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ODR Readiness of Portuguese-Speaking Countries

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Abstract

In this article, we investigate whether the conditions for the emergence of an online dispute resolution (ODR) market in Portuguese-speaking countries have been met. The size of the Portuguese-speaking population and the internet penetration in Portuguese-speaking countries may look promising, but what is called networked readiness as well as the legal context needs to be factored in before any conclusion may be drawn.

Keywords: PALOP, ODR, ICT, Portuguese-speaking, dispute resolution.

1 At First Glance, a Promising Context

Portuguese is the official language of ten countries: Angola, Brazil, Cape Verde, East Timor, Equatorial Guinea, Guinea-Bissau, Macau, Mozambique, Portugal, and São Tomé and Príncipe. It is estimated that Portuguese is spoken by 234 million people worldwide, representing the 9th most spoken language in the world.[1] Portuguese is the 5th most spoken language on the internet, with 171 million users, representing an internet penetration of 73% and making Portuguese-speaking countries an attractive market for online providers (see Table 1).

Table 1 Ranking of the ten most spoken languages in the world and internet penetration[a]

Rank	Language	Total Speakers	Internet Users	Internet Penetration (%)
1	English	1,132	1,105	98
2	Mandarin Chinese	1,117	863	77
3	Hindi	615		0

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1 Carmen, A. (2020) *The World's Top 10 Most Spoken Languages, Visual Capitalist*. Available at: https://www.visualcapitalist.com/the-worlds-top-10-most-spoken-languages/, accessed: 9 May 2021.

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Table 1 (Continued)

Rank	Language	Total Speakers	Internet Users	Internet Penetration (%)
4	Spanish	534	344	64
5	French	280	144	51
6	Standard Arabic	274	226	82
7	Bengali	265		0
8	Russian	258	109	42
9	Portuguese	234	171	73
10	Indonesian	199	169	85

[a] Portuguese is the 9th most spoken language in the world. However, internet usage among the Portuguese-speaking population is the 5th highest in the world.

Six of these Portuguese-speaking countries are in Africa, and the United Nations Department for Economic and Social Affairs (UNDESA) has estimated that all the Portuguese-language countries in Africa will grow in 2022, with the exception of Equatorial Guinea (see Table 2).[2] However, the report from UNDESA (*World Economic Situation and Prospects*, 2021) emphasizes the uncertainty of these forecasts owing to the measures that have been taken or should be taken to prevent the spread of the pandemic. In Africa, the pandemic is expected to have an extremely adverse effect on employment, poverty and inequality.

Table 2 Ranking of Portuguese-speaking countries according to the rate of growth of real GDP in 2022

Rates of Growth of Real GDP	2020	2021	2022
Equatorial Guinea	−8.00	0.30	−0.60
Brazil	−5.30	3.20	2.20
Angola	−3.00	1.20	2.60
Portugal	−9.10	4.80	2.90
Mozambique	1.30	2.30	3.00
Timor-Leste	−6.50	3.00	3.50
Guinea-Bissau	−2.50	2.60	3.60
Cape Verde	−8.40	3.40	4.90
São Tome and Principe	−7.10	4.70	5.00

However, in the mid-term it can be expected that the economy of Portuguese-speaking countries will rebound and that they will become an even bigger part of the global economy.

2 *World Economic Situation and Prospects* (2021). Available at: https://www.un.org/development/desa/dpad/publication/world-economic-situation-and-prospects-2021/, accessed: 5 September 2021.

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2 Information and Communications Technology Readiness: Challenges to and Requisites for ODR

The Networked Readiness Index measures the capacity of countries to leverage ICTs for increased competitiveness and well-being. It identifies several drivers grouped within four subindexes that are then summarized in a single index. According to this report, certain factors, including a supportive and enabling environment characterized by sound regulation, quality infrastructure and ready skill supply, can pave the way towards wider adoption of information and communication technologies (ICTs). The Networked Readiness Index 2016[3] lists 139 countries, among which are some of the Portuguese-speaking countries, as seen in Table 3.

Table 3 Ranking of Portuguese-speaking countries according to population, networked readiness, internet usage and literacy indices Source: World Bank

Country	Total	Networked Readiness Index Ranking	Mobile Usage[b] (%)	Total Internet Usage[c] (%)	At least Completed Secondary Education[d](%)
Brazil	212.0	74	139	74	60
Angola	32.8	NA	44.5	36	29
Mozambique	31.2	123	70	20	14
Portugal	10.3	30	116	79	61
Guinea-Bissau	1.9	NA	97	28	NA
Equatorial Guinea	1.4	NA	45	20	NA
Timor-Leste	1.3	NA	104	28	NA
Cape Verde	0.555	85	122	63	NA
São Tome and Principe	.219	NA	80	29	NA

[b] *Ibid.*
[c] % of population.
[d] % of population over 25.

For a developed country that belongs to the European Union, Portugal's ICT readiness is quite high. Brazil's low readiness could come as a surprise in terms of its total and mobile usage. However, the business and innovation environment in Brazil has been ranked one of the weakest in the world, with both venture capital availability and government technology procurement falling. Government support of ICT is weak, and the business community sees the government as having failed to deliver in terms of incorporating digital technologies in its overall strategy as well as in the direct promotion of ICT.

3 *The Global Information Technology Report* (2016). Available at: https://www.weforum.org/reports/the-global-information-technology-report-2016.

