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# Recognition and Enforcement of Foreign Arbitral Awards

The Interpretation and Application  
of the New York Convention  
by National Courts



 Springer

# Interpretation and Application of the New York Convention in Portugal

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**Abstract** The New York Convention’s ratification in 1994—long after a large number of other Contracting States had ratified it—was hailed as a particularly auspicious moment for the development of international arbitration in Portugal. Although case law on the Convention in Portugal is limited, its application by the courts has so far been generally in line with the spirit of the Convention. The main problems surrounding the application of the Convention in Portugal concern the determination of the hierarchically competent court to recognize foreign arbitral awards covered by the Convention and the extent to which a previous review or confirmation of a foreign arbitral award governed by the Convention is required.

## 1 IMPLEMENTATION

### *1.1 Form of Implementation of the Convention into National Law*

In Portugal, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “Convention”) was approved for ratification by the National Assembly (*Assembleia da República*) in Resolution No 37/94 on 10 March 1994, and subsequently ratified by the President of the Republic in Decree No 52/94 on 8 July 1994.<sup>1</sup>

According to Article XII(2), the Convention entered into force in Portugal ninety days after the deposit of its instrument of ratification, i.e., on 16 January 1995.<sup>2</sup> As of this date, the Convention became directly applicable by Portuguese courts

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<sup>1</sup>Both acts were published in the *Official Journal of the Portuguese Republic (Diário da República)* 1st series (8 July 1994) 3642 et seq (DR I).

<sup>2</sup>See the Notice (“Aviso”) of the Ministry of Foreign Affairs No 142/95, *DR I* (21 June 1995) 2014.

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according to Article 8(2) of the Portuguese Constitution.<sup>3</sup> No implementing legislation is thus required for that purpose.

More recently, the new Portuguese Law on Voluntary Arbitration (the “LVA”)<sup>4</sup>, which was approved by Law No 63/2011 on 14 December 2011 and includes a Chapter X on the recognition and enforcement of foreign arbitral awards, reproduced the Convention rules on this subject and regulates enforcement proceedings. The basic rules of the Convention have thus been incorporated into Portuguese domestic law and are now also applicable to the recognition and enforcement of foreign arbitral awards not covered by the Convention or by any other international convention.<sup>5</sup>

## ***1.2 Declarations and/or Reservations Attached to the Instrument of Ratification***

Portugal made the reciprocity reservation provided for in Article I(3) of the Convention. That reservation is stated in Article 2 of the Assembly of the Republic’s Resolution of 10 March 1994 and in the text of the President’s Decree of 8 July 1994.

By virtue of this reservation, the Convention only applies in Portugal to the recognition and enforcement of awards made in the territory of another Contracting State. Due to the abovementioned incorporation of the Convention into Portuguese domestic law, the relevance of that reservation is however considerably diminished in this country.

## ***1.3 Definition of “Arbitral Award” and “Foreign Arbitral Award”***

An “arbitral award” is, from the perspective of Portuguese law, an act whereby one or more arbitrators decide, wholly or in part, the merits of a dispute submitted to them.<sup>6</sup> Partial awards are expressly allowed by Article 42(2) of the LVA, according

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<sup>3</sup>According to which, “[t]he rules set out in duly ratified or passed international agreements shall come into force in Portuguese internal law once they have been officially published, and shall remain so for as long as they are internationally binding on the Portuguese state.”

<sup>4</sup>Law on Voluntary Arbitration, *DR I* (14 December 2011) 5276 et seq. The law entered into force on 15 March 2012.

<sup>5</sup>No substantive differences exist between the Convention and the LVA on the recognition and enforcement of foreign arbitral awards. See D Moura Vicente et al, *Lei da Arbitragem Voluntária Anotada* (2nd ed., Coimbra, 2015) 139 et seq. An English translation of the LVA, revised by the present author, was published in the *International Handbook on Commercial Arbitration*, supp 73 (2013).

<sup>6</sup>No provision of the LVA defines the term “arbitral award” (*sentença arbitral*). However, Article 152(2) of the Portuguese Code of Civil Procedure defines “judgment” (*sentença*) as an act whereby

to which, “[u]nless otherwise agreed by the parties, the arbitrators may decide the merits of the dispute in a single award or in as many partial awards as they deem necessary.” Interim awards on preliminary issues, such as the applicable law, time-bar defences, or the arbitral tribunal’s jurisdiction, are also allowed.<sup>7</sup> Insofar as they contain a final decision on a disputed point, they are, like any other arbitral awards, binding upon the parties and may, in certain circumstances, be reviewed by Portuguese courts.<sup>8</sup>

In Portugal, the arbitrators’ powers to decide a dispute may derive either from the will of the parties (i.e., the so-called “voluntary arbitration”) or from a provision of the law (i.e., the so-called “mandatory arbitration”). Under Portuguese law, arbitral awards comprise arbitrators’ final decisions rendered in both types of arbitrations.

