

# Portugal: A New Hub for International Arbitration Disputes

## **Kluwer Arbitration Blog**

August 7, 2017

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*Please refer to this post as: André Pereira da Fonseca, 'Portugal: A New Hub for International Arbitration Disputes', Kluwer Arbitration Blog, August 7 2017, <http://arbitrationblog.kluwerarbitration.com/2017/08/07/portugal-new-hub-international-arbitration-disputes/>*

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### **Introduction**

There are over 250 million people who speak Portuguese, being commonly identified as the sixth most spoken language in the world.

It is an official dialect in Angola, Brazil, Cabo-Verde, Equatorial-Guinea, Guinea-Bissau, Macau, Mozambique, Portugal, São-Tomé and Príncipe and Timor-Leste.

Business transactions are entered into daily within a vast territorial space that reaches from Macau's ruins of Saint Paul, passing through the exotic city of Maputo unto the Brazilian State of the Amazonas. The area of the globe occupied by the current members of the "Community of Portuguese Language Countries" is of 10,742,000 km<sup>2</sup> scattered over four continents.

### **A common heritage**

While having their own distinctive identity, these countries share a common historical and legal heritage.

Indeed, besides the fact that all jurisdictions share a civil law base, they are strongly influenced by Portuguese law. For example, Guinea-Bissau, Angola, São Tomé, Cabo-Verde and Mozambique still use the same Civil Code enacted by the Portuguese Government in 1966. The arbitral laws of the latter four countries are influenced by the old Portuguese arbitral law - Law n.º 31/86 of 29 August 1986 (while Guinea-Bissau follows the OHADA Uniform Act on International Arbitration). Timor-Leste 2011 Civil Code and Macau's 5 major codes (the core of the country's legal system) are based on its Portuguese equivalents. It is frequent for lawyers, judges and arbitrators in these jurisdictions to resort to Portuguese academics and case law to reason their arguments and decisions.

### **A space-time to invest**

The Lusophone space is bursting with investment opportunities.

Just to name a few, Angola is the world's top diamond producer, the largest oil producer in Sub-Saharan Africa and an alternative to the current dominance of the Middle-East. Operators such as Total, BP or Chevron regularly conduct business in the country. The end of the civil war in 2002 opened the country to foreign investment and, next to the natural resources sector, opportunities

exist in the agriculture, transport and construction sectors.

In Mozambique a recent discovery of massive gas reserves in the Rovuma Basin (around 180 trillion cubic feet) has triggered one of the world's largest LNG projects. Estimations indicate that more than US\$30 billion is to be invested in order to produce 20 million tons of LNG per year, with exports to start in 2021. This has resulted in major investments by Anadarko and ENI, as well as from other Asian and European investors. This discovery has the potential to transform Mozambique's economy and boost other economic sectors.

Macau is today seen by many as the gaming capital of the world and a regional center for conventions and tourism. In 2015, Macau's gross gaming revenue topped US\$28.9 billion, exceeding the combined revenues of Nevada and Atlantic City. Other growth areas include finance, insurance, construction, real estate, and retail.

Cabo Verde is currently pursuing a strong policy to promote investment in renewable energies. The country implemented the first commercial-scale, privately financed, public private partnership wind farm in sub-Saharan Africa ("Cabeolica"). With wind farms built on four islands, renewables account for more than 20% of the total electricity generated and is set to provide as much as half of all electricity production by 2020.

Brazil needs no introductions. With a domestic market of nearly 210 million inhabitants, it is the world's ninth largest economy. Despite the current recession, it is accredited as the largest recipient of foreign investment in Latin America and the eighth largest recipient in the world. The country is currently the fourth largest investor in emerging markets and the largest in Latin America.

Timor-Leste is seeking to attract investment in the oil and gas sector. Unexplored offshore oil and gas deposits, as well as onshore resources such as gold, manganese and marble present prospects for development. Other opportunities exist in the services, tourism and agriculture sectors particularly regarding timber and coffee (Starbucks is a major purchaser).