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Data about Portuguese-speaking African countries is scarce and often contradictory. There has been notable growth in some African countries (including Portuguese-speaking countries) with respect to subscription to 3G applications and internet usage. However, Table 3 shows a strong discrepancy between mobile penetration and internet usage. Internet usage in those countries will primarily be mobile – the question is, when? Mohamed Abdel Wahab has expressed the following view in regard to Portuguese-speaking countries in Africa:[4]

> the incorporation of ICT in dispute resolution schemes has not yet been fully utilized. In fact, ICT implementation in traditional dispute resolution schemes as well as the creation of new forms of technology-based processes is still at its inception

The preceding data confirms this perspective. Furthermore, Table 3 reminds us that most African states are developing nations with a rather low level of secondary education.

3 ODR Laws, Regulations and Initiatives

We next focus on the legal and regulatory background that is the most directly related to ICT and ODR and provide a more detailed arbitration and mediation legislation analysis in the appendix.

3.1 Brazil

The proliferation of ICT applications and services, especially ODR schemes necessitates a solid framework of supporting laws and regulations. The need for an adequate sociolegal and regulatory framework for ODR has been emphasized by the United Nations Conference on Trade and Development. It is thus interesting to look at what has been done in terms of this need in Brazil before turning to an examination of the case in Africa.

Substantive legislation has been passed to encourage the use of ICT and ODR. Technology has been part of the Brazilian courts for some time. The Electronic Process Law (Law no. 11419/2006) has been enforced for more than 15 years, and this has brought notable advances towards seeking greater use of technology as a way of expanding access to justice, gaining efficiency and reducing cost.

In 2020, the number of new cases filed electronically in the judiciary was 85%, and in certain areas such as labour law, this percentage reached 99%. There are initiatives across the country to promote the use of technological means, including the recent positioning of the National Council of Justice (CNJ), to accept the use of WhatsApp as a tool for subpoenas in the country's superior courts.

Resolution 358 of the CNJ, passed on 12 February 2020, regulates the creation and adoption of technological solutions to solve conflicts through conciliation and

4 Wahab, M. S. A., Katsh, M. E. and Rainey, D. (2012) *Online Dispute Resolution: Theory and Practice: a Treatise on Technology and Dispute Resolution*. doi: 9490947253.

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mediation. The purpose of the Resolution is to encourage the use of alternative modes of dispute resolution with the support of technological solutions, aiming to make access to justice more effective and accelerate the resolution of disputes.

The General Data Protection Law came into force in August 2020 and applies to any data collection or processing taking place in the Brazilian territory or designed for services offered in Brazil (Art. 3). It sets up several principles, such as purpose (data collected can be used only for the purpose for which its use was declared at the time of consent), adequacy, necessity and transparency.

An initiative of the National Consumer Secretariat (SENACOM), within the scope of the Ministry of Justice, named *consumidor.gov.br*, offers a simple space for negotiation between companies and consumers. Even though it does not offer more complex mechanisms of negotiation through artificial intelligence, at the end of each case, the program asks whether the conflict has been solved or not. The data is saved on the platform and can be retrieved by the parties at any time, in addition to generating rankings and other public information on conflicts brought to the platform.

It is worth mentioning two private ODR initiatives introduced in Brazil:
1. www.reclameaqui.com.br, which presents itself as the largest online platform for resolving conflicts between consumers and companies.
2. https://credor.oi.com.br/pex: the OI Telecom Digital Platform (Platform for credit mediation of the OI Group) was developed in 2018 to carry out the negotiation of credits/payments due and resulting from judicial recovery involving the negotiation of Brazilian Reals 60M (thousands of credits with values below 10,000 dollars).[5]

In addition to these two initiatives, large national and international companies such as Mercado Livre[6] and Uber offer ODR mechanisms to their consumers. This is the result of the urgent need for developing cheaper and more effective means of solving disputes. There is thus a shift in the understanding of the most adequate path for solving less complex disputes, especially those related to consumer relations.

3.2 Africa

The majority of African and Middle Eastern states are predominantly legislation-centric. In other words, the prevailing legal culture in such regions is founded on statutory instruments, which serve a dual purpose of regulating specific sectors, services and/or activities and boosting public trust and confidence in such services and activities.

Africa lacks ICT and ODR-oriented legislative instruments, including the full recognition of electronic data messages and communications, e-commerce and/or data protection. Nevertheless, some ICT-ready and progressive African states have recently gone through a proliferation of several legislative initiatives that support ICT applications and services.

5 More information is available at www.recuperacaojudicialoi.com.br/.
6 www.mercadolivre.com.br/.

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As diverse ODR schemes involve electronic exchange of documents, which may be intrinsically electronic in nature and format, the validity and evidentiary weight of e-documents has become indispensable. Accordingly, e-evidence denotes the legal value and admissibility of electronic and electronically exchanged data. In technology-ready African states, it is incontrovertible that e-documents and e-data are admissible as e-evidence and are afforded the same evidentiary weight as standard paper-based documents.

As protection of internet users is a key requirement for the proliferation of e-commerce and the progressive use of ODR, most advanced African states have enacted specific laws such as Industrial Property Rights laws.

The ODR initiatives in Africa have focused primarily on domain names disputes and consumer disputes. Both initiatives are located in South Africa, which has led the continent's first initiatives that may well qualify as ODR processes. However, since over twenty African states, usually under a national chamber of commerce, have established alternative dispute resolution (ADR) centres since 1995, this may lead those governments to also step in to incentivize and promote ODR by adopting and encouraging pilot ODR projects, especially in the e-government, telecommunications, and IT arenas. To this effect, insofar as disputes associated with e-government are concerned, governments may wish to establish and operate, or simply hire, an established ODR provider that would cater for such administrative disputes that may arise in a G2C and G2B context.