In the context of the recognition and enforcement of foreign arbitral awards covered by the Convention (which, as mentioned above, is directly applicable in Portugal), Portuguese courts should consider as “arbitral awards” not only the awards made by arbitrators specifically appointed to decide a given case, but also those made by permanent arbitral bodies to which the parties have submitted,<sup>9</sup> pursuant to Article I(2) of the Convention.

A “foreign arbitral award” is, from the perspective of Portuguese law, any arbitral award rendered in an arbitration, the seat of which is located abroad, even if the award is issued in national territory.<sup>10</sup> This would be the case in an arbitration where a sole arbitrator with Portuguese nationality issued an award in Portugal in a dispute involving two Brazilian companies and where the arbitral proceedings and hearing were seated in Brazil. Pursuant to the second sentence of Article I(1), the recognition and enforcement of such an award in Portugal is also covered by the Convention’s provisions.<sup>11</sup>

Conversely, if an arbitral award is rendered in a foreign country, it may be enforced in Portugal without prior recognition by a Portuguese court if the seat of

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“the judge decides the main dispute or any incident with the structure of a dispute.” The same criterion should apply to arbitral awards.

<sup>7</sup> See Article 18(8) of the LVA, which allows an interim award whereby the tribunal settles the issue of its own jurisdiction.

<sup>8</sup> See A Sampaio Caramelo, “Decisões interlocutórias e parciais no processo arbitral. Seu objecto e regime” in *eiusdem*, *Temas de Direito da Arbitragem* (Coimbra, 2013) 153 et seq.

<sup>9</sup> See A Jan van den Berg, *The New York Arbitration Convention of 1958* (Deventer, 1981) 379 et seq.

<sup>10</sup> See Article 55 of the LVA, according to which, “[w]ithout prejudice to the mandatory provisions of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as well as to other treaties or conventions that bind the Portuguese State, the awards made in arbitrations seated abroad shall only be effective in Portugal, regardless of the nationality of the parties, if they have been recognised by the competent Portuguese State court, under the present chapter of this Law.”

<sup>11</sup> See C Pimenta Coelho, “A Convenção de Nova Iorque de 10 de Junho de 1958 Relativa ao Reconhecimento e Execução de Sentenças Arbitrais Estrangeiras” (1996) *Revista Jurídica* 20, 37 et seq.

arbitration is in Portugal. Such an award is, for all intents and purposes, a Portuguese award rather than a foreign one.

In fact, according to Article 42(7) of the LVA, an arbitral award has the same effect, for the purposes of its enforcement, as a judgement of a State court. That is, there is no need for the award to be reviewed or confirmed.<sup>12</sup> By virtue of Article 61 of the same Law,<sup>13</sup> that provision applies to all awards rendered in arbitrations that take place in Portugal.

The key factor that determines whether an arbitral award is subject to recognition or enforcement is therefore not the place where it is rendered, but rather the place where the arbitration takes place. If that place is Portugal, the award may be enforced immediately without further need for recognition.<sup>14</sup>

#### ***1.4 Measures of Provisional Relief Ordered by Arbitral Tribunal as “Awards”***

In Portugal, interim measures issued by arbitral tribunals are not arbitral awards insofar as they are not final. Notwithstanding the foregoing, according to Article 27(1) of the LVA (which incorporates Article 17-H of the UNCITRAL Model Law on International Commercial Arbitration into domestic law), an interim measure issued by an arbitral tribunal shall be binding on the parties, and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent Portuguese court, irrespective of whether or not it was issued abroad.

Recognition or enforcement of an interim measure may only be refused by a Portuguese court if one of the grounds for refusal provided for in Article 28 of the LVA (which incorporates Article 17-I of the UNCITRAL Model Law) occurs in the instant case. These grounds include the following: (i) incapacity of the parties or invalidity of the arbitration agreement; (ii) failure to properly notify one of the parties of the arbitral proceedings; (iii) the interim measure deals with a dispute not contemplated in the arbitration agreement; (iv) non-conformity of the arbitration procedure with the law of the place of the arbitration; (v) non-arbitrability of the subject-matter of the dispute; and (v) violation of public policy of the Portuguese State.

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<sup>12</sup> See P Costa e Silva, “A execução em Portugal de decisões arbitrais nacionais e estrangeiras” (2007) *Revista da Ordem dos Advogados* 629 et seq.

<sup>13</sup> According to which, “[t]he present Law is applicable to all arbitrations that take place in Portuguese territory, as well as to the recognition and enforcement in Portugal of awards made in arbitrations seated abroad.”

