Litigation ADR Questionnaire Portugal

CIVIL LITIGATION

1. In what language(s) may court proceedings be conducted? What arrangements can be made for translation/interpreter services?

Under Portuguese law all official documents issued by legislative and governmental bodies, administrative authorities and courts shall be in Portuguese, Portugal's official language. In any national court, all proceedings, either written or oral, shall be conducted in Portuguese.

If it is required to hear a foreign person who does not speak Portuguese, the court shall appoint an interpreter that must take an oath. Likewise, if a party files a document in a foreign language, it shall be accompanied by a translation. In some cases, when the translation is challenged, courts may order that the translation is made by a notary or certified by a diplomatic or consular officer of the respective State.

2. What types of pre-action measures are available and what are their limitations? Must you send a warning letter before issuing any proceedings?

Provisional judicial relief may be requested in court even before an action is filed, as a means to preserve the ability to grant effective relief by final judgment or to maintain or otherwise regulate the *status quo*. The statutory law provides for particular provisional remedies, but other provisional remedies not specifically provided for may be requested.

Provisional remedies specifically provided for in Portuguese civil law include, *inter alia*:

(i) Provisional restoration of possession;
(ii) Suspension of resolutions of corporate bodies of companies;
(iii) Attachment of property;
(iv) Suspension of new works;
(v) Listing of assets or documents.

With regard to administrative jurisdiction, provisional remedies, which are specifically provided for include, *inter alia*:

(i) Suspension of administrative decisions;
(ii) Suspension of administrative regulation;
(iii) Provisional admittance to take part in a public tender;
(iv) Provisional assignment of property;
(v) Provisional authorization to perform an activity or to adopt a conduct;
(vi) Provisional regulation of the *status quo*;
(vii) Order to adopt or not to adopt a conduct;
(viii) Suspension of public procurement procedures.

As a general rule, it is not mandatory to issue a warning prior to the request for any interim measures. However, when the defendant is an attorney-at-law, a judge or a public attorney, the plaintiff's attorney must provide a reasoned warning in writing prior to the institution of any judicial proceedings.

3. What are the costs of civil and commercial proceedings? Who bears the costs?

Court fees and attorney fees are the main costs that any party must provide for when going to court.

Under the Portuguese Civil Procedure Code and Court Fees Regulation (approved by Decree-Law no. 7/2012, of 13th February), court fees due in any civil, commercial or administrative judicial proceedings depend on the value of the claim - in other words, the economic value of the dispute (excluding special proceedings) – which is determined by the court.

A first instalment for court fees is paid by both parties at the beginning of the court proceedings and the amount also depends on the economic value of the dispute. For instance, if the amount in dispute is € 275.000,00, plaintiff and defendant shall each pay € 1.632. At the end of the proceedings, an extra fee will be charged to the losing party considering the value of the dispute and also the global amount that has been paid in advance. As judicial costs are exclusively due by the losing party, at the end of any judicial procedure it shall reimburse the other party all expenses that have been incurred until then. Court fees are scaled according to the claim's (and counter claim's) value and they rise, in first instance proceedings, to nearly 1,25% of that value.

As to attorney fees, there is no mandatory regulation on its value.

4. What are the basic rules of disclosure of documents in civil and commercial proceedings? Which documents do not require disclosure? Is electronic disclosure of documents normal?

The basic rule is that any documentary evidence must be filed with the parties´ written submissions. Nevertheless, depending on the specifics of each

proceedings, documentary evidence may be filed afterwards, up until the closing of arguments. Such later production of documents implies the payment of a fine, unless the party that files the document is able to prove that it was not possible to present it when its first written statement was filed.

With regard to appeals, and as a general rule, only documents that a party could not file at a previous stage and documents which only become necessary by virtue of the judgment in first instance may be presented with the appeal.

The court is empowered to order, whether on its own accord or upon request of a party, the production of any documents held by a party in the proceedings or any third party.