Taking into consideration the massive political unrest in some African states as well as the recurring disputes arising from diverse election processes, ODR may offer novel and efficient schemes to resolve electoral disputes; in particular, the failure to resolve election controversies peacefully and in a timely manner can lead to conflict escalation, threatening the democratic process and political stability of the state. In such contexts, ODR can truly offer affordable geographically and legally available processes that could produce efficient, unprejudiced and impartial results within a short time frame in many instances. This would ultimately strengthen credibility and guarantee public trust in neutral schemes that produce unbiased results.

4 Conclusions

Our reviews demonstrates that for ODR to grow in Portuguese-speaking countries, ODR applications will have to be compatible with a low bandwidth and easy to use (especially in Africa).

It can be hoped that the most advanced Portuguese-speaking countries will emulate the public initiatives taken in Brazil.

Last but not least, private ODR providers would benefit from focusing on Brazil and Portugal as their core markets, until Angola, Mozambique and other smaller African countries have achieved a better mobile/internet penetration and secondary education.

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Appendix A: Arbitration and Mediation Legislation in Portuguese-Speaking Countries

The Portuguese-speaking countries are listed here by alphabetical order.

1 Angola

Arbitration

- Law on Voluntary Arbitration – Law 16/03 of 25 July
- Decree no. 04/2006 of 27 February – Authorizes the creation of arbitration centres
- Resolution no. 34/06 of 15 May – Angolan government reaffirms its commitment to arbitration as a means of resolving disputes over available rights
- Separate sectorial legislation
- Private Investment Law – Law no. 10/18 of 26 June
  - Article 15

§ The Angolan state guarantees all private investors access to Angolan courts for the defence of their interests, with due process, protection and security being ensured;

§ Within the scope of this law, conflicts that may arise regarding available rights may be resolved through alternative methods of conflict resolution, namely, negotiation, mediation, conciliation and arbitration, provided that by special law they are not exclusively submitted to a judicial court or to the necessary arbitration.

- Law no. 9/16, of 16 June – Approves the Public Contracts Law
  - Article 338:
    - Possibility for the parties to choose to submit the dispute to an arbitral tribunal;
    - The arbitral tribunal is constituted and operates under the terms of the Law on Voluntary Arbitration;
    - When the value of the dispute does not exceed Kz: 36,000,000.00, a single arbitrator may be appointed.
  - Article 339
    - The arbitration process is simplified in the following terms:

§ When there are only two pleadings: the petition and the defence;

§ When only two witnesses can be appointed for each fact contained in the questionnaire;

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§ When the discussion is written.
  - Once the decision has been made and notified to the parties, the process is handed over to the competent service of the Ministry of Public Works, where it is filed. Courts for the performance of the contractor's obligations and a copy of the arbitral tribunal's decision must be sent to the competent judge for the purposes of the executive process.
- Capital Markets Law – Law no. 12/05 of 23/09
  - Article 118: allows disputes between different participants in the capital market, namely investors, to be subject to arbitration
- Petroleum Activities Law – Law no. 10/2004, of 12 November
  - Article 89: the use of arbitration is mandatory for the resolution of disputes arising from the contractual relations established between the supervising Ministry and its licensees, as well as between the National Concessionaire and its associates.
- Presidential Decree no. 41/20 of 27 February
  - Agreement between the Government of the Republic of Angola and the Government of the Portuguese Republic on Promotion and Reciprocal Protection of Investments
- General Labor Law – Law no. 7/15 of 15 June
  - Article 273 et seq.

§ Individual labour disputes are resolved by extrajudicial mechanisms, namely mediation, conciliation and arbitration, as well as by judicial mechanisms.
  - Article 293 et seq.

§ For the purposes of this Diploma, voluntary arbitration is the out-of-court mechanism for resolving labour disputes in which the parties freely choose arbitrators;

§ Collective labour disputes are preferably resolved through the voluntary arbitration mechanism, under the terms of the present Law;

§ The parties may, by agreement, subject the matters in conflict to voluntary arbitration;

§ The use of arbitration in the conflict excludes its submission to mediation or conciliation;

§ The arbitration will be carried out by three (3) arbitrators, one appointed by each of the parties and the third, who will preside, chosen by the parties' arbitrators;

§ Managers, administrators, directors, consultants and workers of the company or companies involved in the arbitration cannot be chosen as chairman arbitrators, as well as all those who have any direct or related interest with any of the parties and spouses, relatives in a straight line or up to the third degree of the collateral line, the affines, adopters and adoptees of the entities referred to in them;

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§ The arbitral award produces the same effects as a sentence handed down by the organs of the judicial power and constitutes an enforceable title;

§ The arbitrators decide with mandatory force on the resolution of the conflict;

§ An arbitration appeal is allowed for an annulment;

§ The arbitral award may be annulled by the competent court at the request of the Public Prosecutor on any of the following grounds:

- a The decision has been rendered by an arbitration body irregularly constituted;
- b It does not contain reasons;
- c There has been a violation of the principle of equality of the parties, of the adversary at all stages of the proceedings and of the parties' hearing, oral or written, before making the final decision, and this influenced the resolution of the dispute;
- d Have the court aware of issues that it could not hear or have failed to rule on matters that it should consider;
- e Not having the arbitral entity, whenever it judges according to equity and uses and customs, respecting the principles of the Angolan legal system;

§ In everything that is not specially regulated by this Law, the legislation on voluntary arbitration applies, with the necessary adaptations.