<sup>14</sup> The same conclusion is reached by C Friedrich Nordmeier, “Zur Annerkennung und Vollstreckung ausländischer Schiedsprüche in Portugal” (2013) *Zeitschrift für Schiedsverfahren* 201 et seq.

### ***1.5 Alternatives to Convention as Means of Obtaining Recognition or Enforcement of a Foreign Award***

Portugal is a party to a number of other multilateral conventions which contain rules on the recognition and enforcement of foreign arbitral awards.<sup>15</sup> These are the Convention on the Execution of Foreign Arbitral Awards, adopted on 26 September 1927 in Geneva;<sup>16</sup> the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, adopted on 18 March 1965 in Washington;<sup>17</sup> and the Inter-American Convention on International Commercial Arbitration, adopted on 30 January 1975 in Panama.<sup>18</sup>

Portugal and other Portuguese-speaking countries have entered into a number of bilateral treaties on judicial cooperation, which provide for the enforcement of foreign arbitral awards. This is the case of treaties concluded with São Tomé e Príncipe (in 1976, amended in 1998); Guinea-Bissau (in 1988); Mozambique (in 1990); Angola (in 1995); and Cape-Verde (in 2003).

Pursuant to the first sentence of Article VII(1) of the Convention, these conventions may be relied upon by the party seeking recognition and enforcement of a foreign arbitral award that falls into their scope of application.

However, it is noteworthy that the 1927 Geneva Convention ceased to have effect between Portugal and other Contracting States of that Convention upon their becoming bound by the New York Convention, pursuant to Article VII(2) of the Convention. Also, the Portuguese accession instrument to the Inter-American Convention has not been deposited with the General Secretariat of the Organization of American States, as required by Article 9 of that Convention, and is therefore not binding on Portugal internationally.

If no convention applies, a party seeking recognition or enforcement may rely upon the abovementioned provisions of Chapter X of the LVA regarding the recognition and enforcement of foreign arbitral awards. The fact that they basically reproduce the provisions of the Convention leaves little room for their application on the basis of the second sentence of Article VII(1) of the Convention (the so-called most favorable right provision), according to which the Convention does not deprive any interested party of the right it may have to avail itself of an arbitral award according to the law of the country where such award is sought to be relied upon.<sup>19</sup>

<sup>15</sup> See D Moura Vicente, "Portugal e as convenções internacionais em matéria de arbitragem" in *I Congresso do Centro de Arbitragem da Câmara de Comércio e Indústria Portuguesa (Centro de arbitragem comercial) Intervenções* (Coimbra, 2008) 71 et seq.

<sup>16</sup> Convention on the Execution of Foreign Arbitral Awards (adopted 26 September 1927) *DR I*, no 10 (13 January 1931) 69 et seq.

<sup>17</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965) *DR I*, no 79 (3 April 1984) 1102 et seq.

<sup>18</sup> Inter-American Convention on International Commercial Arbitration (adopted 30 January 1975) *DR I*, no 79 (4 April 2002) 3025 et seq.

<sup>19</sup> See van den Berg, *The New York Arbitration Convention of 1958*, 81 et seq.

## 2 ENFORCEMENT OF AGREEMENTS TO ARBITRATE (N.Y. Convention, Article II)

### 2.1 *Meaning of Convention Terms “Null, Void, Inoperative or Incapable of Being Performed” and Choice of Law for That Determination*

The meaning of these terms does not seem to have been addressed by the Portuguese higher courts. However, Article 51(1) of the LVA contains a conflict of laws rule on the substantial validity of arbitration agreements, according to which, “in an international arbitration, the arbitration agreement is valid as to its substance and the dispute it governs may be submitted to arbitration if the requirements set out either by the law chosen by the parties to govern the arbitration agreement, by the law applicable to the subject-matter of the dispute[,] or by Portuguese law are met.”

This rule, which reflects the *favor arbitrandum* that inspires Portuguese law, should be applied by Portuguese courts when determining whether an arbitration agreement governed by the Convention is null, void, inoperative, or incapable of being performed.

### 2.2 *Objections to Arbitral Jurisdiction or Admissibility that Courts are Willing to Entertain Prior to the Arbitration, if Requested*

According to Article 5(1) of the LVA, “a State court before which an action is brought in a matter which is the object of an arbitration agreement shall, if the respondent so requests not later than when submitting its first statement on the substance of the dispute, dismiss the case, unless it finds that the arbitration agreement is clearly null and void, is or became inoperative[,] or is incapable of being performed.”<sup>20</sup>

In Portugal, courts may thus only carry out a *prima facie* determination of the validity, operativeness and enforceability of the arbitration agreement. Arbitral tribunals have priority in deciding issues affecting their jurisdiction. This is the so-called negative effect of competence-competence. The *favor arbitrandum* that inspires Portuguese law is also patent in this provision.

