Global Arbitration Review

The Guide to Advocacy

Editors
Stephen Jagusch QC, Philippe Pinsolle and Alexander G Leventhal

Fifth Edition

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Publisher's Note

Global Arbitration Review is delighted to publish this new edition of *The Guide to Advocacy*.

For those new to Global Arbitration Review (GAR), we are the online home for international arbitration specialists, telling them all they need to know about everything that matters.

Most know us for our daily news and analysis. But we also provide more in-depth content: including books like this one; regional reviews; conferences with a bit of flair to them; and time-saving workflow tools. Visit us at www.globalarbitrationreview.com to find out more.

As the unofficial 'official journal' of international arbitration, sometimes we spot gaps in the literature. At other times people point them out to us. That was the case with advocacy and international arbitration. We are indebted to editors Philippe Pinsolle and Stephen Jagusch for having spotted the gap and suggesting we cooperate on something.

The Guide to Advocacy is the result.

It aims to provide those newer to international arbitration with the tools to succeed as an advocate, whatever their national origin, and to provide the more experienced with insight into cultural and regional variations. In its short lifetime it has grown beyond either GAR's or the editors' original conception. One of the reasons for its success are the 'arbitrator boxes' – see the Index to Arbitrator's Comments on page ix if you don't know what I mean) – wherein arbitrators, many of whom have been advocates themselves, share their wisdom and war stories, and divulge what advocacy techniques work from their perspective. We have some pretty remarkable names (and are always on the look out for more – so please do share this open invitation to get in touch with anyone who has impressed you).

Alas since the last edition we lost one of those remarkable names with the passing of Stephen Bond (1943–2020). Steve was a former head of the ICC and of White & Case's international arbitration team, and a refreshingly clear-eyed thinker. As with Emmanuel Gaillard in 2021, the world of international arbitration was suddenly much poorer when he went. I would urge those who have not seen the two GAR pieces published in commemoration to look them up.[1] One of the things that comes across strongly is how much Steve loved to teach, in his own fashion. With that in mind we thought it would be

1 https://globalarbitrationreview.com/tributes-stephen-bond; https://globalarbitrationreview.com/stephen-bond-1943-2020.

fitting to preserve his arbitrator boxes for the benefit of future generations. So you will still see his name appearing throughout.

We hope you find the guide useful. If you do, you may be interested in some of the other books in the GAR Guides series, which have the same tone. They cover energy, construction, M&A, and mining disputes and (from later this year) evidence, and investor–state disputes, in the same unique, practical way. We also have a guide to assessing damages, and a citation manual (*Universal Citation in International Arbitration - UCIA*). You will find all of them in e-form on our site, with hard copies available to buy if you aren't already a subscriber.

My thanks to our editors Stephen Jagusch QC, Philippe Pinsolle and Alexander G Leventhal for their vision and editorial oversight, to our exceptional contributors for the energy they have put into bringing it to life, and to my colleagues in our production team for achieving such a polished work. And also to practitioners Neville Byford, Stephen Fietta and Sean Upson ('The Role of the Expert in Advocacy') and Flore Poloni and Kabir Duggal ('Tips for Second Chairing an Oral Argument') for giving us extra material to enrich those chapters.

David Samuels
Publisher, GAR
August 2021

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Cultural Considerations in Advocacy: Portuguese-Speaking Africa

Rui Andrade and Catarina Carvalho Cunha[1]

In formal terms, Portuguese-speaking Africa, also known as Lusophone Africa, is made up of six countries in which Portuguese is an official language: Angola, Cape Verde, Guinea-Bissau, Mozambique, São Tomé and Príncipe, and Equatorial Guinea. The latter amended its Constitution in 2011 to include Portuguese as one of its official languages, tellingly, as part of a strategy to accede to the Lusophone Commonwealth or Community of Portuguese Language Countries, to which Brazil and Timor-Leste also belong.

Now, whereas Angola, Cape Verde, Guinea-Bissau, Mozambique and São Tomé and Príncipe were colonies of Portugal until the mid 1970s, Equatorial Guinea was claimed from Portugal by Spain in 1778 and remained part of the latter's empire until 1968. Thus, whereas the first five countries' legal regimes and advocacy culture stem from and were built upon the same backbone, this is not the case with Equatorial Guinea, whose law and regime, though also civil law-based, has significant differences. This chapter is therefore focused on those first five Portuguese-speaking African countries.

Since their independence from Portugal, Angola, Cape Verde, Guinea-Bissau, Mozambique, and São Tomé and Príncipe have developed and shaped their legal regimes, in the majority of sectors, to fit their own individual needs – quite significantly in Guinea Bissau's case since, in 1994, it acceded to the Organisation for the Harmonisation of Business Law in Africa (OHADA) Convention and adopted its Uniform Acts. Nevertheless, all these countries still incorporate as their own the 1966 Portuguese Civil Code (which is, for the most part, the same Code that is in force in Portugal to date) though with variances that have been adopted over time – mostly to do with family law – and the 1967 Portuguese Code on Civil Procedure. However, Mozambique, Cape Verde and, most recently, Angola have since adopted new statutes to regulate insolvency – a field of law that was formerly provided for in the Code on Civil Procedure – which they did, respectively, via Law No. 1/2013 dated

1 Rui Andrade is a partner and Catarina Carvalho Cunha is a managing associate at Vieira de Almeida.

4 July 2013, Law No. 116/VIII/2016 dated 22 March 2016 and Law No. 13/21 dated 10 May 2021, while Guinea-Bissau has adopted the OHADA Uniform Acts on Insolvency, and on Simplified Recovery Procedures and Measures of Execution. Angola has also been working on new legislation in this domain, but as at June 2021, this statute has not yet been enacted.

It follows that Angola, Cape Verde, Guinea-Bissau, Mozambique, and São Tomé and Príncipe all share a civil law legal system, with statutes as their primary source of law. Consequently, there is no system of precedent and case law, which are viewed as secondary sources of law, as is legal writing. Additionally, to date, none of these countries has set up relevant case law records or databases to be available for consultation by the general public or those engaged in the legal profession, it being common for lawyers exercising law in these jurisdictions (and the judiciary itself) to revert to Portuguese jurisprudence as a means to sustain and uphold legal arguments. On the other hand, it is worth mentioning that in certain areas of law, traditional customary law still plays a crucial role in these countries.

Written stage of proceedings: pleadings

In Angola, Cape Verde, Guinea-Bissau, Mozambique, and São Tomé and Príncipe, civil proceedings are designed to incorporate four stages of written pleadings within specific deadlines.

To launch proceedings, the claimant must file a statement of claim (SOC)[2] before the court with an outline of its underlying factual and legal reasoning, the relief sought and an indication as to the claim's economic value, which must be submitted with all the necessary evidentiary documents to support it. Judicial costs (an initial fee) indexed to the claim's value must be paid when the SOC is filed.

As soon as the SOC has been filed, the court clerk verifies that all the necessary formal requirements have been met and summoning of the defendant to the proceedings follows.

Service under the law of Angola, Cape Verde, Guinea-Bissau, Mozambique, and São Tomé and Príncipe is, as a rule, carried out in person and not by post; in addition, personal service is exclusively carried out by judicial clerks or officials, that is to say the law does not allow for service to be rendered by attorneys or any other service agents as occurs in other parts of the world. If the defendant is a company, service will be carried out before its legal representative at the company's headquarters or, if this is not possible, before any company employee.

When the defendant lives or is domiciled abroad, service is carried out in accordance with the provisions set forth in international treaties or conventions to which the relevant country is a party, or, and in the absence of any such provisions, through diplomatic means via rogatory letters. Naturally, this delays proceedings considerably since serving parties abroad in all these jurisdictions typically takes up a great deal of time.

On this note, it is worth highlighting that although the law allows and foresees that when a defendant lives or is domiciled abroad and there is no applicable treaty or convention on the matter, he or she may be summoned to the proceedings by registered courier with acknowledgment of receipt, this never occurs in practice. This is because postal

2 The Portuguese term is *petição inicial*.

services in these countries are very rudimentary. It also means that all subsequent notices to be made within proceedings are dependent on the relevant attorneys' visits to court. When proceedings are pending with courts that are a significant distance from the attorneys' or parties' offices, or both, this translates into added constraints, since parties and their attorneys are frequently contacted by the courts to arrange for transport of the relevant notices.

In its statement of defence, the defendant must offer all factual and legal grounds that make up for its defence, alongside all the evidentiary documents to support it. Counterclaims may also be filed by the defendant with its statement of defence so long as the grounds emerge from the facts and grounds of the SOC. Set-off claims are allowed so long as they are in accordance with the underlying legal requirements.

Joinder and rejoinder follow.

Pleadings are markedly formal in both style and language. Since judges are historically generalists, rather than specialists in specific areas of law – except those who preside over specialised courts, such as those set up to govern tax or maritime law issues – objective, clear-cut and succinct pleadings are advisable.

Once the written stage of proceedings is over, the judge may choose to convene a preliminary hearing with a view to reconciling the parties. If no such hearing is held, the judge then draws up a court order ruling on any pre-emptive issue of law raised by the parties in their pleadings and with a selection of facts (1) that are deemed to have already been established in the proceedings based on party confession or documents with full and complete evidentiary force and (2) that are still to be proven. At this stage, the presiding judge may in any case find that he or she is already able to decide on the merits without going to trial either because the merits of the case are solely based on legal grounds or, when this is not the situation, he or she finds that the proceedings already contain all the necessary elements for a judgment to be delivered.

Courts' prerogatives

The Code on Civil Procedure in Angola, Cape Verde, Guinea-Bissau, Mozambique, and São Tomé and Príncipe presents a mixed approach between the inquisitorial and adversarial systems. Thus, although the general rule is that each party must prove the facts that it claims, courts also have the duty to seek the truth, and in view of such a duty, can order that evidence be provided for this purpose *ex officio*. This means that in these jurisdictions the court may, on its own initiative, or following the request of one of the parties, request that certain information, opinions, photographs, drawings, objects and any document necessary to the clarification of the truth be disclosed or brought before it. Should parties refrain from filing the requested documents, this may result in reverting to the rules on the burden of proof or lead to the determination of fines or the court adopting coercive measures to guarantee proper filing.

The court will also decide whether to waive certain privileges, if so requested.

Court hearings and taking of evidence

The means of evidence available to counsel for parties under Angola, Cape Verde, Guinea-Bissau, Mozambique, and São Tomé and Príncipe law are evidence by party confession, documentary evidence, expert evidence, judicial inspections and witness statements.

Though all these means are provided for in the law, as a rule, parties tend to stick to party confession, documentary evidence and witness statements. Further, although party representatives may be heard before court, their statements only bear value to the extent that they confess facts that have been claimed against them. This means that it is the counterparty who will ask that the other party's representative be heard on specific facts of which it has direct knowledge. It also means that, although party representatives are often the people best suited to provide the court with a true version of the facts (they are often the only people that can testify on what happened or what a given party's true intent was when entering into an agreement, among other things), unless the representative's statements are a confession of facts claimed against them by the counterparty, the courts will not be able to rely on these testimonies as evidence.

As to witness statements, these are, as a rule, offered in person before the court; the witnesses are generally questioned by the party that has presented them to the proceedings and then cross-examined by the counterparty's counsel. The presiding judge will intervene and ask questions whenever he or she deems it necessary – though it is not unprecedented for a judge to take on the enquiry him or herself, leaving only small clarification requests to be made by the parties' counsel.

Witness preparation is not just highly controversial, it is actually forbidden by most of statutes of the relevant bar associations. This does not mean that witnesses will not be approached by counsel prior to hearings (as a means of forestalling surprises), yet it must be carried out with utmost circumspection. Written statements are only allowed when the conditions for pretrial testimonies are met or when the witnesses live outside the district where the hearing is to take place. Those people who carry out public authority roles may be heard by the court at their own homes or place of work.

When weighing evidence, courts in these jurisdictions tend to focus more on the documentary evidence brought before them than on witness statements and they will quite often dismiss these testimonials entirely.

In addition, there is no real-time transcription of witness statements nor are they generally recorded although the law foresees that parties may request that testimonies be recorded, provided the court is appropriately equipped or parties bring their own equipment to court.

There is also still a level of bias (which varies from jurisdiction to jurisdiction) towards domestic parties that cannot be overridden when advocating in these jurisdictions.

Closing arguments and final judgments

Closing legal arguments are typically rendered in writing. The judgment is then rendered by the judge. Now, whereas the judicial systems in Angola, Cape Verde, Guinea-Bissau, Mozambique, and São Tomé and Príncipe have become increasingly reliant over time, they are also all still exceedingly slow. Typically, it takes about five years for cases to be ruled on in the first instance and it is not impossible for cases to drag on for 10 years or more with appeals. It follows that as a means to manage expectations, these circumstances need to be amply discussed by attorneys and their clients when seeking to have disputes resolved in these Portuguese-speaking African countries.

Generally, there are two levels of appeals available to parties, although in some cases, and subsequent to a given set of specific and limited prerequisites, it is also possible to launch an additional appeal before the Constitutional Court.

Interim relief

To ensure the outcome of the proceedings when the effectiveness of a possible favourable ruling is at risk, an applicant may request the adoption of interim remedies. These measures may be requested before or after the main claim has been filed and will lead to independent and separate proceedings with a separate court order.

In general, when requesting interim measures, the applicant must demonstrate that the following requirements have been met: (1) *fumus boni iuris* – prima facie case, the applicant has a justifiable claim on the merits against the respondent; (2) *periculum in mora* – there are circumstances giving rise to the urgency of safeguarding the applicant's purported entitlement; and (3) the damage the applicant intends to avoid must not exceed the damage caused by the interim measure, if granted, to the counterparty.

As to the measures that may be requested, the law provides for a range of specified (such as provisional alimony, restitution of possession, lien on assets and preventive arrest) and unspecified measures.

Arbitration as a valid alternative dispute resolution mechanism

For a long time, arbitration was almost non-existent in Angola, Cape Verde, Guinea-Bissau, Mozambique, and São Tomé and Príncipe. Although its legal provision dates back to the Portuguese 1876 Code on Civil Procedure, this alternative dispute resolution (ADR) mechanism was then subject to the control of state courts, the same solution having been adopted in the subsequent 1939 and 1961 versions of this statute, rendering it void of use.

However, the truth is that these countries have progressively become aware that commercial and investment arbitration has a key role in contributing to their economic development. Consequently, they have all devised and enacted their own statutes to govern this vital alternative dispute resolution mechanism:

- Angola enacted the Voluntary Arbitration Law – Law No. 16/03, dated 25 July – in 2003, which governs both domestic and international arbitration.
- Cape Verde's primary source of law relating to arbitration is the Law on Arbitration, Law No. 76/VI/2005 of 16 August, which also governs both domestic and international arbitration.
- In Guinea-Bissau, although arbitration is foreseen in the country by Law No. 19/2010, dated 8 October, as an OHADA Member State, it is the OHADA Uniform Act on Arbitration, enacted on 11 March 1999, that applies to both domestic and international arbitrations when the seat of arbitration is in Guinea-Bissau.
- In Mozambique, the Law on Arbitration, Conciliation and Mediation, Law No. 11/99, dated 8 July, applies.
- In São Tomé and Príncipe, the matter is governed by Law No. 9/2006 of 2 November.

Further to this, the five countries have also established arbitration as an alternative to state courts transversely, it now being common to see this ADR mechanism provided for in

the countries' private investment laws, laws regulating labour and public policy and those governing and regulating the energy and oil and gas sectors.

Another indication of these countries' growing and enhanced openness to arbitration is the fact that most of them – though only in the last decade in most cases – have acceded to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Angola in 2017, Cape Verde in 2018, Mozambique in 1998, and São Tomé and Príncipe, 2012,[3] though in case of the latter, despite its instrument of accession being deposited with the Secretary General of the United Nations on 20 November 2012, the Convention is not yet in force in the country. Cape Verde, Guinea-Bissau, Mozambique, and São Tomé and Príncipe are also all Member States of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States;[4] however, it is not yet in force in Guinea-Bissau.

This, aligned with the time taken for proceedings to be ruled on by the courts of Angola, Cape Verde, Guinea-Bissau, Mozambique or São Tomé and Príncipe, the level of bias that parties will still encounter when litigating against local entities or parties and the lack of technical expertise of the more generalist judges presiding over such courts, has resulted in arbitration developing at a stout pace. This is particularly true of the past decade, with arbitration being generally and increasingly recognised by the relevant judicial courts and national authorities in these countries. As a consequence, arbitration is now the dispute resolution mechanism that is most often provided and resorted to in commercial agreements entered into by foreign companies and entities that have projects in Angola, Cape Verde, Guinea-Bissau, Mozambique, and São Tomé and Príncipe, all of which have begun to set up a number of arbitration institutions in their territories.

So how do national courts deal with court proceedings that are instituted despite an existing arbitration agreement? An agreement to arbitrate implies a waiver by the parties to initiate state court action on the matters or disputes submitted to arbitration. As a result, in all the jurisdictions to which our discussion relates, once the parties have agreed to resort to arbitration to solve their underlying disputes, the intervention of the judicial court will be limited to those instances set forth in the relevant arbitration acts of each country. Consequently, should proceedings be filed with a judicial court in any of these countries, the relevant arbitration agreement may be relied upon by the defendant summoned to proceedings to have them dismissed, the court being prevented from ruling on the case's merits.

However, it must be said that given the way the subject matter is still dealt with within the Code on Civil Procedure, the court will not address this matter *ex officio*, and the interested party will have to make a plea in its statement of defence.

Further, according to the governing law in these countries, actions concerning the validity of an arbitration agreement (i.e., not involving a dispute covered by the arbitration agreement) that are filed with a judicial court after the arbitral tribunal is constituted will not be admissible, as per the principle of 'competence-negative effect of competence'.

3 For a list of contracting states, see www.newyorkconvention.org/countries.

4 For a list of states that have signed the ICSID Convention, see https://icsid.worldbank.org/en/Documents/icsiddocs/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf.

This said, when deciding the seat for the arbitration, practice shows that when possible – and it is not always possible given the specific limitations provided for in local law intended to safeguard certain economic sectors deemed to be vital to the underlying economies – parties will almost always avoid choosing Angola, Cape Verde, Guinea-Bissau, Mozambique or São Tomé and Príncipe. Instead they will opt for a neutral and more arbitration-friendly jurisdiction. Although this avoids having to interact with national courts when their assistance proves necessary or launching set-aside proceedings with these same courts – whose experience in dealing with arbitration is still undeniably limited – it still does not avoid having to institute recognition proceedings prior to enforcement therewith when a party is a national of one of these countries or has assets located therein.

The downside of parties avoiding seating their arbitrations in Angola, Cape Verde, Guinea-Bissau, Mozambique or São Tomé and Príncipe is that it precludes the national courts and practitioners from dealing with arbitration more regularly. However, it is hoped that the growing use of domestic arbitration, and of the arbitral institutions that each country has been setting up, will balance this out.

Successful advocacy is always a challenge. Throw in different languages, a matrix of (exotic) laws and differing cultural backgrounds as well and you have advocacy in international arbitration.

Global Arbitration Review's *The Guide to Advocacy* is for lawyers who wish to transcend these obstacles and be as effective in the international sphere as they are used to being elsewhere. Aimed at practitioners of all backgrounds and at all levels of experience, this Guide covers everything from case strategy to the hard skills of written advocacy and cross-examination, and much more. It also contains the wit and wisdom on advocacy of more than 40 practising arbitrators, including some of the world's biggest names in this field.

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