 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).
- Reduction of the amount of fees or expenses fixed by the arbitrators (if there was no agreement in that regard).

7 Preliminary Relief and Interim Measures

7.1 Is an arbitrator in your jurisdiction 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?

Portuguese law provides for the possibility of arbitral tribunals awarding interim measures whenever the same are deemed as necessary in relation to the subject matter of the dispute, unless otherwise agreed between the parties.

For these purposes, an interim measure is a temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the tribunal orders a party to: a) maintain or restore the *status quo* pending determination of the dispute; b) take action that would prevent, or refrain from taking action that is likely to cause, harm or prejudice to the arbitral process itself; c) provide a means of preserving assets out of which a subsequent award may be satisfied; and d) preserve evidence that may be relevant and material to the resolution of the dispute.

Also, and unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested. Preliminary orders may be granted *ex parte*, but are not enforceable in State courts.

7.2 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?

Portuguese law provides that state courts are entitled to award interim reliefs during arbitration proceedings, irrespectively of the place in which these occur. However, and as mentioned in question 7.4 below, Portuguese law does not provide for anti-suit injunctions.

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

In general, national courts are not favourably or unfavourably biased concerning the rendering of interim relief at the request of parties to arbitration agreements, provided the requirements set forth by the law are complied with.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Portuguese law does not provide for anti-suit injunctions.

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

Yes, it does.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

In general, interim measures awarded by an arbitral tribunal are binding upon the parties and, unless otherwise provided by the arbitral tribunal, may be enforced upon request to the competent state court. The judgment in which the state court decides on the enforcement of an interim relief awarded by an arbitral tribunal is not subject to appeal. In general, national courts are not favourably or unfavourably biased concerning the enforcement of interim measures, provided the requirements set forth by the law are complied with.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

With some exceptions, the law does not provide for particular rules of evidence on arbitral proceedings. The parties may, until the acceptance by the first arbitrator, agree on the procedure to be followed by the arbitral tribunal in the conduct of the proceedings, respecting the mandatory provisions of the VAL. In the absence of such agreement and in the absence of applicable provisions in the VAL, the tribunal may conduct the arbitration in such manner as it considers appropriate. The powers conferred upon the arbitral tribunal include the determination of the admissibility, relevance and weight of any evidence presented or to be presented.

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

Unless the parties have agreed otherwise, tribunals may order the parties to produce certain documents.

Tribunals have no powers regarding third-parties.

In any case, court assistance is available as explained above (see question 6.7).

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

See the answer to question 6.7.

8.4 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 or is cross-examination allowed?

As mentioned above, in the absence of a particular legal framework and unless if otherwise agreed, the conduct of the hearing is determined by the arbitral tribunal in the manner deemed most appropriate.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

Privilege matters are not dealt with in the VAL. Privilege rules have a broad scope in Portugal and, in general, communications between lawyers and between lawyers and their clients are privileged.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the Award contain reasons or that the arbitrators sign every page?

The award shall be delivered in writing and signed by the arbitrator or arbitrators. In the case of arbitrations with more than one arbitrator, the signatures of the majority or just the signature of the president suffice, the latter in case the award has to be issued by him/her and provided that the award specifies the reason for the omission of the remaining signatures. Furthermore, the award shall contain the reasons based on which it was rendered, the date of issuance, the seat of the arbitration and, except if otherwise provided by the parties, the distribution among them of the costs directly arising from the arbitration.

9.2 What powers (if any) do arbitrators have to clarify, correct or amend an arbitral award?

Within 30 days of receipt of the notification of the award, unless another period of time has been agreed upon by the parties, any party may request the tribunal to clarify any obscurity or ambiguity of the award or of the reasons on which it is based, or to correct in the award any errors in computation, any clerical or typographical error, or any error of an identical nature.

In cases where the request made by any of the parties is deemed justifiable, the tribunal rectifies it or provides the clarification within 30 days.

The tribunal may also, on its own initiative, within 30 days from the notification of the award, rectify any errors in computation, any clerical or typographical error or any error of an identical nature comprised therein.