Pursuant to Article 5(2) of the same Law, “in the case foreseen in article 5(1)[,] arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the State court.”

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<sup>20</sup> See, on that provision, A Sampaio Caramelo, “A competência da competência e a autonomia do tribunal arbitral na lei de arbitragem portuguesa” (2014) *Revista del Club Español del Arbitraje* 19 et seq.

According to Article 5(3), “[t]he arbitral proceedings shall cease and the award made therein shall cease to produce effects, when a State court considers, by means of a final and binding decision, that the arbitral tribunal is incompetent to settle the dispute that was brought before it.” The final word on jurisdictional issues is thus deferred by Portuguese law to State courts. Arbitrators may be the first judges to decide on their jurisdiction, but they are not the sole judges of that issue.

However, pursuant to Article 5(4), “[t]he issues of invalidity, inoperativeness or unenforceability of an arbitration agreement cannot be discussed autonomously in an action brought before a State court to that effect or in an interim measure procedure brought before the same court, aiming at preventing the constitution or the operation of an arbitral tribunal.” Anti-arbitration injunctions, allowed by some jurisdictions, are thus excluded under Portuguese law.

### **3 GROUNDS FOR REFUSAL OF RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (N.Y. Convention, Article V)**

#### ***3.1 General***

##### **3.1.1 Recognition or Enforcement of a Foreign Award Despite Presence of a Convention Ground for Denying Recognition or Enforcement**

Under Articles V(1) and (2) of the Convention and Article 56(1) of the LVA, national courts may refuse the recognition and enforcement of foreign arbitral awards in the presence of one the grounds specified therein, but are not *compelled* to do so. The wording of both provisions thus suggests that such courts enjoy some discretion in this regard and may therefore recognize and enforce a foreign arbitral award notwithstanding the presence of a ground for the refusal to do so.

This could be the case, e.g., if the arbitral procedure is not in accordance with the law of the country where the arbitration took place (see Article V(1)(d) of the Convention and Article 56(1)(a)(iv) of the LVA), but the breach of procedural rules has no decisive influence over the outcome of the dispute. In fact, Article 46(3)(ii) of the LVA expressly limits the annulment of domestic arbitral awards on the basis of a breach of the procedural principles set forth in Article 30 of the Law to cases in which that breach had a decisive influence over the outcome of the dispute. The same rule should apply by way of analogy to foreign arbitral awards in recognition and enforcement proceedings in Portugal. So far, however, no reported cases in Portugal have dealt with this issue.

### **3.1.2 Waiver of grounds for Denying Recognition or Enforcement of a Foreign Award**

Portuguese law does not expressly address the waiver question. However, according to Article 46(4) of the LVA, “[i]f a party, knowing that one of the provisions of this Law that parties can derogate from, or any condition set out in the arbitration agreement, was not respected, and nonetheless continues the arbitration without immediate opposition or, if there is a defined time-limit therefore, does not object within said time-limit, it is deemed that the party has waived the right to set aside the arbitral award on such grounds.”

This rule may be applied by way of analogy in proceedings for the recognition and enforcement of foreign arbitral awards. If the requesting party does not promptly raise the relevant grounds for the refusal of such recognition and enforcement in the arbitration after they become aware of them, that party should be deemed to have waived them.

However, such waiver should not extend to issues that only occur after the arbitration has concluded (such as an appeal or the setting aside of the award), the non-arbitrability of the dispute, or violations of international public policy of the country of enforcement, which implicate public interests and are therefore not within parties’ free disposal.

### **3.1.3 Deference by the Courts to Prior Judicial Determinations in Deciding Whether a Ground for Denying Recognition or Enforcement of a Foreign Award is Established**

Unless otherwise provided for in international treaties or European Union regulations, determinations of private rights made by foreign courts are only effective as *res judicata* in proceedings pending before a Portuguese court insofar as they have been reviewed and confirmed by the competent Portuguese court (Article 978(1) of the Code of Civil Procedure). The same rule applies to arbitral awards by virtue of Article 55 of the LVA.

Review and confirmation proceedings take place before a Court of Appeal. The party seeking confirmation must supply the Court with a certified copy of the foreign judgment at stake, as well as a translation thereof, whenever it is not originally in Portuguese. The Court of Appeal will then verify whether the foreign judgment complies with a number of formal requirements listed in Article 980 of the Code of Civil Procedure, which comprise the following: (i) the authenticity of the document containing the foreign judgment; (ii) the *res judicata* effect of that judgment; (iii) whether the judgment encroaches upon the exclusive jurisdiction of Portuguese courts; (iv) whether the same case is pending or has already been decided by Portuguese courts; (v) whether the foreign court observed due process; and (vi) whether the judgment offends Portuguese international public policy.

