

Enforcement 2017

Portugal

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Applicable procedural law for recognition and enforcement of arbitral awards

1 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 in Portugal is regulated both by the Portuguese Voluntary Arbitration Law (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 Sao Tome and Principe. 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.

2 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 (i) Portugal is party to treaties that allow for the recognition of foreign arbitral awards; and (ii) the requirements for the recognition of foreign arbitral awards contained in the VAL, which was enacted in December of 2011 and entered into force in March 2012, are very similar to those of the Convention.

Recognition proceedings

3 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 which the domicile of the person against whom the decision to be invoked is located. 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. Finally, domestic arbitral awards are automatically enforceable and need not be recognised in order to have the same value of a judicial award rendered by a Portuguese state court. The enforcement of domestic arbitral awards must take place in the first instance court in whose jurisdiction the place of arbitration is located.

4 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 9 for details) there are no particular requirements for the competent courts (as per the answer to the previous question) 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.

5 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 submit its opposition to the recognition (see question 9 for details). The applicant may reply within 10 days of the opposition being submitted.

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.

6 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. In case 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.

7 If the required documentation is drafted in another language than the official language of your jurisdiction, is it necessary to submit a translation together 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 which are not written in Portuguese must be translated. In case of founded doubts as to the translation, the applicant must provide a duly certified translation by a notary or a diplomatic or consular officer of the country of the original language of the document.

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

In order to apply for the recognition and enforcement of an arbitral award, the applicant must be represented by a lawyer and pay court fees, which may be claimed (together with lawyer fees up 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 duties of cooperation, procedural good faith and reciprocal correction.

9 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 it contains a final and binding decision. While procedural orders are not enforceable as awards, awards on costs as well as settlements formalised in a “consent award” 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 to the recognition or enforcement of an interim award on grounds similar to those established in the UNCITRAL Model Law. Accordingly, recognition or enforcement of an interim measure may be refused by a state in the following circumstances:

At the request of the party against whom it is invoked, if the court is satisfied that:

- Such refusal is warranted on the grounds set forth in sub-paragraph a), points (i), (ii), (iii) or (iv) of the response to question 10 below;
- The arbitral tribunal’s decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with;
- The interim measure has been revoked or suspended by the arbitral tribunal or, where so empowered, by the court of the state in which the arbitration takes place or under the law of which that interim measure was granted; or

If the state court finds that:

- The interim measure is incompatible with the powers conferred upon the state court unless the state court decides to reformulate

the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

- Any of the grounds for refusal of recognition set forth in subparagraph b), points (i) or (ii) of the response to question 10 apply to the recognition or enforcement of the interim measure.

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.

10 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 in Portugal on the grounds set forth in the Convention or, when the Convention is not applicable, under the following grounds established in the VAL, which are very similar to those of the Convention:

a At the request of the party against whom the award is invoked, if that party furnishes to the competent court to which recognition or enforcement is demanded proof that:

- (i) 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;
- (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 its case;
- (iii) 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;
- (iv) 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.

b If the court finds that:

- (i) The subject-matter of the dispute is not capable of settlement by arbitration under Portuguese law; or
- (ii) The recognition of the award would lead to a result 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).

11 What is the effect of a decision recognising the 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.

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

12 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.

13 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 weight 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.

14 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 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.

15 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? In case the 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 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.

It is, however, recognised among Portuguese legal scholars, knowledgeable of cases such as Chromalloy, Dallah or Yukos, that a foreign award set aside at the seat may be recognised in Portugal in exceptional circumstances where the decision annulling the award was obtained in breach of due process or was contrary to the 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 the enforcement of the award.

Service

16 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.

17 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 in Portugal by three different sets of rules depending on the defendant's state of domicile:

1. Service to an addressee located in an EU member state is governed by EU Regulation No. 1393/2007 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.
2. Service to an addressee located outside the EU 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.
3. 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

18 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 (immoveable 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 insufficient to pay their debts (www.citius.mj.pt/portal/execucoes/listapublicaexecucoes.aspx).

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

Judicial proceedings are, as a matter of principle, public in Portugal. 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 Administration, the Social Security and the various Public Registers. In what concerns banking information, the Bank of Portugal must disclose to enforcement agents the name of the financial institution where the debtor owns bank accounts and bank deposits. When such information is protected by tax secrecy or other confidentiality regime, enforcement agents need the court's authorisation to request the 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, related or not to the debtor's assets, which are relevant to the enforcement.

Enforcement proceedings

20 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 answer to question 21) and they may be granted by the state courts against assets owned by the Portuguese state, limited however to assets which 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, please see answer to question 31.

21 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 different types – “non-specified” and “specified” – of interim measures.