Unless otherwise agreed by the parties, any party may request the tribunal within 30 days of receipt of the notice of the award to make an additional award as to parts of the claim or claims submitted in the arbitral proceedings but omitted from the award. If the tribunal deems the request to be justified, it shall make the additional award within 60 days of the request.

The above-mentioned time limits applicable to the tribunal may be extended by the tribunal itself, provided that the global time limit for issuing the award is complied with.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Unless otherwise agreed, the VAL provides that the parties are not entitled to appeal an award on its merits.

Thus, in general, recourse to a State court against an arbitral award may be made only by an application for setting aside.

An arbitral award may be set aside by the competent State court only if:

(a) the party making the application furnishes proof that:
  (i) one of the parties to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the VAL;
  (ii) there has been a violation within the proceedings of some of the fundamental principles of due process with a decisive influence on the outcome of the dispute;
  (iii) the award dealt with a dispute not contemplated by the arbitration agreement, or contains decisions beyond the scope of the latter;
  (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the VAL from which the parties cannot derogate, or, failing such agreement, was not in accordance with the VAL, and, in any case, this inconformity had a decisive influence on the decision of the dispute;
  (v) the arbitral tribunal has condemned in an amount in excess of what was claimed or on a different claim from that that was presented, or has dealt with issues that it should not have dealt with, or has failed to decide issues that it should have decided;
  (vi) the award was made in violation of certain formal requirements set out in the VAL; or
  (vii) the award was notified to the parties after the maximum applicable time-limit had lapsed; or

(b) the court finds that:
  (i) the subject matter of the dispute cannot be decided by arbitration under Portuguese law; or
  (ii) the content of the award is in conflict with the principles of international public policy of the Portuguese State.

With regards to international arbitration, it is also possible to seek the set aside of the award with the grounds mentioned in point v) under question 2.2 above.

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

The parties cannot, *a priori* (e.g., in the arbitration agreement), agree to exclude the possibility of setting aside a future award. However, the right to seek such setting aside is subject to certain time limits.

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

The abovementioned grounds for setting aside an award cannot be expanded by the parties. However, the parties may agree on the existence of appeals on the merits of the award.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

There is a 60-day time limit from the notification of the award (or from the date in which the tribunal clarified, corrected, or amended it) to submit a set aside application to the competent State court. The application must be accompanied by a certified copy of the award, and, if it is drafted in a foreign language, by a translation into Portuguese. Evidence needs to presented with the application and the opposing party is then summoned to present its opposition and to present evidence. Furthermore, the requesting party may present a statement in reply to eventual objections raised by the opposing party. The taking of any necessary evidence shall follow. The procedure follows, with the necessary adjustments, the rules on appeals before State courts.

As mentioned above, appeals to a State court on the merits of the dispute are, as a general rule, excluded. However, when available, they follow the rules of provided for appeals of the final judgments rendered by a state court of first instance.

The VAL provides that in international arbitration it is only possible to subject the award to an appeal to another arbitral tribunal and provided that the parties regulate the terms of that appeal.

11 Enforcement of an Award

11.1 Has your jurisdiction 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 on 18 October 1994 and entered a reservation further to Article 1.º, number 3 of the same: Portugal shall only apply the Convention in cases where the arbitral awards were rendered in the territory of States bound by the Convention.

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

In addition to the New York Convention, Portugal is bound by the Geneva Convention on Execution of Foreign Arbitral Awards, dated 26 September 1927 (ratified by Portugal in 1931), the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention), concluded in Washington in 1965 (ratified by Portugal in 1984), and the Inter-American Convention on International Commercial Arbitration, signed in Panama in 1975 (ratified by Portugal in 2002).

In addition to these Conventions, there are multiple Bilateral Investments Treaties in force between Portugal and other countries, some of which deal with enforcement issues.

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

Awards issued in arbitrations seated in Portugal do not require any previous recognition and are enforceable in terms that are, in general, equivalent to decisions of the Portuguese state courts.