However, no review is necessary when the foreign judgment is invoked in a case pending before Portuguese courts as a simple means of evidence, subject to the free evaluation by the competent judge (Article 978(2) of the Code of Civil Procedure).

## 3.2 *Particular Grounds*

### 3.2.1 **Incapacity of Parties to Agree to Arbitrate or Invalidity of the Arbitration Agreement (Art. V(1)(a))**

With regard to Article V(1)(a) of the Convention, it should be noted that, according to Article 50 of the LVA, when an arbitration is international and one of the parties to the arbitration agreement is a State, a State-controlled organization, or a State-controlled company, “this party may not invoke its domestic law to either challenge the arbitrability of the dispute or its capacity to be a party to the arbitration, [or] in any other way evade its obligations arising from such agreement.”

The exclusion of pleas based on the domestic law of a party is a corollary of the principle of good faith, which underlies a number of other provisions of Portuguese procedural and substantive law<sup>21</sup> and has in numerous instances been applied by Portuguese higher courts.<sup>22</sup>

### 3.2.2 **Inadequate Notice or Opportunity to Present One’s Case (Art. V(1) (b))**

In a ruling of 2 February 2006,<sup>23</sup> the Portuguese Supreme Court (*Supremo Tribunal de Justiça*) decided that the proper form of the notice of the appointment of the arbitrator or an arbitral proceeding, which is required by Article V(1)(b) of the Convention, is governed by the law applicable to the arbitral proceeding and not by the law of the country where the recognition and enforcement of the arbitral award are requested.

Accordingly, the failure to comply with the requirement that such notice is made by registered mail with a certificate of receipt, set out in the Portuguese Code of Civil Procedure, is not a sufficient ground to refuse enforcement of an award rendered in an arbitration that took place in London and where the party opposing recognition failed to prove that the rules applicable to the arbitration proceeding were infringed.

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<sup>21</sup> See, eg, Article 8 of the Code of Civil Procedure, according to which “[p]arties should act in good faith and comply with the duties of cooperation set out in the previous article.”

<sup>22</sup> For a recent example, see the Ruling of the Supreme Court of 10 October 2013 in Case No 1387/11.5TBBCL.G1.S1, available at [www.dgsi.pt](http://www.dgsi.pt).

<sup>23</sup> Ruling of the Supreme Court of 2 February 2006 in Case No 05B3766, available at [www.dgsi.pt](http://www.dgsi.pt).

### **3.2.3 Decisions on Matters Beyond the Scope of the Arbitration Agreement (Art. V(1)(c))**

There is no reported case law on this question in Portugal.

### **3.2.4 Improper Composition of Arbitral Tribunal or Non-Compliance of Arbitral Procedure (Art. V(1)(d))**

There is no reported case law on this question in Portugal.

### **3.2.5 Award not Binding on the Parties or Set Aside by a Court of the Arbitral Seat (Art V(1)(e))**

If a foreign arbitral award has been set aside by a court of the country in which, or under the law of which, that award is made, its recognition and enforcement may be refused under Article 56(1)(v) of the LVA.

There are no reported cases in Portugal in which a court recognized and enforced a foreign arbitral award in spite of it having been set aside by a competent court of the place of arbitration.

According to Article 56(2) of the LVA, if an application for the setting aside of an award has been made to a court of its country of origin, the Portuguese court in which recognition or enforcement is requested may, if it considers it proper, stay the proceedings and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

The Court of Appeal of Lisbon decided in a judgment dated 30 June 2011<sup>24</sup> that, under Article VI of the Convention, the provision of such security may be determined either at the moment when the competent court stays the recognition proceedings or at a later stage, upon an application of the party requesting the recognition and submitted while the proceedings are suspended.

### **3.2.6 Non-Arbitrability of the Dispute (Art. V(2)(a))**

The issue of the arbitrability of disputes is now regulated by Articles 1(1) and (2) of the LVA. Under Article 1(1) of the LVA, any dispute involving economic interests may be referred by the parties to arbitration, by means of an arbitration agreement, provided that it is not exclusively submitted by a special law to the State courts or to mandatory arbitration. Article 1(2) of the LVA provides that an arbitration agreement concerning disputes that do not involve economic interests is also valid provided that the parties are entitled to conclude a settlement over the right in dispute.

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<sup>24</sup> Judgment of the Court of Appeal of Lisbon of 30 June 2011 in Case No 2004/08.6TVLSB-A-7, available at [www.dgsi.pt](http://www.dgsi.pt).

Portuguese law has thus adopted two alternative criteria for assessing the arbitrability of a dispute: the economic nature of the disputed interests; and the admissibility, with regard to disputes that do not involve economic interests, of a settlement over the right in dispute.

