Global Arbitration Review

The Guide to Challenging and Enforcing Arbitration Awards

General Editor
J William Rowley QC

Editors
Emmanuel Gaillard and Gordon E Kaiser

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Publisher's Note

Global Arbitration Review is delighted to publish this new volume, *The Guide to Challenging and Enforcing Arbitration Awards*.

For those unfamiliar with Global Arbitration Review, we are the online home for international arbitration specialists, telling them everything they need to know about all the developments that matter. We provide daily news and analysis, and a series of more in-depth books and reviews, and also organise conferences and build work-flow tools. Visit us at www.globalarbitrationreview.com.

As the unofficial journal of international arbitration, sometimes we spot gaps in the literature earlier than other publishers. Recently, as J William Rowley QC observes in his excellent preface, it became obvious that the time spent on post-award matters has increased vastly compared with, say, 10 years ago, and it was high time someone published a reference work focused on this phase.

The Guide to Challenging and Enforcing Arbitration Awards is that book. It is a practical know-how text covering both sides of the coin – challenging and enforcing – first at thematic level, and then country by country. We are delighted to have worked with so many leading firms and individuals to produce it.

If you find it useful, you may also like the other books in the GAR Guides series. They cover energy, construction, M&A and mining disputes in the same unique, practical way. We also have books on advocacy in international arbitration and the assessment of damages.

My thanks to the editors for their vision and energy in pursuing this project and to my colleagues in production for achieving such a polished work.

Contents

Editor's Preface

During the past two decades, the explosive and continuous growth in cross-border trade and investments that began after World War II has jet-propelled the growth of international arbitration. Today, arbitration (whether *ad hoc* or institutional) is the universal first choice over transnational litigation for the resolution of cross-border business disputes.

Why parties choose arbitration for international disputes

During the same period, forests have been destroyed to print the thousands of papers, pamphlets, scholarly treatises and texts that have analysed every aspect of arbitration as a dispute resolution tool. The eight or 10 reasons usually given for why arbitration is the best way to resolve cross-border disputes have remained pretty constant, but their comparative rankings have changed somewhat. At present, two reasons probably outweigh all others.

The first must be the widespread disinclination of those doing business internationally to entrust the resolution of prospective disputes to the national court systems of their foreign counterparties. This unwillingness to trust foreign courts (whether based on knowledge or simply uncertainty as to whether the counterparty's court system is worthy – i.e., efficient, experienced and impartial) leaves international arbitration as the only realistic alternative, assuming the parties have equal bargaining power.

The second is that, unlike court judgments, arbitral awards benefit from a series of international treaties that provide robust and effective means of enforcement. Unquestionably, the most important of these is the 1958 New York Convention, which enables the straightforward enforcement of arbitral awards in approximately 160 countries. When enforcement against a sovereign state is at issue, the ICSID Convention of 1966 requires that ICSID awards are to be treated as final judgments of the courts of the relevant contracting state, of which there are currently 161.

Awards used to be honoured

A decade ago, international corporate counsel who responded to the 2008 Queen Mary/PricewaterhouseCoopers Survey on Corporate Attitudes and Practices in Relation to Investment Arbitration (the 2008 Queen Mary Survey) reported positive outcomes on the use of international arbitration to resolve disputes. A very high percentage (84 per cent) indicated that, in more than 76 per cent of arbitration proceedings, the non-prevailing party voluntarily complied with the arbitral award. Where enforcement was required, 57 per cent said that it took less than a year for awards to be recognised and enforced, 44 per cent received the full value of the award and 84 per cent received more than three-quarters of the award. Of those who experienced problems in enforcement, most described them as complications rather than insurmountable difficulties. The survey results amounted to a stunning endorsement of international arbitration for the resolution of cross-border disputes.

Is the situation changing?

As an arbitrator, my job is done with the delivery of a timely and enforceable award. When the award is issued, my attention invariably turns to other cases, rather than to whether the award produces results. The question of enforcing the award (or challenging it) is for others. This has meant that, until relatively recently, I have not given much thought to whether the recipient of an award would be as sanguine today about its enforceability and payment as those who responded to the 2008 Queen Mary Survey.

My interest in the question of whether international business disputes are still being resolved effectively by the delivery of an award perked up a few years ago. This was a result of the frequency of media reports – pretty well daily - of awards being challenged (either on appeal or by applications to vacate) and of prevailing parties being required to bring enforcement proceedings (often in multiple jurisdictions).

Increasing press reports of awards under attack

During 2018, *Global Arbitration Review*'s daily news reports contained literally hundreds of headlines that suggest that a repeat of the 2008 Queen Mary Survey today could well lead to a significantly different view as to the state of voluntary compliance with awards or the need to seek enforcement.

A sprinkling of last year's headlines on the subject are illustrative:

- 'Well known' arbitrator sees award set aside in London
- Gazprom challenges gas pricing award in Sweden
- ICC award set aside in Paris in Russia–Ukrainian dispute
- Yukos bankruptcy denied recognition in the Netherlands
- Award against Zimbabwe upheld after eight years
- Malaysia to challenge multibillion-dollar 1MBD settlement
- Uzbekistan escapes Swiss enforcement bid
- India wins leave to challenge award on home turf

Regrettably, no source of reliable data is available as yet to test the question of whether challenges to awards are on the increase or the ease of enforcement has changed materially

since 2008. However, given the importance of the subject (without effective enforcement, there really is no effective resolution) and my anecdote-based perception of increasing concerns, last summer I raised the possibility of doing a book on the subject with David Samuels (*Global Arbitration Review*'s publisher). Ultimately, we became convinced that a practical, 'know-how' text that covered both sides of the coin – challenges and enforcement – would be a useful addition to the bookshelves of those who more frequently than in the past may have to deal with challenges to, and enforcement of, international arbitration awards. Being well equipped (and up to date) on how to deal with a client's post-award options is essential for counsel in today's increasingly disputatious environment.

David and I were obviously delighted when Emmanuel Gaillard and Gordon Kaiser agreed to become partners in the project.

Editorial approach

As editors, we have not approached our work with a particular view on whether parties are currently making inappropriate use of mechanisms to challenge or resist the enforcement of awards. Any consideration of that question should be made against an understanding that not every tribunal delivers a flawless award. As Pierre Lalive said in a report 35 years ago:

> *an arbitral award is not always worthy of being respected and enforced; in consequence, appeals against awards [where permitted] or the refusal of enforcement can, in certain cases, be justified both in the general interest and in that of a better quality of arbitration.*

Nevertheless, the 2008 Queen Mary Survey, and the statistics kept by a number of the leading arbitral institutions, suggest that the great majority of awards come to conclusions that should normally be upheld and enforced.

Structure of the guide

This guide is structured to include, in Part I, coverage of general matters that will always need to be considered by parties, wherever situated, when faced with the need to enforce or to challenge an award. In this first edition, the 13 chapters in Part I deal with subjects that include (1) initial strategic considerations in relation to prospective proceedings, (2) how best to achieve an enforceable award, (3) challenges generally, (4) a variety of specific types of challenges, (5) enforcement generally, (6) the enforcement of interim measures, (7) how to prevent asset stripping, (8) grounds to refuse enforcement, and (9) the special case of ICSID awards.

Part II of the book is designed to provide answers to more specific questions that practitioners will need to consider when reaching decisions concerning the use (or avoidance) of a particular national jurisdiction – whether this concerns the choice of that jurisdiction as a seat of an arbitration, as a physical venue for the hearing, as a place for enforcement, or as a place in which to challenge an award. This first edition includes reports on 29 national jurisdictions. The author, or authors, of each chapter have been asked to address the same 35 questions. All relate to essential, practical information on the local approach and requirements relating to challenging or seeking to enforce awards in each jurisdiction. Obviously, the answers to a common set of questions will provide readers

with a straightforward way in which to assess the comparative advantages and disadvantages of competing jurisdictions.

Through this approach, we have tried to produce a coherent and comprehensive coverage of many of the most obvious, recurring or new issues that are now faced by parties who find that they will need to take steps to enforce these awards or, conversely, find themselves with an award that ought not to have been made and should not be enforced.

Quality control and future editions

Having taken on the task, my aim as general editor has been to achieve a substantive quality consistent with *The Guide to Challenging and Enforcing Arbitration Awards* being seen as an essential desktop reference work in our field. To ensure content of high quality, I agreed to go forward only if we could attract as contributors, colleagues who were some of the internationally recognised leaders in the field. Emmanuel, Gordon and I feel blessed to have been able to enlist the support of such an extraordinarily capable list of contributors.

In future editions, we hope to fill in important omissions. In Part I, these could include chapters on successful cross-border asset tracing, the new role played by funders at the enforcement stage, and the special skill sets required by successful enforcement counsel. In Part II, we plan to expand the geographical reach with chapters on China, Saudi Arabia, Turkey and Venezuela.

Without the tireless efforts of the Global Arbitration Review team at Law Business Research, this work never would have been completed within the very tight schedule we allowed ourselves; David Samuels and I are greatly indebted to them. Finally, I am enormously grateful to Doris Hutton Smith (my long-suffering PA), who has managed endless correspondence with our contributors with skill, grace and patience.

I hope that all my friends and colleagues who have helped with this project have saved us from error – but it is I alone who should be charged with the responsibility for such errors as may appear.

Although it should go without saying, this first edition of this publication will obviously benefit from the thoughts and suggestions of our readers on how we might be able to improve the next edition, for which we will be extremely grateful.

J William Rowley QC

April 2019

London

Part II

Challenging and Enforcing Arbitration Awards: Jurisdictional Know-How

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Portugal

Frederico Gonçalves Pereira, Miguel Pinto Cardoso, Rui Andrade, Filipe Rocha Vieira, Joana Neves, Catarina Cunha and Matilde Líbano Monteiro[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

According to the Portuguese Voluntary Arbitration Law (VAL), which was enacted in December 2011 and entered into force in March 2012, the award shall:

- be made in writing and signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, signatures of the majority of the tribunal's members or that of the chairman, if the award is to be made by the latter, shall suffice, provided that the reason for the omission of the remaining signatures is stated in the award;
- state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is rendered on the basis of a settlement of the parties (award by consent);
- state the date on which it was rendered, as well as the place of arbitration;
- determine the proportions in which the parties shall bear the costs directly resulting from the arbitration, unless otherwise agreed by the parties; and
- after its completion, be immediately notified through delivery to each of the parties of a copy signed by the arbitrator or arbitrators.

1 Frederico Gonçalves Pereira, Miguel Pinto Cardoso and Rui Andrade are partners, Filipe Rocha Vieira and Joana Neves are managing associates and Catarina Cunha and Matilde Líbano Monteiro are senior associates at Vieira de Almeida (VdA).

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

Yes, the VAL establishes that any party may, within 30 days of receipt of the award and with notice to the other party, request the arbitral tribunal to correct any error in computation, any clerical or typographical error or any error of an identical nature in the award or to clarify any obscurity or ambiguity of the award or of the reasons on which it is based. If the arbitral tribunal considers the request to be justified, it shall make the correction or give the clarification within 30 days of receipt of the request. This clarification shall form part of the award. The arbitral tribunal may also, on its own initiative and within 30 days of the date of notice of the award, correct any of the above-mentioned errors in the award.

Within 30 days of receipt of the award, any party may also, with notice to the other party, request the arbitral tribunal to make an additional award as regards parts of the claim or claims submitted in the arbitral proceedings but omitted from the award, unless the parties agreed otherwise. If the arbitral tribunal considers the request to be justified, it shall grant the additional award within 60 days.

Appeals from an award

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

According to the VAL, an award is only subject to appeal if the parties have expressly agreed on such a possibility in the arbitration agreement and provided that the dispute has not been decided *ex aequo et bono* or through amiable composition.

However, if the arbitration agreement was concluded while the VAL of 1986 was in force, the parties maintain the rights to the appeals they would have had, had the arbitral proceedings been conducted under this law. The consequence is that, unless the parties have waived the right to appeal, the same appeals that are admissible regarding a judgment of the court of first instance may be lodged with the court of appeal against the arbitral award.

In international arbitration, the award made by the arbitral tribunal is not subject to appeal, unless the parties have expressly agreed on the possibility of an appeal to another arbitral tribunal and regulated its terms.

The VAL establishes that the right to apply for the setting aside of an arbitral award cannot be waived. The VAL allows a waiver only if a party knew that a provision of the VAL that parties can derogate from, or any condition set out in the arbitration agreement, was not respected and the party proceeds without making a timely objection.

An arbitral award may be set aside if:

- a party, within 60 days of the date on which it received notification of the award, applies to set aside the award, furnishing proof that:
  - one of the parties to the arbitration agreement was under some incapacity; or that said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the VAL;
  - there has been a violation within the proceedings of fundamental principles and the violation had a decisive influence on the outcome of the dispute;
  - the award dealt with a dispute not contemplated by the arbitration agreement, or contains decisions beyond the scope of the agreement;
  - the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless the 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 this law, and, in any case, this inconformity had a decisive influence on the decision of the dispute;
  - the arbitral tribunal has decided in an amount in excess of what was claimed or on a different claim from that which 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;
  - the award was made in violation of the requirements of written form, signature of the arbitrator or arbitrators, and assertion of reasons upon which it is based; or
  - the award was notified to the parties after the maximum time limit of 12 months since the date of acceptance of the last arbitrator, without the parties agreeing, or the arbitral tribunal deciding, to extend the time limit; or
- the court finds that:
  - the subject matter of the dispute cannot be decided by arbitration under Portuguese law; or
  - the content of the award is in conflict with the principles of international public policy of the Portuguese state.

Both the application for appeal and the application for setting aside an arbitral award are presented directly in the court of appeal.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

The recognition and enforcement of arbitral awards is regulated both by the VAL and the Portuguese Civil Procedure Code (PCPC).

Portugal is party to several bilateral and multilateral treaties regarding the recognition and enforcement of arbitral awards. The most important bilateral treaties include those between Portugal and Portuguese-speaking countries, such as Angola, Cape Verde, Guinea-Bissau, Mozambique and São Tomé and Príncipe. Portugal has also signed a Judiciary Cooperation

Agreement with the Special Administrative Region of Macao (People's Republic of China). As for multilateral treaties, Portugal is a party to the Geneva Convention on the Execution of Foreign Arbitral Awards, the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States, and the Inter-American Convention on International Commercial Arbitration.

The New York Convention

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

Portugal is a party to the New York Convention, which entered into force in January 1995. Portugal made the reciprocity reservation, meaning that the Convention is only applicable to arbitral awards rendered in a state that is also a party to the Convention. This reservation is of limited practical effect considering the more-favourable-right provision of the Convention and given that (1) Portugal is a party to treaties that allow for the recognition of foreign arbitral awards, and (2) the requirements for the recognition of foreign arbitral awards contained in the VAL are very similar to those of the Convention.

Recognition proceedings

Competent court

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

The court that has jurisdiction over an application for recognition of foreign arbitral awards in Portugal is the court of appeals in the same location as the domicile of the person against whom the decision is to be invoked. As for the enforcement of foreign arbitral awards, the court with jurisdiction is the first instance court of the domicile of the person against whom the decision is enforced. The enforcement of domestic arbitral awards must take place in the first instance court in whose jurisdiction the place of arbitration is located.

Jurisdictional issues

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

Without prejudice to the grounds for refusal of the recognition, which are similar to those of the New York Convention (see question 12 for details), there are no particular requirements for the competent courts (as per question 6) to have jurisdiction over an application for the enforcement of an arbitral award (domestic or foreign) other than the general requirements to initiate civil proceedings, notably those of legal personality and legal capacity and having a legitimate interest in the application.

Identifying assets in the application is not a requirement for recognition.

Form of the recognition proceedings

8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

The recognition proceedings are adversarial.

The party against whom the recognition is sought has 15 days to challenge the recognition (see question 12 for details). The applicant may then respond thereto within 10 days.

After the written pleadings of the parties have been made and all the procedural steps deemed necessary by the court have been taken, the parties and the public prosecutor will be granted 15 days to submit closing arguments.

The decision rendered by the Court of Appeals is subject to appeal to the Supreme Court.

Form of application and required documentation

9 What documentation is required to obtain the recognition of an arbitral award?

The applicant must provide an authenticated copy of the award or a duly certified copy, as well as the original of the arbitration agreement or a duly certified copy and proof that the award was duly notified to the parties. If both the agreement and the award are not written in Portuguese, a certified translation must be furnished. Copies must be filed in the number of parties against which the recognition is sought.

Translation of required documentation

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

All documents submitted in court proceedings that are not written in Portuguese must be translated. If there are founded doubts about the translation, the applicant may be ordered by the court to provide a duly certified translation by a notary or a diplomatic or consular officer from the country of the document's original language.

Other practical requirements

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

To apply for recognition and enforcement of an arbitral award, the applicant must be represented by a lawyer and pay court fees, which may be claimed (as can lawyer fees to a certain extent) from the party against whom the recognition and enforcement is sought if the court renders a favourable decision. Parties in court proceedings are bound by the duties of cooperation, procedural good faith and reciprocal correction.

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

Portuguese courts will recognise and enforce an arbitral award, whether it deals with the whole, or with an independent part, of the matter in dispute, to the extent that it contains a final and binding decision on any of the claims. While procedural orders are not enforceable as awards, awards on costs and settlements formalised in an 'award by consent' that finally resolve one or more of the claims may be recognised and enforced as an award.

Unless the tribunal has decided otherwise, awards deciding on interim measures are enforceable before state courts. The court may, if it considers it justified, order the party seeking recognition or enforcement of the interim award to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security, or where such a decision is necessary to protect the rights of third parties.

A party may oppose the recognition or enforcement of an interim award on grounds similar to those established in the UNCITRAL Model Law. The state court's decision on recognition or enforcement of the interim award cannot be subject to appeal.

When deciding whether the award is final, partial or interim, Portuguese courts will look at the substance of the decision and will not be bound to the tribunal's qualification of the decision.

Grounds for refusing recognition of an award

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

Recognition of foreign arbitral awards may be refused on the grounds set forth in the Convention or, when the Convention is not applicable, under certain grounds established in the VAL, which are very similar to those of the Convention.

If a party against whom an award is invoked requests recognition or enforcement of that award by the competent court, that party shall furnish proof of the following: (1) the incapacity of the parties or invalidity of the arbitration agreement 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 rendered; (2) 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 its case; (3) 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; or (4) 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 a court finds that (1) the subject matter of the dispute cannot be settled through arbitration under Portuguese law, or (2) recognition of the award would lead to a result that is clearly incompatible with the international public policy of the Portuguese state.

Portuguese courts have repeatedly adopted a strict interpretation of these rules emphasising the exhaustive nature of the grounds for refusal of recognition and enforcement of foreign arbitral awards and by refusing to review the merits of the dispute (this also applies to the recognition and enforcement of interim measures).

Effect of a decision recognising an award

14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

A foreign award recognised by a Portuguese court is immediately enforceable in substantially the same way as a domestic award. Additionally, upon recognition, parties may assert the *res judicata* effect of the award or use it to raise a set-off defence in any legal proceedings.

Decisions refusing to recognise an award

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

The decision of the court of appeals refusing to recognise the arbitral award can only be subject to appeal to the Supreme Court.

Stay of recognition or enforcement proceedings pending annulment proceedings

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

Recognition or enforcement proceedings may be stayed pending annulment proceedings at the seat under the New York Convention or, when the Convention is not applicable, under the VAL, but stay is not mandatory. When deciding the request for suspension, Portuguese courts enjoy wide discretion and will particularly weigh the prospects of success of the annulment proceedings, the foreseeable duration of the suspension, the damage that it may cause to the plaintiff and the adequacy of a security to prevent such damage.

Security

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

The party requesting the suspension of the recognition or enforcement proceedings may be ordered to post security, usually a deposit or a bank guarantee, either as a condition to the adjournment or during the suspension of the proceedings at the request of the plaintiff. The court's power in this regard is discretionary and will be exercised in light of the specific circumstances of the case, in particular the prospects of success of the annulment proceedings, the solvability of the debtor and the prospects of success of the seizure of his or her assets after the suspension period. The court will also balance the benefits and damage that the security may cause to both parties.

The amount of the security should cover the quantum awarded and foreseeable delay interests.

Recognition or enforcement of an award set aside at the seat

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

Portuguese courts will in principle reject the recognition and enforcement of awards that have been set aside at the seat of arbitration pursuant to the New York Convention or, when the Convention is not applicable, under the VAL.

However, it is recognised by Portuguese legal scholars that a foreign award set aside at the seat may be recognised in Portugal in exceptional circumstances if the decision annulling the award was obtained in breach of due process or was contrary to Portuguese international public policy. Nevertheless, to the best of our knowledge, this issue has not yet been discussed by Portuguese courts.

If the award is set aside at the seat after the decision recognising the award has been issued by a Portuguese court, the judgment on the annulment may still be used as grounds to oppose enforcement of the award.

Service

Service in your jurisdiction

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

In civil proceedings before Portuguese courts, documents will usually be served by registered mail, with acknowledgement of receipt, although service may also be performed

in person by a judicial officer or by a lawyer. If the addressee is a legal entity, service must be made at its registered office. In very exceptional cases, service may be performed by public announcement. Documents to be served must be translated into Portuguese.

Service out of your jurisdiction

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

The procedure for service of documents abroad is governed by one of three sets of rules, depending on the defendant's state of domicile:

Service to an addressee located in an EU Member State is governed by Regulation (EC) No. 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, which shall be made through direct communication between transmitting and receiving agencies designated by Member States, consular or diplomatic channels, post or direct service on the addressee.

Service to an addressee located outside the European Union but in a state that is a party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 1965, which shall be made through the competent authorities designated in the states of origin and destination or by post, direct communication between the states' central authorities or diplomatic channels.

Where there is no applicable international convention or EU regulation, service will be performed in accordance with the PCPC by registered mail, with acknowledgement of receipt, or through diplomatic channels.

Identification of assets

Asset databases

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

Yes, there are several publicly available registries allowing for the identification of different types of assets, namely land registry (immovable property), vehicle registry, aeronautical registry, ship registry, commercial registry (companies) and industrial property registry (trademarks, utility models, patents, designs).

Moreover, there is an Enforcement Public List available online, which identifies debtors whose assets subject to seizure were found to be insufficient to pay their debts (www.citius.mj.pt/portal/execucoes/listapublicaexecucoes.aspx).

Information available through judicial proceedings

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

Judicial proceedings are public in Portugal, as a matter of principle. Additionally, there is a list available online reporting on whether a given company is facing, or has previously faced, any bankruptcy proceedings (www.citius.mj.pt/portal/consultas/consultascire.aspx).

Moreover, enforcement agents may obtain information regarding identification and location of the debtor's assets (located in Portugal) subject to seizure, as they are given access to databases of the tax authority, social security and the various public registers. As regards banking information, the Bank of Portugal must disclose to enforcement agents the name of the financial institution where the debtor has bank accounts and bank deposits. When this information is protected by tax secrecy or some other confidentiality regime, enforcement agents need the court's authorisation to request said information.

Furthermore, under a general duty to cooperate with the court, parties (including debtors or third parties) may be forced to disclose information, including specific documents that are relevant to the enforcement, whether or not they relate to the debtor's assets.

Enforcement proceedings

Availability of interim measures

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

Yes, interim measures against assets are available under Portuguese law and they are relevant, notably, in the context of a pending award recognition procedure.

The interim measures' procedure is set out in the PCPC (see question 24) and they may be granted by the state courts against assets owned by the Portuguese state, though limited to assets that are not part of the public domain – deemed absolutely unseizable – or used for public utility – deemed relatively unseizable.

Regarding assets owned by a sovereign state other than the Portuguese state, see question 34.

Procedure for interim measures

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?

The PCPC sets forth two types of interim measures: non-specified and specified.

A non-specified interim measure is one that allows the party to request the adoption of any protective or pre-emptive interim measure that is not specified, provided it is adequate to secure enforcement of the award. If this is the case, the applicant must demonstrate the fulfilment of three legal conditions: (1) *periculum in mora*; (2) *fumus bonus iuris*; and

(3) adequate balance of interests (the harm resulting from the measure cannot outweigh the damage that the requesting party wants to avoid).

Before granting the non-specified interim measure, the court hears the opposing party, except when that may endanger the effectiveness of the interim measure.

Regarding specified interim measures against assets, the PCPC provides the following: (1) attachment; (2) listing of assets; and (3) interim restitution of possession. These measures may be *ex parte* or not, depending on the specific measure in question or the specific circumstances of the case.

If and when the court grants any of the above-mentioned specified interim measures without hearing the respondent, the latter can present its defence subsequently. The court's ensuing decision (and the court's potential decision to attribute a definitive nature to the interim measure) is subject to appeal.

All proceedings regarding interim measures are treated as urgent.

Interim measures against immovable property

25 What is the procedure for interim measures against immovable property within your jurisdiction?

There are no specific rules governing the procedure for interim measures regarding immovable property other than those outlined in question 24.

Interim measures against movable property

26 What is the procedure for interim measures against movable property within your jurisdiction?

There are no specific rules governing the procedure for interim measures against movable property other than those outlined in question 24.

Interim measures against intangible property

27 What is the procedure for interim measures against intangible property within your jurisdiction?

It is possible to seek interim measures against industrial and intellectual property rights in accordance with the Industrial Property Code and the Code of Copyright and Related Rights.

Courts have the power, at the request of a party, to grant any appropriate measures to prevent any imminent violation or prohibit a current violation of the alleged right, whenever there is a violation of, or justified concern that another party may cause serious and difficult-to-repair harm to, an industrial or intellectual property right. The applicant shall demonstrate that (1) he or she is the holder of the property right in question and (2) a violation of that right exists or is imminent.

Furthermore, courts have the power, upon request, to grant interim and urgent measures to preserve evidence of the violation of industrial or intellectual property rights, including

a detailed description of the situation (with or without the collection of samples) and actual attachment of assets or the materials used for their production.

Finally, courts can order pre-emptive attachment of assets in two circumstances:

- When an infraction at the commercial scale (i.e., acts that violate industrial or intellectual property rights and of which the purpose is to obtain an economic or commercial advantage) exists or is imminent, the court may grant the pre-emptive attachment of the movable and immovable assets owned by the alleged violator, or the communication of or access to banking, financial or commercial data and information relating to the violator, or both.
- When there is a violation of industrial and intellectual property rights, the court may order the attachment of the assets suspected of being used in that violation, or of any instruments that can only be used for the purposes of the violation.

The applicant of both types of pre-emptive attachment of assets shall provide all reasonable evidence of his or her ownership of the right and that the possibility of obtaining compensation for losses and damage is compromised.

Any of these measures shall be granted only after the court hears the respondent, except when that may cause irreparable damage to the applicant. In the latter case, after the granting of the measure, the respondent is immediately notified and may request a revision of the implemented measures within a period of 10 days, providing evidence and presenting arguments that have not yet been considered by the court.