Mediation

- General Labor Law – Law no. 7/15 of 15 June
  - Article 273 et seq.
    - Individual labour conflicts are resolved by extrajudicial mechanisms, namely mediation, conciliation and arbitration, as well as by judicial mechanisms.
  - Article 275 et seq.
    - Mediation and an out-of-court dispute resolution mechanism under the jurisdiction of the General Labor Inspectorate and other entities authorized by law.
    - In the event of a labour dispute, either party may request mediation from the services of the General Labor Inspectorate, by means of an application.
    - The application referred to in the previous number may be submitted orally, and the competent services of the General Labor Inspectorate must reduce it to writing.
    - The applicant must indicate in the application the matters in conflict, as well as provide all the elements that may contribute to the resolution of the conflict.
    - The procedure:

§ Upon receipt of the application, the General Labor Inspectorate must notify the parties for a hearing within ten (10) business days.

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§ The services of the General Labor Inspectorate have up to ten (10) business days after the hearing referred to in the preceding paragraph to present the parties, in audience, the proposed resolution of the conflict.

§ If the proposal referred to in the preceding paragraph is accepted, the final agreement must be drawn up and subsequently signed by the parties.

§ The agreement must not contradict mandatory legal norms, include provisions less favourable to the worker than those enshrined in the law, include provisions on tax regimes or limit the employer's organization and management powers.

§ In cases where there has been no agreement by the parties or if this has been partial, as well as in cases where one of the parties has not appeared and a declaration of impossibility has been drawn up, either party may take legal action, applying the regime of the filing. Action provided for in the conciliation regime.

§ If one of the parties does not attend the hearing and does not justify its absence within the five days following the date set for the mediation session, the General Labor Inspectorate must issue a declaration that it is impossible to obtain a chord.

§ The General Labor Inspectorate, whenever justified, may request support from the representative of the Public Ministry responsible for reconciliation with the competent judicial bodies.

§ The homologation of the chord applies, with the necessary adaptations, the regime provided for in Article 289.

§ The agreement must be drawn up in triplicate, one belonging to each of the parties and the other deposited and registered with the services of the General Labor Inspectorate.

§ If there is no agreement or if it has been partial, the party requesting mediation may freely file a lawsuit, within thirty (30) days, and, for that purpose, attach the declaration of impossibility of obtaining an agreement or the minutes of the meeting, containing the mediation terms.

Since Angola is experiencing exponential economic growth and an increase in international transactions and foreign direct investments involving Angola and/or Angolan parties, the practice of international arbitration in Angola is also growing.

Given the reforms of the last few years, it is expected that the use of arbitration for domestic cases with a foreign element will increase (i.e. where a party has foreign shareholders). Also, there are an increasing number of arbitrations relating to Angolan parties where recognition and enforcement in Angola are important issues to consider, while an increasing number of investment arbitration cases relating to Angola or Angolan parties can be seen as well.

Currently, Arbitration in Angola is regulated by Law no. 16/03, of 25 July 2003, the 'Voluntary Arbitration Law' (VAL).

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This law does not strictly follow the UNCITRAL Model Law; however, it includes many solutions that are common to the ones found in that Model Law. In contrast to the Model Law, we can point out the following aspects:

– the VAL contains no provision on definitions;
– it does not provide for rules on interpretation;
– it adopts the disposable rights criteria regarding arbitrability;
– it does not address the issue of preliminary decisions;
– it does not distinguish between different types of awards; and
– it permits appeal on the merits in domestic arbitrations, unless the parties have agreed otherwise.

Also relevant in this regard, Decree no. 4/06, of 27 February 2006, has the purpose of promoting institutional arbitration in Angola and deals with the licensing procedures for the incorporation of arbitration centres. The Ministry of Justice is the entity empowered to authorize the incorporation of arbitration centres in Angola.

Up to this date, the Ministry of Justice has authorized the creation of some arbitration centres:

– Harmonia – Centro Integrado de Estudos e Resolução de Conflitos (Integrated Centre for Studies and Conflict Resolution);
– Arbitral Juris;
– CAAL – Centro Angolano de Arbitragem de Litígios (Angolan Centre of Arbitration of Conflicts);
– Centre of Mediation and Arbitration of Angola;
– CEFA's Arbitration Centre;
– CREL – Centro de Resolução Extrajudicial de Litígios (Extrajudicial Resolution of Conflicts Centre); and
– CAAIA – Centro de Arbitragem da Associação Industrial de Angola (Arbitration Centre of the Angolan Industrial Association).

However, the majority of arbitration cases conducted in Angola continue to be *ad hoc*.

Normally, the Angolan state and companies in the public sector accept, without any complaints, the use of arbitration to resolve disputes with foreign investors.

In 2016, Angola took another major step on international arbitration, by signing the New York Convention on the Recognition of Foreign Arbitral Awards. On 6 March 2017, Angola deposited its instrument of accession to the Convention with the UN Secretary General. Under Article XII (2), the Convention entered into force in Angola on 4 June 2017, 90 days after the deposit of its instrument of accession.

Angola is not a signatory to the 1927 Geneva Convention. It is also not a Member State of OHADA, nor is it a party to its Convention.

However, Angola is a party to the Multilateral Investment Guarantee Agency Convention (MIGA), since 19 September 1989.

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2 Brazil

Arbitration

- Arbitration Law – Law no. 9307 of 23 September 1996
- Law no. 13.129/15, of 27 May 2015, which amends and complements law 9.307 / 96 ('Arbitration Law')
- Decree 4,311, of 23 July 2002 (New York Convention)

Mediation

Resolution No. 125/2010 of the CNJ

Introduced:

  - Special Justice Centers (CEJUSCs) at the Brazilian Courts devoted designed/oriented to conflict resolution cases and citizenship, whose goals, in addition to the usual mediation legal procedures, are to provide information, guidance and to assist the general public regarding the mediation process;
  - Incentives to encourage the use and to the training of magistrates, public servants and mediators on the best practices associated with consensual conflict resolution;
  - Addressed the required level of qualification for the conciliators and mediators, the registry and statistical monitoring of their activities and management of the Special Justice Centres.