Regarding the first criterion, the interests at stake will be considered as having an economic nature insofar as they can be evaluated in money.

As for the second criterion, Article 1249 of the Civil Code should be taken into consideration by courts applying the LVA. According to that provision, parties may not settle disputes concerning rights that they may not waive, e.g., personality rights, or unlawful dealings.

In order for a dispute to be capable of settlement by an arbitral tribunal chosen by the parties, the dispute at stake must, in any event, not be exclusively submitted by a special law to the State courts or to mandatory arbitration.<sup>25</sup>

### 3.2.7 Violation of Public Policy (Art. V(2)(b))

In a ruling of 9 October 2003,<sup>26</sup> the Portuguese Supreme Court declared that Article V(2)(b) of the Convention refers solely to “international public policy,” that is to say, the “fundamental principles governing the presence of Portugal in the international community.” Such is the case, according to that ruling, of the principle of *pacta sunt servanda*.

The recognition of a foreign arbitral award rendered against a commercial company seated in Portugal that allegedly lacked the necessary financial resources to pay for the expenses of an international arbitration, and that, for this reason, did not make the advance payments requested by the arbitral tribunal, which in turn led to the dismissal of its defense and counterclaim, is not, according to the same ruling, contrary to international public policy. As the Supreme Court stated in that ruling, commercial companies may only exist insofar as they can provide for themselves. This is why they are not entitled to judicial support by the State in the same terms as individuals. They should therefore ensure the financial means necessary in order to exercise their rights. The defendant in the case at hand knew that arbitral proceedings involve expenditures. When it agreed to submit disputes arising from its contractual dealings with foreign parties to arbitration, it should have forearmed itself for such expenditures. If it did not do so, it can only blame itself: *sibi imputet*. The recognition of the arbitral award cannot therefore be refused on that ground.

In the abovementioned ruling of 2 February 2006, the Portuguese Supreme Court reaffirmed the notion that Article V(2)(b) of the Convention only envisages international public policy.

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<sup>25</sup> See A Sampaio Caramelo, “A disponibilidade do direito como critério de arbitrabilidade do litígio”, 71 et seq; *idem*, “Critérios de arbitrabilidade dos litígios. Revisitando o tema” in *eiusdem*, *Temas de Direito da Arbitragem* (Coimbra, 2013) 255 et seq.

<sup>26</sup> Ruling of the Supreme Court of 9 October 2003 in Case No 03B1604, available at [www.dgsi.pt](http://www.dgsi.pt).

According to this ruling, the notification of the defendant by registered mail with a certificate of receipt and the employment of the national language of that party in such a notification are not principles of international public policy and may therefore not be invoked in support of a plea for the refusal of recognition.

This restrictive interpretation of Article V(2)(b) of the Convention was also espoused by the Lisbon Court of Appeal in a ruling issued on 17 December 1998,<sup>27</sup> which confirmed an award rendered in France in proceedings conducted in accordance with the rules of the International Chamber of Commerce. In those proceedings, a company seated in Panama was in a dispute with a company seated in Portugal. The arbitral award ordered the latter company to pay the agreed price in an advertising contract, plus interest at the rate of 1.8 per cent per month, damages for breach of contract, tribunal fees, and expenses. The Portuguese company contested the application for enforcement, *inter alia*, on the grounds that the interest rate that was applied for the late payment was contrary to the international public policy of the Portuguese State, because it vastly exceeded the legal interest rate in force in Portugal. The Lisbon Court of Appeal rejected this argument and recognized the foreign arbitral award pursuant to the Convention.

More recently, the distinction between domestic and international public policy was enshrined in the LVA, which sets out in Article 56(1)(b)(ii) that the recognition and enforcement of a foreign arbitral award may be refused if the court finds that “[t]he recognition or enforcement of the award would lead to a result clearly incompatible with the international public policy of the Portuguese State.”

In a ruling of 16 January 2014,<sup>28</sup> the Court of Appeal of Lisbon rightly decided that Article 33 of the Portuguese law on commercial agency contracts (Decree-Law No 178/86 of 3 July 1986, amended by Decree-Law No 118/93 of 13 April 1993), which grants agents the right to goodwill compensation (*indemnização de clientela*) in case of termination of the contract, is a rule of internal, not international public policy. Accordingly, that rule does not prevent the recognition and enforcement of a foreign arbitral award that denies the right to goodwill compensation to a commercial agent acting on behalf of a foreign company in Portugal. The Supreme Court confirmed this ruling on 23 October 2014.<sup>29</sup>

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<sup>27</sup>Ruling of the Court of Appeal of Lisbon of 17 December 1998, *Colectânea de Jurisprudência*, tome V (1998) 125 et seq.