The non-specified interim measures allow the party to request the adoption of any protective or pre-emptive interim measure which is not specified, provided it is adequate to secure enforcement of the award. In such case, the applicant must demonstrate the fulfilment of three legal conditions: (i) *periculum in mora* (ii) *fumus bonus iuris* and (iii) 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: (i) attachment; (ii) listing of assets; and (iii) interim restitution of possession.

The attachment may be issued by the court upon request of a party, provided it demonstrates justified concern of loss of its credit's guaranty. Particularly, the applicant shall demonstrate the probable existence of its credit and the justification for its concern. The applicant shall also list the assets to be attached and their respective relevant information.

Attachment can regard different types of assets (immoveable or moveable, including shares, or even credit claims), provided they are part of the debtor's assets. The applicant can also request an attachment against the purchaser of the debtor's assets, demonstrating why the purchase must be challenged. Nevertheless, attachment is limited to the assets needed for payment of the debt in question and, in some cases, the law provides for its partial limitation or subjects it to certain conditions.

If the legal requirements are met, the procedure is *ex parte* and the court's decision mentions the assets which shall be attached. Once the assets are seized, they are entrusted to a depository (typically the enforcement agent). Registered moveable and immoveable assets are seized by communication to the respective Registry.

The listing of assets is a description and evaluation of assets or documents, followed by their deposit, in order to ensure their protection while the discussion regarding their legitimate owner is pending.

For granting of this measure, the applicant must (i) demonstrate its right over the assets or document and (ii) a justified concern of damage or loss of the assets (moveable or immoveable) or documents. The court further needs to be persuaded that the denial of the measure will put the applicant's interest at serious risk. These proceedings may be conducted *ex parte* if the effectiveness or utility of the measure is compromised by the respondent's notification.

Interim restitution of possession is available to the possessor of an immoveable or moveable asset when faced with violent dispossession. The applicant shall demonstrate that (i) he had the possession of such asset and (ii) he was violently dispossessed.

If persuaded by the evidence presented, the court may grant the restitution of possession *ex parte*.

Both specified and non-specified interim measures expire if the corresponding enforcement proceedings are not filed within the legal deadline unless, at the request of the applicant and subject to the court being certain about the existence of the right whose protection is required and about the adequacy of the measure to definitively settle the dispute, the court considers the interim measure to be final.

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 following decision (as well as the court's potential decision of attributing a definitive nature to the interim measure) is subject to appeal.

All proceedings regarding interim measures are urgent.

22 What is the procedure for interim measures against immoveable property within your jurisdiction?

There are no specific rules governing the procedure for interim measures regarding immoveable property other than those outlined in answer 21.

23 What is the procedure for interim measures against moveable property within your jurisdiction?

There are no specific rules governing the procedure for interim measures against moveable property other than those outlined in the answer 21.

24 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.

Firstly, courts have the power to, upon request from a party, grant any appropriate measures to prevent any imminent violation and/or prohibit an ongoing 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 (i) he is the holder of the property right in question and that (ii) a violation of such right exists or is imminent.

Furthermore, courts have the power to, upon request, grant interim and urgent measures to preserve evidence of the violation of industrial or intellectual property rights, including the 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 (meaning acts that violate industrial or intellectual property rights and which purpose is to obtain an economic or commercial advantage) exists or is imminent, the court may grant the pre-emptive attachment of the moveable and immoveable assets owned by the alleged violator and/or the communication of or access to banking, financial or commercial data and information relating to the violator.
- when there is a violation of industrial and intellectual property rights, the court may order the attachment of the assets which are suspected of being used in such violation or of any instruments which 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 its 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 this 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 ten days, providing evidence and presenting arguments not yet considered by the court.

25 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 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 checks, promissory notes, etc, or documents to which the law has conferred such 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 is provided by the debtor in the meantime; yet, the enforcement proceedings will proceed regardless.

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 in accordance.

The creditor may be paid in (i) cash (when this or a bank deposit is the attached asset); (ii) direct award; (iii) assignment of earnings; (iv) in instalments when an agreement is entered into between the parties for this specific purpose or (v) with the product of the assets' sale (which in itself may be carried out in several ways).

26 What is the procedure for enforcement measures against immoveable property within your jurisdiction?

Please refer to question 25. In addition, it should be noted that attachment of immoveable 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.

27 What is the procedure for enforcement measures against moveable property within your jurisdiction?

Please refer to question 25. In addition, it should be noted that if the moveable assets are subject to registry, then their attachment will be carried out according to the rules governing the attachment of immoveable assets.

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

Please refer to question 25.

Enforcement against foreign states

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

No, there are no such specific rules.

30 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 17).

31 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, Portuguese 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, such notion of foreign state immunity is interpreted restrictively, ie, 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 amongst 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.

32 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 only to the extent that it is allowed for under customary law. Such waiver must, however, be express and clear.



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