Finally, Portugal is recovering from a financial crisis which bolstered the execution of long-needed reforms. It has a friendly economic environment with some of the lowest operational costs in Western Europe and is called by many as the next Silicon Valley due to the many startups that recently chose to set up in the country. Investment opportunities exist in the sectors of tourism, real estate, construction (particularly since the "Golden Visa" program which allows permanent residence for foreigners who invest more than € 500.000,00 in real estate) and renewable energies.

### **Arbitrating disputes**

Portugal poses as a strategic platform for arbitration disputes arising out of the Lusophone space. The fact that the country shares the same historic and legal roots as the other Portuguese speaking countries has shown to be a decisive factor in the execution of bilateral agreements and in the launching of projects for legal cooperation. The common language puts aside the need for procedural translations and generates comfort amongst parties, lawyers and arbitrators.

Portugal also has all the conditions to become a seat for other international disputes. The country is a member of the most important international arbitral conventions such as the 1958 New York Convention and the 1965 "ICSID" Convention. Furthermore, it has 60 BIT's signed with different nations.

A new arbitral law was recently enacted which entered into force in March 2012 (Law 63/2011 of 14 December) and follows the UNCITRAL Model law (as amended in 2006).

The law embodies fundamental principles such as party autonomy, *Kompetenz-Kompetenz*, separability, equality of the parties, due process and finality of the award. It includes all the legal tools embodied in modern arbitral laws regarding matters such as the constitution of the tribunal, interim measures and recognition / enforcement of arbitral awards. It has a wide criterion for arbitrability considering that any dispute can be subject to arbitration as long as it is not exclusively submitted to the state courts (or to a form of “mandatory arbitration”) and it concerns economic interests. Even disputes that do not involve economic interests can be subject to arbitration as long as the issue at stake is capable of being subject to a settlement by the parties (under the applicable law). It also opens the door for arbitrations arising from labor agreements (historically in the exclusive realm of judicial courts) although making it dependent on the enactment of specific statutes.

Indeed, arbitration has already spread to different domains. A pioneering tax arbitration regime was designed to settle disputes between taxpayers and the Administration (Decree-Law n.º 10/2011 of 20 January 2011). Furthermore, a mandatory arbitration procedure for disputes arising out of industrial property rights related to reference and generic medicines was created (Law 62/2011 of 12 December 2011) and a sports arbitration framework that requires that disputes arising out of acts or omissions from sports bodies and appeals from decisions regarding the breach of anti-doping rules should be resolved through arbitration (Law 74/2013 of 6 September 2013).

Portuguese Courts have shown to be “pro-arbitration”, and in most cases, requests for court intervention will be heard by the Courts of Appeals, thus assigning arbitration matters to experienced judges. Anti-arbitration injunctions are expressly forbidden.

Arbitrators, parties and institutions should keep proceedings confidential, without prejudice of making any facts public if this is necessary to defend their rights or required by law.

The leading arbitration institution is the Arbitration Centre of the Portuguese Chamber of Commerce and Industry (“CCIP”) (established in 1987) with vast experience in domestic and cross-border arbitrations. The Centre recently modernized its facilities with state of the art hearing rooms and audiovisual technology. Located in the heart of Lisbon, it is easily accessible from the airport and conveniently close to numerous hotels.

CCIP last revised its rules in 2014. They are available in Portuguese, English and Spanish and now including rules regarding emergency arbitrators, a fast-track arbitration procedure and an arbitrator Code of Ethics that should be interpreted according to the IBA Guidelines on Conflicts of Interest. The CCIP panel includes the most prominent Portuguese legal authorities as well as international arbitrators. Many are experienced academics who have played an important role in the enactment of several statutes in Portugal and throughout the Lusophone world, thus being skilled to resolve disputes related to different jurisdictions. Furthermore, the panel is “open” allowing the parties to appoint arbitrators that are not on the panel.

Procedures under the CCIP Rules are swift. A study provided by the Centre in 2014 evidenced that the average duration of an arbitration is 15 months. Several proceedings are conducted in English and both lawyers and arbitrators are often experienced in international law with an excellent proficiency of other languages such as Spanish or French thus equipped to deal with any dispute.

In conclusion, Portugal has all the conditions to affirm itself as a first-rate arbitration seat. It is now up to Portuguese arbitral institutions, universities, arbitrators and practitioners to promote the country’s potential in order to increasingly host more international disputes.