<sup>28</sup>Ruling of the Court of Appeal of Lisbon of 16 January 2014 in Case No 1036/12.4YRLSB-8, available at [www.dgsi.pt](http://www.dgsi.pt).

<sup>29</sup>Ruling of the Supreme Court of 23 October 2014 in Case No 1036/12.4YRLSB.S1, available at [www.dgsi.pt](http://www.dgsi.pt).

## 4 PROCEDURAL ISSUES

### 4.1 *Requirements for Personal Jurisdiction Over Award Debtor in Enforcement Action*

According to Article 59(1)(h) of the LVA, the Court of Appeal of the domicile of the respondent is, hierarchically, the competent court for the recognition and enforcement of an arbitral awards.<sup>30</sup>

If the respondent is domiciled abroad, the Court of Appeal of the domicile of the claimant shall be competent. If both are domiciled abroad, the Court of Appeal of Lisbon shall be competent (Article 80(3) of the Code of Civil Procedure).

The enforcement of the award takes place before the court of first instance of the domicile of the respondent (Articles 86 and 90 of the Code of Civil Procedure).

If the respondent is domiciled abroad but has assets in Portugal, the enforcement proceedings may take place before the court of first instance of the location of such assets (Article 89(3) of the Code of Civil Procedure).

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<sup>30</sup>This rule supersedes previous case law from Portuguese higher courts that deferred that competence to the court of first instance of the domicile of the requested party. See, eg, the decision rendered by the Supreme Court on 22 April 2004, *Colectânea de Jurisprudência do Supremo Tribunal de Justiça*, tome II (2004) 50 et seq. That case law was widely criticized by commentators in Portugal. See L Pinheiro, *Arbitragem Transnacional* (Coimbra, 2005) 299 et seq; M Cavaleiro Brandão, “Aplicación de la Convención de Nueva York en Portugal. Análisis de la jurisprudencia portuguesa” in C Soto Coaguila (ed), *Convención de Nueva York de 1958. Reconocimiento y Ejecución de Sentencias Arbitrales Extranjeras* (Instituto Peruano de Arbitraje, 2009) 737 et seq; M Esperança Pina and F Bettencourt Ferreira, “A jurisprudência portuguesa sobre o reconhecimento de sentenças arbitrais estrangeiras no âmbito da Convenção de Nova Iorque de 1958” in *ibid*, 747 et seq. According to the rulings of the Court of Appeal of Oporto of 9 September 2013 in Case No 29/13.9YRPRT and of the Court of Appeal of Lisbon of 16 January 2014 in Case No 1036/12.4YRLSB-8 (both available at [www.dgsi.pt](http://www.dgsi.pt)), the new rule of the LVA applies to recognition proceedings commenced in Portugal after its entry into force (which occurred, as mentioned above, on 15 March 2012), even if the arbitral award was rendered before that date. However, the Supreme Court held otherwise in a ruling of 25 February 2014 in Case No 29/13.9YRPRT.S1 (available at [www.dgsi.pt](http://www.dgsi.pt)) in which it deemed that the new rule is inapplicable to recognition proceedings related to awards rendered abroad before the entry into force of the new Portuguese LVA. This view disregards the rule according to which the competence of Portuguese courts is established at the moment when proceedings are commenced before such courts (Article 37(1) of Law No 62/2013 of 26 August 2013 on the Organization of the Judicial System). This rule entails that it is the moment of commencement of the recognition proceedings (and not of the arbitral proceedings) that counts for the determination of the hierarchically competent court for the recognition proceedings.

## ***4.2 Prescription Period Applicable to Enforcement Action***

No prescription period applies to the commencement of an action to enforce a foreign arbitral award in Portugal. Rights recognized by arbitral awards are subject to the common prescription period of twenty years provided for in Article 309 of the Portuguese Civil Code. However, this provision only applies to rights governed by Portuguese substantive law, as the issue of prescription is subject, according to the conflict of laws rule contained in Article 40 of the same Code, to the law that governs the right to which it refers. The fact that an action to enforce a foreign arbitral award is submitted to a Portuguese court is therefore not sufficient grounds for the prescription period provided for in Portuguese law to apply.

## ***4.3 Other Bases on Which Court May Decline to Entertain Enforcement Action***

There are three circumstances under which a Portuguese court may reject *in limine* a request to enforce an arbitral award: (i) in the case that no enforceable title manifestly exists; (ii) if a procedural irregularity exists that cannot be remedied; or (iii) if the dispute cannot be submitted to arbitrators (article 726 of the Code of Civil Procedure).