- The Civil Procedural Code (CPC) – Law no. 13.105/2015 – an important step towards the dissemination of mediation practices in the country, especially in the Courts of Justice, as there are about 22 references to mediation in this legal text (while there was none in the previous text).
- Mediation Law – Law no. 13.140/2015 – while the Procedural Civil Code sets some rules for mediation, when sessions are held in courts, the Law of Mediation is the fundamental norm which sets broad and cohesive rules and principles to mediation in the Brazilian system.
- Resolution no. 358/2020 of the CNJ – regulates the creation and adoption of technological solutions aimed at resolving conflicts through conciliation and mediation. The purpose of the Resolution is to encourage the use of alternative means of conflict resolution coupled with technological solutions.

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3 Cape Verde

Arbitration

- Arbitration Law – Law no. 76 / VI / 2005 of 16 August;
- Regulatory Decree no. 8/2005, of 10 October, materializes the legal framework of the Arbitration Centers;
- Law no. 89/IV/93, of 13 December 1993, on foreign investment, which provides that disputes between the State of Cape Verde and foreign investors shall be solved by conciliation and arbitration subject to the rules set forth in the statute;
- Decree-Law no. 35/2010, of 6 September 2010, on insurance agreements, which provides that disputes related to the validity, interpretation or non-fulfilment of insurance agreements may be solved by arbitration;
- Decree no. 8/2005, of 10 October 2005, which provides for institutionalized arbitration.

Mediation

- Decree-Law no. 30/2005, of 9 May, and Decree-Law no. 31/2005, of 9 May (Regulates the use of Mediation).

The main national arbitration statute in Cape Verde is the Arbitration Law no. 76/ VI/2005 of 16 August 2005 (the 'Arbitration Law'). The Arbitration Law applies to both domestic and international arbitration.

Cape Verde has not adopted the UNCITRAL Model Law.

The Arbitration Law diverges from the UNCITRAL Model Law in several ways. First,

the Arbitration Law has adopted the inalienable or non-negotiable rights criterion. Therefore, although parties are generally free to submit their disputes to arbitration under the Arbitration Law, the law carves out an exception for disputes which relate to inalienable or non-negotiable rights and for disputes which fall under State exclusive jurisdiction.

Under the Arbitration Law, arbitration shall be of an international nature when either (1) at the time of conclusion of the arbitration agreement, the parties have their places of business in different countries; or (2) the legal relationship giving rise to the dispute affects international trade interests.

The only mandatory principles of due process for any arbitration (domestic or international) held under the Arbitration Law are the following:

1. the parties must be treated equally;
2. proceedings must be adversarial in nature; and
3. each party must be granted full opportunity to present its case, be it orally or in writing before an arbitral award is rendered.

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The Arbitration Law does not address the rules applicable to default of a party.

According to the Arbitration Law, interim measures may be ordered by the arbitral tribunal, but the statute neither details the interim measures nor contains a provision on recognition and enforcement of such measures.

All means of evidence allowed under general law (i.e. documentary, witness and expert evidence) are admissible in arbitration proceedings. Despite this, the Arbitration Law contains no provisions on the arbitral tribunal's authority to order expert evidence, nor does it grant such authority to a State judge. There is also no express provision on the arbitral tribunal's power to request judicial assistance in the taking of evidence.

Unless otherwise agreed by the parties, and unless otherwise agreed between the parties, the arbitral tribunal must render the final award within six months from the date of the last arbitrator's appointment.

In arbitral proceedings with more than one arbitrator, if a minority of the tribunal refuses to sign the award, the refusal must be mentioned in the award, but the reason for such refusal need not be stated.

Cape Verde is not a party to the 1958 New York Convention or to the OHADA Convention. It is, however, a party to the ICSID Convention.

4 Guinea-Bissau

- Voluntary Arbitration – Decree-Law no. 9/2000 of 2 October and Decree-Law No. 19/2000 of 8 October 2010

Guinea-Bissau is a member state of the Organization for Harmonization of Business Law in Africa (OHADA).

OHADA's Uniform Arbitration Act (AUA) was enacted on 11 March 1999 and became effective on 11 June 1999. AUA applies to both national and international arbitration when the place of arbitration is in Guinea-Bissau or any other OHADA member state.

Although the UAA became effective in the territory in 1999, in 2000, a Law on Private Arbitration was passed in Guinea-Bissau by means of Decree-Law No. 9/2000 of 2 October 2000.

However, because this law did not reflect the principles of the UAA and was, for the most part, in conflict with the UAA, it was later revoked by Decree-Law no. 19/2000 of 8 October 2010, which is in most respects now in line with the UAA.

The UAA is based on the 1985 Model Law but diverges from it in many respects:

- The UAA makes no distinction between domestic and international arbitration and does not deal only with commercial matters.
- Article 2 of the UAA provides that arbitration may be resorted to with respect to any rights that may be freely disposed of.
- The UAA contains virtually no rules of procedure. Article 9 of the UAA dictates that parties must be treated with equality and that each party must be given the opportunity to present its case. However, this is the only mandatory

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provision of the UAA dealing with arbitration procedure. Provided Article 9 is not breached, parties are free to choose which rules of procedure shall govern the arbitration. This is probably the main difference between the UAA and the Model Law.

– The grounds which allow a party to challenge arbitrators are not clearly set forth in the UAA. The procedure for such a challenge is not set out in the UAA either. Where a party wishes to challenge an arbitrator, it must apply to the court in the OHADA Member State of the seat of arbitration to rule on the challenge.
– The UAA contains no provisions giving the arbitral tribunal authority to order expert evidence, nor does it give such authority to a State judge. There is also no provision expressly granting arbitral tribunals the power to request State court assistance in taking evidence. At the same time, it does not provide for any specific interim measures that can be ordered by the arbitral tribunal.
– The UAA does not specify what happens if one party refuses to participate in the arbitral process.
– In the absence of an agreement between the parties, the arbitral tribunal has six months as from the date on which the last arbitrator accepted his appointment to render the final award. This period can only be extended by an agreement of the parties or decision by court of the seat.
– If in arbitral proceedings with more than one arbitrator a minority refuses to sign the award, the refusal must be mentioned in the award, but the reason for the omitted signature does not need to be stated.

Guinea-Bissau is not a party to the 1958 New York Convention. It has been party to the OHADA Convention since 24 February 1996. Guinea-Bissau is not a party to any other arbitration-related conventions.

5 Macau

– Voluntary Arbitration – Law no. 19/2019 of 5 November
– Decree-Law no. 29/96/M of 11 June (as amended by Decree-Law no. 19/98/M of 11 May and Decree-Law no. 110/99/M of 13 December). This contains the governing rules on domestic arbitration.
– Decree-Law no. 55/98/M of 23 November (Arbitration Law). This contains the framework of international commercial arbitration, which is based on the UNCITRAL Model Law on International Commercial Arbitration 1985. The Arbitration Law corresponded almost entirely to the original 1986 version of the UNCITRAL Model law.
– Law no. 19/2019 of 5 November (New Arbitration Law, in force from 4 May 2020). The new law contains the framework applicable to all arbitrations that take place in Macau.

The New Arbitration Law is still based on the UNCITRAL Model Law, being now applicable to both internal and external arbitration. In addition, conflicting

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situations resulting from the application of two different sets of rules have been settled.

Macau's New Arbitration Law is a significant development for the Guangdong-Hong Kong-Macau Greater Bay Area. In recent years, there has been a drop in foreign direct investment in Macau. The strengthening of Macau's dispute resolution processes is part of an effort to reverse that trend. With increases in investment comes the increased risk of disputes. These reforms are intended to provide a sound framework for investors to be encouraged not only to invest in Macau, but also to opt for Macau-seated arbitration to resolve any disputes.

The new regime will apply to all arbitrations commenced after 4 May 2020, and to arbitrations already underway where the parties agree to its application. It also applies to both domestic and international arbitrations seated in Macau. The key reforms are outlined below.

Recognition and Enforcement of Arbitral Awards

Macau's New Arbitration Law provides that a Macau arbitration award has the same executory effect as a judgment granted by the court of first instance in Macau. There are also arrangements for the reciprocal enforcement of arbitral awards between Macau and Mainland China, as well as between Hong Kong and Macau. The New Arbitration Law also sets out a process by which arbitral awards issued in other countries may be enforced. Since July 2005, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention') has applied in Macau. This means that the courts in Macau will recognize and enforce arbitral awards subject to the applicability under the New York Convention of (i) the limited defences to enforcement it contains, (ii) the reciprocity reservation (under which only arbitration awards from other signatory states must be enforced), and (iii) the commerciality reservation (under which only arbitration awards deemed to relate to commercial matters under PRC law may be enforced).

Limitations on Appeal Rights

One of the benefits of international arbitration is the limited right of appeal against an arbitral award, which avoids unnecessary delays and uncertainty in the enforcement process. Under Macau's old arbitration regime, parties could agree (prior to the start of arbitration proceedings) to the possibility of appealing the tribunal's award to the Intermediate Court of Macau. Macau's New Arbitration Law precludes this possibility, although it does permit parties to agree to the appointment of another arbitral tribunal to determine any challenge to the original tribunal's award. This challenge is not limited to the narrow defences to resist enforcement of an arbitral award under the New York Convention. However, the agreement permitting challenges must contain all relevant terms for the challenge process, in the absence of which the agreement will be null and void.

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Recognition and Enforcement of Interim Measures

The New Arbitration Law expressly provides Macau-seated arbitral tribunals with the power to order interim measures. It also expressly recognizes the enforceability of interim measures ordered by arbitral tribunals, whether the tribunals are seated in or outside of Macau.

However, unlike Hong Kong, Macau does not yet have specific arrangements with Mainland China for assistance with enforcement of such interim measures. In October 2019, the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the HKSAR came into force. This empowers Mainland Chinese courts to grant interim measures to support certain Hong Kong arbitrations. Several applications for interim measures under this arrangement have already been granted (see our previous updates on this arrangement here and here). It remains to be seen whether Macau will enter into a similar arrangement.

Emergency Arbitration

Emergency arbitration has become an increasingly popular option for parties requiring urgent interim relief during the period of tribunal formation. Depending on the size of the tribunal, there is normally a waiting period of 1 to 3 months between the commencement of arbitration proceedings and the constitution of the tribunal. Emergency arbitration enables parties to seek urgent relief from an emergency arbitrator during this waiting period as an alternative to seeking such relief from the courts. Macau's New Arbitration Law expressly recognizes both the right of parties to turn to emergency arbitration for urgent interim relief, and for the enforceability of emergency arbitrator decisions.

Court Assistance in the Taking of Evidence

Arbitral tribunals typically have the power to order the production of evidence by the parties to the arbitration. The tribunal cannot compel production, though it can sanction non-compliance, for example by drawing adverse inferences. In addition, evidence may be needed from a third party which is unwilling to cooperate. In either instance, a party may wish to request the local courts' assistance in compelling the production of evidence. Macau's New Arbitration Law sets out a formal procedure for obtaining the assistance of the Macanese courts in such circumstances.

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Publication of Arbitral Awards

The new regime also attempts to increase the transparency of arbitral awards rendered in administrative disputes in Macau. These include disputes concerning (a) administrative agreements, (b) the liabilities of administrative authorities, public servants or service staff arising out of public administration activities, including compensation claims, or (c) any monetary rights or legally protected interests. Arbitral awards pertaining to any administrative disputes will now be published online on a platform set up by Macau's Justice Affairs Department. Macau's personal data protection law applies to any such publication. This should protect the identities of private sector parties and require the redaction of those identities prior to publication of awards.

Conclusion

As Macau's New Arbitration Law comes into force, other leading arbitration seats in the region will watch with keen interest to see if the reforms lead to an increase in Macau-seated arbitrations. Investors in the Greater Bay Area are likely to face proposals, and potentially pressure, to enter into Macau-seated arbitration agreements. The choice of the arbitral seat can have wide-ranging repercussions. These range from availability of access to local courts when the need arises, and the procedural restrictions and requirements faced by the arbitral tribunal, to the enforceability of the award. The introduction of a modern arbitration law which is based upon the Model Law will be a welcome development for international parties to arbitrations seated in Macau.

In order to gain the full benefit of this development, Macau's judiciary must properly deploy its provisions to support the arbitral process. Experience from other jurisdictions teaches that a modern law reflecting international norms is a necessary but not sufficient condition for a jurisdiction to be a reliable seat. The attitude adopted by the Macanese courts, and the continued development of Macau's arbitral institutes, will thus be pivotal to ensuring the success of Macau's New Arbitration Law.

6 Mozambique

– Arbitration, Conciliation and Mediation Law – Law no. 11/99 of 8 July

On the entry into force of Law no. 11/99 (1999), Mozambique seemed to be in rapid development, and the enactment of an autonomous Arbitration Law (the Law), a demand of Mozambican entrepreneurs and international cooperation partners alike, appeared to be an adequate response to concerns of the economic agents regarding the state of justice.

With 72 articles (which also regulate conciliation and mediation), the Law was largely inspired by the UNCITRAL Model Law.

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At the outset, the Law expressly lists the principles that preside over arbitration, namely party autonomy, flexibility, privacy, suitability, celerity, strict equality of the parties, holding of a hearing unless otherwise agreed and adversarial procedure. While some of these are a recurring presence in arbitration statutes everywhere, others are proclaimed advantages of arbitration that typically are not deemed worthy of being mentioned in national laws, suggesting that the Mozambican legislator was moved here by a laudable pedagogical intention.

The Law has opted for a dualist model. International arbitration is defined in very broad terms (combining the definition used in the French and Portuguese arbitration acts with that of the Model Law).

On a national level, there are virtually no institutionalized arbitration organizations, something which has also contributed to a certain lethargy in the past. The exception is the Arbitration, Conciliation and Mediation Centre of Maputo (CACM), which has endeavoured since 2001 to contribute to the development and dissemination of arbitration as a means of alternative dispute resolution.

Mozambique has an arbitration-friendly law, which, among other things, allows for freedom and flexibility as well as for the application of international regulations.

A 'foreign' arbitration award as an external act needs to be recognized in the Mozambican legal system in order to be attributed internal legal relevance. In Mozambique there are standards of internal source and international source recognition. These standards are found respectively in Articles 1094 and ss. of the Process Code Mozambican Civil Service (CPC) and the New York Convention on the recognition and enforcement of foreign arbitral awards 1958 (CNI).

7 Portugal

Arbitration

- Law on Voluntary Arbitration – Law no. 63/2011 of December 14

Mediation

Portugal has several Laws regarding Mediation, such as:

- Mediation Law – Law no. 29/2013 of 19 April – Establishes the general principles applicable to mediation held in Portugal, as well as the legal regimes of civil and commercial mediation, mediators and public mediation.
- Family Mediation System (SMF) – regulated by Order no. 13/2018, of 22 October, which also approved the regulation of procedures for the selection of mediators who want to provide mediation services within the scope of this public mediation system.

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- Labor Mediation System (SML) – Protocol between the Ministry of Justice, the Confederations representing the various sectors between the Ministry of Justice, the Confederations representing the various sectors of activity (industry, commerce, tourism and agriculture) and workers (CGTP – IN and UGT), on 5 May 2006.
- Criminal Mediation System (SMP) – introduced in the Portuguese legal system, through Law no. 21/2007, of 12 June, in compliance with the provisions of Article 10 of Framework Decision no. 2001/220 / JHA, of the Council of the European Union, on the status of the victim in criminal proceedings, which requires Member States to endeavour to promote mediation in criminal proceedings.

Nowadays, arbitration has proven itself a true success in Portugal as a dispute resolution method, being increasingly used in both international and domestic disputes, involving both private and public law.

The Portuguese Voluntary Arbitration Law (VAL) is regulated in the Annex to Law no. 63/2011, of December, which is based on the Model Law on International Commercial Arbitration, UNCITRAL of 1985, remodelled in 2006, which entered into force in March 2012.

This arbitration law aimed to introduce a more modern arbitration regime and promote Portugal as a seat for international arbitrations and also tried to reconcile – whenever it saw usefulness in this – the solutions already tested in the application of Law no. 31/86 with the guidelines and inspirations in several national laws regulating arbitration that have been approved in the last 15 years in other countries.