Attachment proceedings

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

The judicial attachment or seizure (*penhora*) of the debtor's assets in the context of enforcement proceedings may only target assets that are sufficient to cover the amount in debt and the foreseeable costs of the enforcement proceedings. Hence, only assets and rights that can be evaluated in pecuniary terms may generally be seized.

Enforcement proceedings begin with an application filed by the creditor based on an existing enforcement title (court ruling or arbitral award; documents issued or authenticated by a notary public or by other entities with the same qualifications, which either originate or recognise a valid obligation; credit instruments such as cheques, promissory notes; or documents to which the law has conferred direct enforceability). Besides indicating the underlying facts of the enforcement and the net value of the credit in question, the application should also indicate the assets to be seized, bank accounts owned by the debtor and the identity of the debtor's employer, as well as the identity of the enforcement agent.

In what concerns the enforcement of arbitral awards, and when there are no grounds to summon the debtor prior to the attachment of the assets, assets will be seized immediately after the enforcement application has been filed. Attachment is carried out by the enforcement agent, who normally also acts as the asset's custodian. Once seizure of the assets has been secured, the debtor is made aware of the same. The debtor may then challenge the enforcement application itself or the specific enforcement measures, or both.

The attachment may be suspended if security has been provided by the debtor in the meantime; nevertheless, the enforcement proceedings will still proceed.

Creditors with registered and known rights over the seized assets may claim their credits thereafter. The enforcement judge will then review their credits and, if necessary, rank them accordingly.

Attachment against immovable property

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

Please refer to question 28. In addition, it should be noted that attachment of immovable property is undertaken via electronic communication thereof by the enforcement agent to the relevant land registry. Once the asset's attachment has been duly registered, notice of the attachment will be made public and affixed at the property's door. Unless expressly excluded, the attachment will automatically encompass the property's proceeds.

Attachment against movable property

30 What is the procedure for enforcement measures against movable property within your jurisdiction?

Please refer to question 28. In addition, it should be noted that if the movable assets are subject to registry, then their attachment will be carried out according to the rules governing the attachment of immovable assets.

Attachment against intangible property

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

Please refer to question 28.

Enforcement against foreign states

Applicable law

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

No, there are no specific rules.

Service of documents to a foreign state

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

Portuguese law does not provide for specific rules on the matter. Yet, jurisprudence has consistently asserted that foreign states may be summoned to proceedings as any other parties are (see response to question 20).

Immunity from enforcement

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

Foreign state immunity is not dealt with expressly by Portuguese law. However, the courts and authorities widely recognise foreign state immunity as an international custom, which, in turn, and pursuant to the Portuguese Constitution, is an integral part of the Portuguese legal order.

Notwithstanding, the notion of foreign state immunity is interpreted restrictively, that is to say, it is limited to *ius imperii* acts (although the exact meaning of the contemporary notion of restrictive state immunity is still subject to a wide level of controversy among Portuguese jurisprudence and scholars).

In late 2006, Portugal ratified the Convention on Jurisdictional Immunities of States and Their Property. Upon entry into force of this Convention (which is dependent on a minimum number of signatory states being reached), it will become a part of the Portuguese legal order, pursuant to the Portuguese Constitution.

Waiver of immunity from enforcement

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

Yes, it is possible for a foreign state to waive immunity from enforcement in Portugal, but only to the extent that it is allowed for under customary law. However, such a waiver must be express and clear.

Appendix 1

About the Authors

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Frederico Gonçalves Pereira is dispute resolution group executive partner and a litigation and arbitration partner. He has been involved in many cases representing several domestic and international clients in disputes involving commercial law before judicial courts as well as in arbitration before Portuguese and international entities. In addition, he has been active in out-of-court negotiations involving groups of companies and public entities. More recently, he has gained extensive experience in insolvency and restructuring under Portuguese law, having represented clients in many of the most important cases in Portugal in the past five years.

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