Without prejudice to the mandatory provisions of the New York Convention as well as to other treaties or conventions that bind the Portuguese State, arbitral awards issued in arbitrations seated abroad shall only be effective in Portugal if they are recognised by the competent Portuguese state courts.

The party wishing to recognise a foreign arbitral award, namely in order to have it enforced in Portugal, shall provide the original of the award duly authenticated or a copy duly certified of the same, as well as the original of the arbitration agreement or a duly authenticated

copy of the same. If the award or the arbitration agreement are not in Portuguese, the requesting party shall provide a dully certified translation in this language. Once the application for recognition is filled, together with the documents identified above, the opposing party is summoned to, within 15 days, submit its opposition. The trial is conducted pursuant to the rules applicable to appeals.

Portuguese courts are generally favourable to the recognition and enforcement of arbitration awards.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? 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?

An arbitral award granted by an arbitral tribunal is binding upon the parties in the same terms prescribed for a domestic final judgment rendered by a state court and may be enforced similarly. Thus, issues raised that have been finally determined by a competent arbitral tribunal constitute *res judicata*.

Only in exceptional circumstances is it possible to re-hear those issues in a national court. Those circumstances, which are also applicable to State courts' decisions, include, for instance, the existence of another final decision attesting that the award was the result of a crime committed by the arbitrators in the performance of their functions.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

While it is not possible to present a definitive and precise standard, a breach of public policy is usually understood in this context as a violation not only of mandatory rules, but of basic or fundamental principles of the Portuguese legal system. Accordingly, Portuguese courts tend to refuse most requests for rejecting enforcement of awards on the grounds of public policy.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

The VAL provides that the arbitrators, the parties and the arbitral institutions have to maintain confidentiality regarding all information obtained and on documents of which they become aware of during the course of the arbitration. Nevertheless, the law provides that the parties are allowed to make public the procedural acts necessary for the defence of their rights and the duty to communicate or disclose procedural acts to the competent authorities, which may be imposed by law.

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

In general, the evidence submitted and collected in the context of a specific arbitration may only be relied upon within the boundaries of said arbitration. However, and as previously mentioned, the parties are allowed to make public the procedural acts necessary for the defence of their rights and may be bound by a duty to communicate or disclose procedural acts to the competent authorities.

13 Remedies / Interests / Costs

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

The VAL does not directly provide any limits concerning the types of remedies that are available in arbitration. Said limits shall be assessed in light of the law applicable to the merits of the case. In the case of punitive damages, substantive Portuguese law governing non-contractual obligations does not provide for this specific type of remedy.

13.2 What, if any, interest is available, and how is the rate of interest determined?

If the parties do not expressly agree on this issue, the same should be assessed in light of the law applicable to the substance of the case.

13.3 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?

Unless otherwise agreed by the parties, the award shall determine the proportions in which they shall bear the costs directly resulting from the arbitration. The arbitrators may also 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.

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

An award itself is not subject to tax.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

The so-called "third-party funding" is yet to be regulated in Portugal. As of the present date, we are not aware of any decisions concerning its admissibility.

As for contingency fees, the Portuguese Bar Association Statute expressly forbids arrangements pursuant to which the lawyers' fees depend exclusively on the outcome of a specific dispute.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Portugal signed and ratified the ICSID Convention in 1984 and the same is in force since 1 August of that year.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Portugal is party to more than 60 Bilateral Investment Treaties and is a party to the Energy Charter Treaty.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Portugal's BITs usually include not only the typical substantive protection granted to investors, but also access to international arbitration. However, Portugal does not have a Model BIT and the language used in its BITs is not entirely uniform.

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

Portuguese courts tend to acknowledge the general principle of sovereign immunity of foreign states. Nonetheless, this principle only applies as far as the actions carried out by sovereign states are comprised within their sovereign authority (*acta iure imperii*).

The European Convention on State Immunity and its Additional Protocol and the United Nations Convention on Jurisdictional Immunities of States and Their Property, although not yet in force, it is often referred to by Portuguese courts for the purposes of interpretation and definition of the content of state immunity.