# **5 ASSESSMENT**

## ***5.1 Evaluation of the New York Convention in Practice***

The Convention has not been the object of criticism in Portugal. Although case law on this subject is still limited in Portugal—which is partly due to the fact that the Convention has been in force in this country for less than 20 years—its application by the courts has so far been generally in line with the spirit of the Convention.

It is particularly noteworthy that, in the abovementioned ruling of 30 June 2011, the Court of Appeal of Lisbon expressly stated that, as it interpreted Article VI of the Convention, “[n]ational courts should not ignore the meaning commonly attributed to the provisions of international conventions, as a fundamental step in order that a reasonable degree of uniformity in the different contracting States be achieved.”

One of the principal problems surrounding the application of the Convention in Portugal is determination of the hierarchically competent court to recognize foreign arbitral awards covered by the Convention. As mentioned above, until recently there was some controversy in this regard, since the higher courts widely held, on the basis of Article III of the Convention and of the 1986 LVA, that this should be the court of first instance of the domicile of the requesting party. The issue was finally

settled by the 2011 LVA, which adopted a rule expressly declaring the Court of Appeal of the domicile of the requesting party as the competent court.

Another issue is the extent to which a previous review and confirmation of a foreign arbitral award governed by the Convention is required in Portugal. Article III of the Convention states that “[t]here shall not be imposed substantially more onerous conditions or higher fees on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.” Since Portuguese law does not require a specific act of recognition (or exequatur) of domestic arbitral awards in order that they may be enforced in this country, a doubt arose as to whether such an act may be required with regard to foreign awards covered by the Convention. Whilst the Courts of Appeal of Lisbon and Oporto have consistently held that Article III of the Convention does not eliminate the possibility of exequatur proceedings in Portugal and that the recognition of foreign arbitral awards is thus not automatic in this country (a formal act of confirmation is required for that purpose),<sup>31</sup> the Supreme Court concluded in a ruling of 19 March 2009<sup>32</sup> that, on the basis of Article III of the Convention, an ICC award rendered in Zurich could be enforced immediately in Portugal in spite of the fact that it had not been previously reviewed and confirmed by a Portuguese court. However, this ruling was strongly criticized by commentators in Portugal.<sup>33</sup> More recently, the Supreme Court changed its view on this issue in a ruling of 18 February 2014,<sup>34</sup> according to which: “A foreign arbitral award is not automatically enforceable in Portuguese territory ... without being previously submitted to review and confirmation by the competent court in light of the national legal system, in spite of the fact that it is covered by the Convention.”

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<sup>31</sup> See, eg, the Rulings of the Court of Appeal of Lisbon of 8 June 2010 in Case No 243/10.9YRLSB-7 and of the Court of Appeal of Oporto of 9 September 2013 in Case No 29/13.9YRPRT, both available at [www.dgsi.pt](http://www.dgsi.pt). The former ruling states that: “[A] foreign arbitral award is not automatically enforceable in Portuguese national territory, that is to say, it is not an enforceable title without having first been submitted to revision and confirmation proceedings before the competent court, in spite of the fact that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is in force.”

<sup>32</sup> Ruling of the Supreme Court of 19 March 2009 in Case No 299/09 (2010) *Revista Internacional de Arbitragem e Conciliação* 145 et seq.

<sup>33</sup> See J Miguel Júdice and A Pedro Pinto Monteiro, “Do reconhecimento e execução de decisões arbitrais estrangeiras ao abrigo da Convenção de Nova Iorque” (2010) *Revista Internacional de Arbitragem e Conciliação* 149 et seq; A Ribeiro Mendes and S Ribeiro Mendes, “Crónica de jurisprudência” (2011) *Revista Internacional de Arbitragem e Conciliação* 300.

<sup>34</sup> Ruling of the Supreme Court of 18 February 2014 in Case No 1630/06.2YRCBR.C2.S1, available at [www.dgsi.pt](http://www.dgsi.pt).

## 5.2 *Proposed Reforms*

Reform of the Convention is admittedly an arduous task, given *inter alia* the considerable number of its Contracting States and the difficulty in obtaining ratifications of an amended version of the Convention by all of them, which could lead to different versions of the Convention being in force in different jurisdictions. An international effort to promote greater harmony in the interpretation and application of the Convention by domestic courts might therefore be preferable.

If however such an enterprise were undertaken, it is submitted that, in light of the Portuguese experience as reported above, a clarification of Articles III and V(2)(b) of the Convention would be in order, since the current drafting of these two provisions has led to disputes before Portuguese courts. As concerns the former, this clarification should aim at establishing that the rule contained in Article III does not exclude the submission of foreign arbitral awards to exequatur proceedings in Contracting States that do not require such proceedings in regard of domestic awards. In respect of the latter, the Convention should state that the public policy exception to the enforcement of foreign arbitral awards refers solely to international public policy.

## REFERENCES

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