Disclosure of electronic copies of documents may be considered normal and is regulated by law.

5. **What is the process for witness evidence (namely, is it deposition based in advance, or witness statement, or examination or cross-examination)? Can a witness be compelled to attend to give evidence?**

As a general rule, witnesses are to be presented in the pre-trial stage that takes place after the initial written statements are filed. However, in some proceedings, witnesses must be identified by all parties at the time of the initial written statements.

Witnesses testify at the final hearing, and teleconference shall be used when appropriate. All witnesses are subject to examination by the appointing party and to cross-examination. However, the scope of cross-examination varies. Generally speaking, the opposing party may contest the testimony.

Exceptions to the abovementioned rule include the following situations:

(i) If there is a risk that the testimony will become impossible or very difficult to be given, a witness may testify in advance and even before an action is filed;

(ii) The parties may agree that the testimony is to be given at the office of one of the attorneys. In this situation, a minute of the hearing must be written and signed by all the attorneys and the witness;

(iii) If it is impossible or seriously difficult to the witness to attend the court hearing, the judge may determine that the witness is to testify in writing provided that the parties agree to this course of action. Furthermore, in this situation and when appropriate, the judge may determine that the witness is to explain aspects deemed material to the judgment by telephone or by any means of direct communication between the witness and the court, provided that the parties agree to this course of action;

(iv) If a witness cannot attend the court hearings because of illness, the judge may also determine a specific time and place for the testimony to be given.

Confrontation between witnesses may also be ordered.

Any witness that fails to attend the court hearings may be ordered to give evidence. Ascendants, descendants, adoptive parents, adoptive children, parents-in-law, children-in-law, spouses, ex-spouses to, and people cohabiting (or that cohabited) with a party may refuse to testify. Moreover, people bound by professional or State secrecy must refuse to testify.

Special rules apply with regard to the testimony by the President of the Portuguese Republic, foreign diplomats, members of the cabinet, members of Parliament, members of the regional cabinets, members of the regional parliaments, judges of the high courts, the ombudsman, the Attorney-General, the Vice-Attorney-General, members of the magistrates supreme councils, generals and admirals, clerics of high station, the president of the Portuguese Bar Association and the president of the Portuguese Chamber of Bailiffs.

6. **How are settlement discussions usually conducted (namely whether oral or written and whether between the parties direct or their representatives)? Is the settlement correspondence between the parties/counsel privileged (i.e: may not be disclosed to the court)?**

Settlement discussions may take place either before or at any stage of the proceedings, provided that the parties may settle the right in dispute.

The parties may be summoned for the purpose of an attempt to settle before the court, on the judge's own accord, or upon request by both parties.

However, the parties may be summoned only once exclusively for such purpose.

Settlement discussions may take place between the parties directly or between their representatives and they can either be oral or in writing.

Settlement correspondence exchanged between the parties directly is generally and as a rule of practice undertaken on a without prejudice basis. Only if the parties so declare or agree upon will the exchanged correspondence be found privileged (cf. Article 75 of the Portuguese Civil Code).

If settlement discussions are conducted by attorneys all matters discussed are privileged as set forth by the Portuguese Bar Association Statute (cf. Law no. 15/2005, of 26 January, Article 87.1 e) and f)).

7. How can foreign judgments be enforced?

Foreign judgments are subject to a recognition (confirmation) procedure to confer *exequatur* prior to enforcement procedures.

For international judgments to be confirmed it is necessary that:

(i) No doubts exist as to the authenticity of the document that contains the judgment or as to the intelligibility of the decision;
(ii) It has the force of *res judicata* according to the law of the country where it was rendered;
(iii) It was rendered by a foreign court, the competence of which was not provoked by fraud and does not concern a subject matter for which the Portuguese courts are exclusively competent;
(iv) The same case is not pending before or has not been tried by a Portuguese court, except if it was first brought before a foreign court;
(v) The defendant was duly summoned, according to the law of the country of origin and due process has been observed;
(vi) The confirmation of the judgment is not contrary to the Portuguese international public policy.