15 General

15.1 Are there noteworthy trends in or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

Considering that the latest major legislative reform in this field took place only 5 (five) years ago, currently there is no pending or proposed legislation in this area.

As for the trends regarding the type of disputes, it is worth mentioning that during the last few years there has been a large number of arbitrations on disputes arising from concession agreements entered into between the Portuguese State and private entities. Furthermore, we note that Portuguese law firms increasingly work on arbitrations which are exclusively international, i.e., without any nexus or connection with the Portuguese jurisdiction.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

The leading arbitral institution in Portugal, the Arbitration Centre of the Portuguese Chamber of Commerce and Industry, recently released a new set of Rules for Fast Track Arbitration with the aim of providing a speedier and less costly alternative to the standard rules.

Rita Gouveia
Cuatrecasas, Gonçalves Pereira
Praça Marquês do Pombal, nº 2
Lisbon
Portugal

Tel: +351 21 355 3801
Email: rgouveia@cuatrecasas.com
URL: www.cuatrecasas.com

Rita Gouveia has been a partner of Cuatrecasas, Gonçalves Pereira since 2009.

She has focused her practice on in-court and out-of-court dispute resolution through litigation or arbitration in matters concerning corporate and shareholders relations, engineering and construction, distribution agreements, consortium agreements, service agreements, M&A transactions and disputes arising out of industrial property rights.

Lecturer of Civil Procedural Law, General Theory of Civil Law and Fundamental Principles of Civil Law at Universidade Católica Portuguesa since 1998. She also lectures in postgraduate courses in legal studies at the same university.

She holds a law degree from the School of Law of the Portuguese Catholic University of Lisbon, 1998, and a Master's degree in civil law sciences, 2004, from the same university.

Frederico Bettencourt Ferreira
Cuatrecasas, Gonçalves Pereira
Praça Marquês do Pombal, nº 2
Lisbon
Portugal

Tel: +351 21 355 3801
Email: frederico.ferreira@cuatrecasas.com
URL: www.cuatrecasas.com

Frederico Bettencourt Ferreira is a senior associate at Cuatrecasas, Gonçalves Pereira's Lisbon office. In 2013–2014, he was a consulting attorney of US law firm Arent Fox, LLP and represented the government of Timor-Leste in multiple disputes with international oil companies. His practice focuses on in-court and out-of-court resolution of disputes, advising and representing Portuguese and foreign clients both in the pre-litigation stage and in judicial and arbitration proceedings. He has been involved, among others, in national and international disputes relating to works contracts, commercial contracts, investment agreements, conflicts between shareholders and companies, and in civil liability proceedings in sectors such as banking and finance, private equity, construction, aviation, and energy. Frederico holds an LL.M. in International Business Law from King's College, London. He published several articles about national and international arbitration and participates in arbitration conferences as a speaker in Portugal and abroad.

Cuatrecasas, Gonçalves Pereira

Cuatrecasas, Gonçalves Pereira is a leading law firm in Portugal and Spain. It represents most of the largest listed Portuguese and Spanish companies, and advises on strategic transactions and foreign investments in the Iberian market.

The firm's history in Portugal goes back to 1928. In 2009, the firm adopted its current designation following a merger with one of the most renowned law firms in Spain. The firm now has over 950 lawyers recruited from the best talent, all with the same focus: the client.

With 25 offices worldwide, the firm's headquarters are located in Lisbon, Barcelona and Madrid. Cuatrecasas, Gonçalves Pereira has international offices in the largest financial centres, Latin America, Asia and Africa. The firm has relationships and experience with leading law firms worldwide, so it can meet clients' legal needs anywhere.

The firm advises on all areas of business law, including 18 practice areas and 15 industry-specific knowledge groups. It guarantees the same excellence throughout all of its legal services.

Cuatrecasas, Gonçalves Pereira is committed to smart legal innovation, giving clients practical and innovative advice, responding to the challenges they face today.

Current titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks

glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk