

Country report



Portugal

In a struggling economy, it is no surprise that Portugal's overloaded court system is busy, Julian Matteucchi finds. But while arbitration is attracting investors with interests in Brazil and Africa, mediation is still viewed with suspicion

At first glance, Portugal should be an attractive venue for dispute resolution. The cost of litigating in Portugal is cheaper than in many European jurisdictions; and given the presence of experienced judges, local lawyers say the quality of judgments in Portugal is extremely high. Other important features include an independent judiciary and autonomous prosecutors.

On the downside, "it can take up to five years to have a first instance civil case decided," says **Fernando Aguilar de Carvalho**, a partner at Iberian firm **Uria Menendez - Proenca de Carvalho**.

De Carvalho says the situation is no better in the capital: "The

Lisbon Commercial Court can be even worse, because it is overloaded with bankruptcy and insolvency cases. Unfortunately, the more complex the case is, the slower the proceedings are."

And with a backlog of court cases going back years, urgent reform is needed in order to speed up the process, believes **Nuno Libano Monteiro**, a partner at Portuguese firm **PLMJ**.

The Portuguese Civil Procedure Code was introduced forty years ago, but it is cemented in the first procedural reforms of the 1800s.

"Delays in proceedings have long been recognised as the main problem in the Portuguese legal system," says **Miguel Esperanca Pina**, head of litigation at Iberian firm **Cuatrecasas, Goncalves Pereira**.

Because of Portugal's recent financial bailout, the time for reform is now.

Litigation

▶ A recent Memorandum of Understanding executed by the Portuguese Government with the European Union, the IMF and the ECB aims to restructure the court system, adopt new court management models, eliminate the backlog of cases and facilitate out-of-court settlements. "We are counting on the justice system to continue to make good decisions," Monteiro says, "but to do so much faster."

But according to Uria's de Carvalho, it is not just the procedural system that needs changing but also the mindset of those operating it. There have already been attempts to modernise the judicial process, with the computerisation of court decisions and legal documentation, but judges are reportedly unenthusiastic.

Miguel Pinto Cardoso, a partner at **Linklaters**, also believes that a change of mindset is required, but from just about everyone involved — from lawyers to judges, public prosecutors and court administrative services. "This will probably take more than one generation to achieve," he says.

The case

A standout dispute is the row that ensued between the Portuguese Competition Authority and several global pharmaceutical companies, including **Abbott**, **Menarini** and **Johnson & Johnson**.

Commenced in 2004, the case concerned alleged price fixing in relation to public tenders for hospital supplies. In 2010, the Lisbon Commercial Court substantially reduced the fines previously imposed by the Competition Authority but concluded that 63 breaches of the competition rules were proven.

The firms involved in the litigation were **Raposo Bernardo**, **PLMJ**, **Moras**

Arbitration

Commercial arbitration is well established in Portugal, with an arbitration law that is based on the UNCITRAL Model. Leave of the court is not required so as to enforce awards in Portugal — they are immediately enforceable.

The Portuguese courts tend to respect arbitration's autonomy and to refrain from annulling arbitration awards. "International arbitration in Portugal is taking its first steps," says Uria's de Carvalho, "but Portugal has an active community of arbitration specialists. With time, Portugal will become a well respected international forum."

Furthermore, a new Arbitration Act is anticipated which will incorporate recent UNCITRAL reforms that deal with issues such as preliminary measures and interim orders. "One of the aims of the new law is to increase the chances of Portugal being chosen as the seat of international arbitration," says **Cardoso**.

Arbitrating in Portugal is of particular interest to investors and third parties in Brazil and in the Portuguese-speaking parts of Africa such as Angola and Mozambique, where there are significant similarities between the legal systems.

According to de Carvalho, for entrepreneurs from Angola and Brazil, who share the same language and whose judicial systems have greater

Leitao, **Galvao Teles**, **Soares da Silva** (MLGTS) and **Linklaters**.

The market

"The dispute resolution market is almost completely dominated by local law firms," says **PLMJ's** Monteiro. But according to **Linklaters' Cardoso**, the foreign firms in Portugal house reputed lawyers and practices that are respected in the market.

Nonetheless, many believe that foreign firms merging with domestic practices shows that local knowledge is crucial in establishing an effective dispute resolution practice in Portugal.

Uria Menendez having initially integrated with a Portuguese firm, in 2004, augmented its strength with a 2010 merger with **Proenca de Carvalho & Associados**. **Cuatrecasas**, **Goncalves Pereira** is itself the result of a 2003 merger of **Cuatrecasas** and

PortuGoncalves Pereira, **Castelo Branco**.

Responding to this assertion Uria accepts that local knowledge in Portugal is crucial but points out an important distinction. "Uria is not a Spanish practice, but rather an Iberian law firm and has a regional approach to legal services in Portugal."

In the last year there have been no significant arrivals from foreign players, which commentators put down to the current economic crisis and the maturity of the Portuguese legal market.

"We do not expect any kind of churn in the Portuguese law market in the coming years," says **Ana Claudia Rangel**, the litigation, ADR and arbitration head at domestic firm **Raposo Bernardo**.

PLMJ and **MLGTS** are widely recognised as having leading dispute resolution practices. Of the non-Portuguese firms, Uria, **Cuatrecasas** and **Linklaters** have strong offerings.

problems than Portugal's, having a case arbitrated in a country like Portugal — to which they have cultural ties as the formal colonial power — is much more appealing than, Paris or Zurich. Moreover, it is significantly cheaper to arbitrate in Lisbon.

The case

In 2006, a dispute erupted between the state power grid operator, **REN**, and **Amorim Energia**, the entity that together with Italy's **ENI**, controls Portuguese oil company **GALP**.

The dispute concerned which company was entitled to dividends issued by GALP, and in June 2006,

the Court of Arbitration recognised REN's right to retain dividends.

In subsequent ICC arbitration proceedings, Amorim Energia demanded the payment of compensation equal to the dividends from REN. In 2010, REN was ordered to pay more than EUR 20

million to Amorim Energia. Recently, REN initiated proceedings before the French courts seeking the annulment of the arbitral award. MLGTS' **Miguel Galvao Teles** represented REN and Linklaters acted for Amorim Energia.

The market

As far as advocacy is concerned, the same leading litigation practices house the foremost arbitration practices, believes **Jose Miguel Justice**, a partner at PLMJ.

PLMJ itself has a team of over 10 practitioners who specialise in arbitration. Other top practices are evident at MLGTS, **Serra Lopes, Cortes Martins & Associados** and **Rui Pena, Arnaut & Associados (RPA)**.

Of the foreign firms, Cuatrecasas, **Goncalves Pereira, Uria Menendez – Proenca de Carvalho** and Linklaters also have quality arbitration practices.

Mediation

Although the courts encourage litigants to resort to mediation, they do not exert any pressure on parties to do so. Even though commercial contracts can opt to include multi-step procedures and to have a matter mediated, "it is rare for a Portuguese lawyer to include a clause obliging parties to mediate," says **Joaquim Shearman de Macedo**, a partner at RPA.

The use of mediation in commercial matters invites suspicion amongst both lawyers and clients. "They are reluctant to disclose aspects of their case prior to a court hearing," adds de Macedo.

The government, however, is keen to see mediation take off; in line with EU legal changes, by the end of 2012 it is expected to adopt definitive measures that prioritise the application of ADR over cases pending before Portugal's courts. ■

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