Only after confirmation can enforcement be brought before State courts. Enforcement will be refused on the following grounds:

(i) Inexistence or lack of *exequatur* of the judgment;
(ii) False (inexistent) judgment procedure; false or inexact translation of the rendered judgment into the Portuguese language, which affects the enforcement procedure;
(iii) Lack of any procedural prerequisite related to the enforcement procedure;
(iv) Inexistent or void summon of the defendant in the judgment procedure in which the defendant did not partake;
(v) Uncertainty, ineligibility or illiquidity of the obligations to be enforced;
(vi) *Res judicata* prior to the rendered judgment;
(vii) Any dully documented modifying or annulling reasons for opposition to the enforcement of the obligation that are subsequent to the formal hearings before the court that rendered the judgment;
(viii) The limitation period of the applicant's right has expired.

Litigation ADR Questionnaire Portugal

ARBITRATION

1. Are mediation clauses in commercial contracts binding and enforceable?

Whenever a plaintiff files an action regardless of an applicable mediation clause, the defendant may request the judicial proceedings to be suspended, so that the mediation procedure may take place. As such, one can say that mediation clauses are binding and enforceable.

2. What is the procedure for mediation? Is it a popular method for resolving commercial disputes?

Statutory regulation of mediation procedures is scarce, although new legislation has very recently been enacted by the Portuguese parliament (Law no. 29/2013, of April 19th). Nevertheless, the main features of said procedures are as follows:

(i) Mediation procedures take place on a voluntary basis;
(ii) The mediator is bound by principles of confidentiality, equality and impartiality; Mediation procedures may take place before or after a judicial action is filed. The judge is able to refer the dispute to a mediation procedure;
(iii) Mediation procedures consist of mediation sessions;
(iv) The parties, attorneys, bailiffs and other professionals may take part in mediation sessions;
(v) The time limits for forfeiture and limitation are suspended during the time mediation procedures take place;
(vi) Mediation agreements qualify as executive titles, except where the law provides for a mandatory judicial homologation of such agreements;
(vii) Nevertheless, the judicial homologation of said agreements may be requested.

There is no ground to say that mediation is seen as a popular method for the resolution of commercial disputes. Please note that we do not address family, labor and criminal mediation.

3. Are arbitration clauses in commercial contracts binding and enforceable?

Yes, arbitration clauses in commercial contracts are regarded as binding and enforceable under Portuguese law.

Arbitration clauses in commercial contracts are regarded as independent agreements and remain valid even if the commercial contract itself is found to be null and void. Arbitration clauses will only be found null and void if agreed upon in breach of mandatory provisions (*e.g.* if a special statute deems a certain commercial relation to be exclusively submittable to State courts, or if the arbitration clause is not set in writing (the requisite for the agreement to be in writing is met even if the parties intentions are expressed in different documents - comprising any form of document, including exchanged electronic correspondence between parties –) or if, in light of an arbitration procedure filed by one of the parties, the other party does not object to the existence of such arbitration clause).

Arbitration clauses in commercial contracts may function as a bar to filling suit in a state court. Furthermore, anti-suit injunctions brought before a State court are expressly forbidden.

4. What type of arbitration is commonly used for resolving commercial disputes: ad hoc arbitration or institutional arbitration?

There are no official statistics available, but it seems that *ad hoc* arbitration has been more common in recent years.

It is important to mention though that it is common to have *ad hoc* arbitration proceedings managed by arbitral institutions. In those cases, the proceedings do not observe the arbitration regulation of the institution, but the parties and the arbitrators may benefit from the services and logistic conditions provided for by the said institutions.

5. Which arbitration institutes are most popular?

The most popular Portuguese arbitration institute is the Arbitration Centre of the Portuguese Chamber of Commerce and Industry, established in Lisbon since 1987 (http://www.acl.org.pt).

According to official records, there are 36 arbitral institutions in Portugal, some of them established to solve disputes in very specific matters. For instance, the arbitration centre ARBITRARE solves disputes regarding industrial property (trademarks and patents), domain names, trade names and corporate names (http://www.arbitrare.pt/en). The Arbitration

Centre of the Automotive Sector solves disputes related to the purchase, sale, maintenance or use of automobiles. In different cities in Portugal there are arbitration centres of consumer conflicts, meant to solve disputes regarding consumer rights. The establishment of arbitral institutions requires an authorization from the Minister of Justice.

6. What influence can the parties have on the identity of the arbitrator(s)?

The arbitral tribunal can be formed by one arbitrator or by a panel of an uneven number of arbitrators. Ordinarily parties choose a three arbitrators panel.

The parties are free to appoint the arbitrator or the arbitrators that shall form the arbitral tribunal in the arbitration agreement or in a later document signed by the parties. They can also agree on a procedure for appointing them.

In arbitration with only one arbitrator, if the parties fail to agree on the arbitrator's appointment, any party may request the State court to appoint the arbitrator. In arbitration with three or more arbitrators, each party shall appoint an equal number of arbitrators. Afterwards, the appointed arbitrators shall appoint a further arbitrator who will preside the arbitral tribunal. Unless otherwise agreed upon, when a party does not appoint an arbitrator or when the arbitrators appointed by the parties do not agree on the choice of the presiding arbitrator, any party can request the State court to appoint the remaining arbitrator.

If the parties choose to submit the dispute to an arbitral institution, the arbitrators' appointment by the parties may be limited. In some Arbitration Centres, the arbitrators are selected from an existing list.

7. In what language is an arbitration proceedings conducted?

The parties are free to agree on the language to be used in arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language to be used in the proceedings. Thenceforth, any written statement by a party, any hearing or any arbitral award, decision or other communication by the arbitral tribunal shall be issued in the chosen language.

Having defined the language to be used in arbitral proceedings, the arbitral tribunal may order that any documentary evidence in a different language shall be accompanied by a translation.

8. What types of pre-arbitration measures are available and what are their limitations?

Interim measures may always be requested before State courts. Parties may ask State courts to take any interim measures they deem fit to ensure that the final arbitral award is fully effective.

The Portuguese Law on Voluntary Arbitration (Law no. 63/2011, of 14th December) grants the parties the right to request both interim measures and preliminary orders before arbitral tribunals, unless otherwise agreed upon by the parties.

Parties may ask arbitral tribunals to order the other party to take the following interim measures of protection: to maintain or restore the previous situation until the issuance of the final award; to take all necessary actions or to refrain from any actions in order to prevent all and any harm to the arbitral procedure; to ensure protection of any goods or property in relation to which the final award may be enforced (thus ensuring preservation and/or preventing sale of the said goods or property); to ensure preservation of evidence relevant to the arbitral procedure.

While considering an interim measures request, the arbitral tribunal does not undertake a detailed enquiry into the merits of the dispute and only applies the standard of *prima facie* establishment of a case. Notwithstanding, interim measures will only be adopted if the arbitral tribunal *(i)* deems that a strong presumption of sufficient legal basis exists (*fumus boni iuris*) *(ii)* finds that fear of such right being harmed (*periculum in mora*) is sufficiently proved and *(iii)* concludes that the harm to the defendant does not considerably exceed the harm intended to be prevented by the interim measure.

Preliminary orders may be granted *ex parte* by the arbitral tribunal if disclosure of an interim measure request is sufficient to frustrate the purpose thereof. For that reason, preliminary orders are issued previously to giving notice to the defendant of an interim measure request. The defendant is then given the right to respond to both the preliminary order and the requested interim measure.

Both preliminary orders and interim measures are binding on the parties, but only interim measures are enforceable by State courts.

Preliminary orders and interim measures adopted by the arbitral tribunal are not appealable nor is the state court's decision on the former's enforceability.

9. What are the costs of arbitration proceedings and who bears these costs?

Unless set forth by the arbitration agreement, the parties and the arbitrators shall agree, in writing, upon arbitrators' fees, before the acceptance by the last arbitrator to be appointed. Failing the agreement, arbitrators can decide on the amount of their fees and expenses and furthermore determine the payment by the parties of advance payments, taking into consideration the complexity and value of the dispute and the time spent or to be spent in the arbitral proceedings. In this case, any party may request the State court to reduce the amount of the fees fixed by the arbitrators. If a party fails to pay any fees, arbitrators may suspend or even terminate the proceedings without issuing an award.

Unless otherwise agreed by the parties, the final award shall determine the proportions in which the parties shall bear the costs directly resulting from the arbitration.

The arbitration regulation of the Arbitration Centre of the Portuguese Chamber of Commerce and Industry specifies that arbitration proceedings costs include the arbitrators' fees, the administrative costs and the expenses incurred with the production of evidence. This arbitration regulation sets forth the global amount that is due in any arbitration for arbitrator's fees and administrative costs, and that amount depends on the value of the arbitration.

10. What are the basic rules of document disclosure in arbitration? Which documents do not require disclosure?

The Portuguese Law on Voluntary Arbitration allows parties to choose the rules of the proceedings, including rules on admissible evidence. If the parties do not agree on any matter pertaining to the proceedings, the arbitral tribunal will set out the rules it deems fitting to the dispute resolution. This power includes determining admissibility, relevance, materiality and weight of evidence presented or to be presented. Thus, unless otherwise agreed by the parties, arbitral tribunals are not bound by the Portuguese Code of Civil Procedure.

Having said this, Portuguese Law on Voluntary Arbitration does not set any specific rules on the subject. The only provision pertaining to document disclosure states that the parties may add documents to their application or defence statements. Parties may also mention in such application and defence other means of evidence they shall present before the court.

Usually, parties adopt the rule that all documents intending to produce evidence on relevant facts must be presented with the application and defence filed by the parties or, at the latest, until a few days after (ordinarily 10-15 days) the arbitral tribunal lays down the facts that it considers not yet proved. If a document is only created, or if the party only has access to the document afterwards, the party may still bring the document before the court on these grounds.

11. What is the procedure for witness evidence in arbitration (namely, is it deposition based or witness examination or cross-examination)?

Notwithstanding parties' autonomy to choose the rules of the arbitration proceedings, ordinarily witness evidence in arbitration takes place by examination and cross-examination process. Although deposition based evidence is included in the Portuguese Code of Civil Procedure it is of seldom (if any) use.

Arbitral tribunals do accept written depositions by witnesses. If so requested by the counterparty, witnesses are then subject to hearings before the arbitral tribunal in order to clarify any matter deriving from the written deposition.

12. How are settlement discussions usually conducted (namely whether oral or written and whether between the parties direct or their representatives)? Is the settlement correspondence between the parties and/or counsel privileged (i.e., may not be disclosed to the Arbitrator)?

Portuguese Law on Voluntary Arbitration is silent on this matter. Settlement discussions between parties directly are usually conducted on oral basis due to the rules applying to privileged documents.

Settlement correspondence exchanged between the parties directly are generally and as a rule of practice undertaken on a without prejudice basis. Only if the parties so declare or agree upon will the exchanged correspondence be found privileged (cf. Article 75 of the Portuguese Civil Code).

If settlement discussions are conducted by attorneys all matters discussed are privileged as set forth by the Portuguese Bar Association Statute (cf. Law no. 15/2005, of 26th January, Article 87.1 e) and f)).