The Law is characterized by the following fundamental points:
- it is characterized by the autonomy of the arbitration process (as stated in the UNCITRAL Model Law);
- as advocated by UNCITRAL, formal validity of the arbitration agreement is required in order to give greater flexibility to compliance with the written form requirement; and
- VAL also confers jurisdiction on state courts to rule on the competence of arbitral tribunals only where the arbitration agreement is manifestly null and void, inoperative or incapable of being performed.

Portugal also joined the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (CNI 1958) on 16 January 1995. However, it is in force in the Portuguese legal system with an express reservation of reciprocity (but not with the commercial reserve), which means that it applies only in relation to arbitration decisions rendered in states that are also party to this Convention. The grounds for the refusal of recognition and for the annulment of arbitral awards are, in the Portuguese law, broadly in line with the grounds for refusal of recognition laid down in CNI 1958.

Regarding the international arbitration legal regime, this is regulated by Chapter IX of the VAL. According to Article 49, international arbitration is a private

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and voluntary means of resolving a dispute, with a contractual nature or not, where the interests of international trade are at stake.

Thus, the VAL states, in Article 49 no. 2, that the same internal rules are applicable to international arbitration, *mutatis mutandis*.

The VAL also integrates the general arbitration regime and must be applied to all arbitral proceedings, including the necessary arbitration and certain special arbitrations, unless a special law expressly determines otherwise. Only those special laws may punctually or generically derogate from the application of the PAL or by establishing a procedural regime different from that provided for therein.

The most prominent commercial arbitration institution in Portugal is the Arbitration Centre of the Portuguese Chamber of Commerce and Industry, whose rules entered into force in March 2014 and reflect both the changes introduced by the PAL and international best practice. The Centre may act as an appointing authority, if agreed between the parties in the arbitration agreement.

There are no international arbitration bodies based in Portugal, although the ICC has a national committee in Portugal, which assists the Court in the appointment of Portuguese arbitrations.

8 São Tomé and Principe

– Law on Voluntary Arbitration – Law no. 9/2006 of 2 November

The VAL governs both domestic and international arbitration. STP's VAL is largely based on the 1986 Portuguese Arbitration Act. Nevertheless, many of the UNCITRAL Model Law principles are incorporated into the VAL.

The main differences between the VAL and the Model Law are the following:

– The VAL does not include a provision on definitions, nor does it provide for rules on interpretation;
– The VAL does not provide on the procedure to challenge an arbitrator;
– The VAL is silent on the matters of interim measures or preliminary orders;
– Other than providing for the principles of due process, the VAL contains virtually no rules on procedure itself;
– The VAL does not expressly distinguish between different types of awards;
– According to the VAL, parties shall only be given one month from the date on which they were given notice of the arbitral award to initiate setting aside proceedings;
– The VAL allows for appeals on the merits to be lodged against domestic arbitral awards, unless otherwise agreed between the parties.

Sao Tome and Principe has recently deposited its instrument of accession to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which entered into force in the territory on 18 February 2013.

Sao Tome and Principe is not a Member State of the Organization for the Harmonization of Business Law in Africa (OHADA), nor is it a party.

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9 Timor-Leste

– Civil Procedure Code of Timor – Decree-Law n.º 2006/01

On 22 February 2016, the National Parliament approved the Timor Law on Arbitration, Mediation and Conciliation, whose preamble specifically mentions that its objective is precisely to improve the business environment, promoting investment and stimulating economic growth.

This new Timor's Arbitration Law is based on the International Commercial Arbitration Law Model – UNCITRAL – and is influenced by laws adopted by Portuguese-speaking countries.

There are also provisions relating specifically to International arbitration. First, the bill defines arbitration as an international one whose matter of litigation emerges from commercial relations international standards, adopting, similar to the UNCITRAL Law Model, the provisions of Article 28, giving the parties freedom to choose the law material applicable to the dispute, which must be expressly agreed by those.

Timor-Leste has the clear intention to modernize the national legal framework in this specific matter as a contribution to investment and economic growth.

Pursuant to paragraphs 3, 4 and 5 of Article 123 of the Constitution of the Democratic Republic of Timor-Leste (hereinafter referred to as CRDTL) the institution of arbitral tribunals is allowed as a category of courts and, furthermore, that ordinary law can institutionalize instruments and forms of non-jurisdictional composition of conflicts.

There are also several provisions in the ordinary law, namely in the Civil Procedure Code, approved by Decree-Law nº. 21/2006, of 21 February (hereinafter referred to only as CPC), with reference to arbitration.

Pursuant to Article 239 of the CPC, it is established that the commitment arbitration is part of one of the causes of extinction of the instance.

Furthermore, Article 671 of the CPC provides that the decisions rendered by arbitral tribunal are enforceable under the same terms as court decisions.

And with regard to the feasibility of foreign decisions, it foresees the Article 672 of the CPC that sentences handed down by courts or arbitrators in a foreign country can only serve as a basis for execution when reviewed and confirmed by the Supreme Court of Justice.

With regard to the resolution of international conflicts, it provides for in Article 67 (1) of the CPC the following:

The parties may agree on the competent jurisdiction to settle a particular dispute, or disputes eventually arising from a certain legal relationship, provided that the relationship controversial has a connection with more than one legal order, admitting that in international conflicts related to the legal order East Timorese, the parties can agree which jurisdiction is competent to settle the litigation.

Note that Timor-Leste, until now, is not a signatory to the New York Convention on the Recognition and Enforcement of Arbitral Awards, of 1958, which establishes

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the formalities of recognition and enforcement of foreign arbitral awards, as well as the conditions of rejection of the application.

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