13. Under what circumstances can an Arbitration Award be enforced, challenged or annulled?

Unless otherwise previously agreed upon by the parties, arbitration awards are not subject to appeal. On the other hand *æquitas* based awards (as opposed to strict rules of law based awards) are never subject to appeal. Further to the Portuguese Law on Voluntary Arbitration international arbitration awards are also not subject to appeal. Notwithstanding, if the international arbitration procedure is governed by the Portuguese Law on Voluntary Arbitration, the parties may agree to appeal admissibility before another arbitral tribunal.

Where appeal before State courts is possible, it must be filed within 30 days as of the final award notice. The appeal procedure is set out in the Portuguese Code of Civil Procedure, the provisions regarding an appeal against State courts judgments apply. The appeal gives State courts the power to fully review the arbitration award.

Setting aside of domestic or international arbitration awards may be requested before State courts within 60 days as of the notice of the arbitral final award and on the following grounds:

(i) One of the parties to the arbitration agreement was incapacitated, or the said agreement is not valid under the law to which the parties have agreed to submit it, or failing any indication thereon, under the Portuguese Law on Voluntary Arbitration;

(ii) There has been a violation of any of the mandatory principles of due process applicable as per the Portuguese Law on Voluntary Arbitration with influence on the rendered award

(iii) The award deals with a dispute or it contains decisions on matters outside the scope of the arbitration agreement;

(iv) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the parties' agreement and that fact influences the rendered award – if the parties' agreement breaches any mandatory rules or if there is no agreement on this matter, the Portuguese Law on Voluntary Arbitration is applicable. In such situations the grounds for annulment are referred to in the Portuguese Law on Voluntary Arbitration provisions on this matter;

(v) The tribunal decided in quantity or on matters beyond the scope of the submission, or deals with issues on which a decision was not required or does not deal with issues on which a decision was required;

(vi) The award is not signed by the arbitrators or the Chairman, where applicable, nor is it reasoned, as required by the Portuguese Law on Voluntary Arbitration;

(vii) The award is notified to the parties later than the time limits set under the Portuguese Law on Voluntary Arbitration, or agreed to by the parties.

An award may additionally be annulled if the State court finds that:

(i) The dispute is not susceptible of settlement by arbitration under Portuguese law;

(ii) The content of the award is in conflict with Portuguese international public policy.

If the matters that are to be considered set aside can be separated from the other matters of the arbitration award, only the former will be set aside.

Further to the Portuguese Constitution, domestic arbitral tribunals are included in the general courts category (differing in gender not in species). Hence domestic arbitration awards are as binding on the parties as a state court judgment. Therefore, it is not necessary to file an *exequatur* claim.

Enforcement procedures take place before State courts. Enforcement may be refused if any of the grounds for setting aside applies and on the same grounds foreign judgments enforcement may be set aside.

International arbitration awards are subject to a recognition procedure to confer *exequatur* prior to enforcement procedures.

Exequatur will be denied on the grounds set out in the Portuguese Law on Voluntary Arbitration, which do not depart relevantly from those set forth under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and are even more similar to the UNCITRAL Model Law on International Commercial Arbitration. Hence recognition will be refused at the request of the party against whom it is invoked, if that party provides the competent court where recognition or enforcement is sought with proof that:

(i) A party 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 law of the country where the award was made;

(ii) The party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

(iii) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced;

(iv) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;

(v) The award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.

Recognition will also be refused if the court finds that:

(i) The subject matter of the dispute is not capable of settlement by arbitration under the Portuguese law;

(ii) The recognition or enforcement of the award would be contrary to the Portuguese international public policy.

Although not expressly stated under Article 56 of the Portuguese Law on Voluntary Arbitration, recognition is also refused if there is no arbitral agreement or if the said agreement is in breach of any mandatory provisions of the governing law (cf. Article II of the New York Convention). As aforementioned refusal on this ground can only take place if the defendant did object to the existence or the validity of such arbitration clause maintaining such standpoint throughout the whole arbitration procedure.

After a successful recognition procedure the party must file an enforcement procedure to which the aforementioned rules apply.