

Moura Vicente | Dias Oliveira | Gomes de Almeida (Eds.)

Online Dispute Resolution

New Challenges



Nomos

CIDP

Faculdade de Direito
Universidade de Lisboa

<https://doi.org/10.5771/9783748931508-1>, am 03.08.2024, 15:43:32

Open Access –  – <https://www.nomos-elibrary.de/agb>



Dário Moura Vicente | Elsa Dias Oliveira
João Gomes de Almeida (Eds.)

Online Dispute Resolution

New Challenges



Nomos

CIDP

Faculdade de Direito
Universidade de Lisboa

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

ISBN 978-3-8487-8619-0 (Print)
978-3-7489-3150-8 (ePDF)

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN 978-3-8487-8619-0 (Print)
978-3-7489-3150-8 (ePDF)

Library of Congress Cataloging-in-Publication Data

Moura Vicente, Dário | Dias Oliveira, Elsa | Gomes de Almeida, João

Online Dispute Resolution

New Challenges

Dário Moura Vicente | Elsa Dias Oliveira | João Gomes de Almeida (Eds.)

241 pp.

Includes bibliographic references.

ISBN 978-3-8487-8619-0 (Print)
978-3-7489-3150-8 (ePDF)

1st Edition 2022

© The Authors

Published by

Nomos Verlagsgesellschaft mbH & Co. KG

Waldseestraße 3–5 | 76530 Baden-Baden

www.nomos.de

Production of the printed version:

Nomos Verlagsgesellschaft mbH & Co. KG

Waldseestraße 3–5 | 76530 Baden-Baden

ISBN 978-3-8487-8619-0 (Print)

ISBN 978-3-7489-3150-8 (ePDF)

DOI <https://doi.org/10.5771/9783748931508>



Onlineversion
Nomos eLibrary



This work is licensed under the Creative Commons Attribution – ShareAlike 4.0 International License.

Table of Content

List of Abbreviations	7
Introduction	9
Editors	11
Contributors	13

Part I Due Process Guarantees and Online Dispute Resolution

A Judge's Perspective: Guarantees of a Fair Trial and Online Dispute Resolution	21
---	----

António Santos Abrantes Geraldés

An Arbitrator's Perspective: Between Equal Treatment and the Good Administration of Transnational Justice in Online Arbitration	37
---	----

Diego P. Fernández Arroyo and Bruno Sousa Rodrigues

A Lawyer's Perspective: Guarantees of a Fair Trial and Online Dispute Resolution	59
--	----

Nuno Ferreira Lousa

An Arbitration Center's Perspective: Due Process in Online Dispute Resolution	65
---	----

Juan Serrada Hierro

Part II Online Trial Hearings – In Particular, Evidence

A Judge's Perspective: Online Hearings, especially the Gathering and Assessment of Evidence	87
---	----

Luís Filipe Pires de Sousa

Table of Content

An Arbitrator's Perspective: Online hearings in Arbitration: the taking of Evidence <i>Pilar Perales Viscasillas</i>	107
A Lawyer's Perspective: Virtual Hearings <i>Catarina Monteiro Pires and Madalena Diniz de Ayala</i>	133
An Arbitration Center's Perspective: Online Dispute Resolution and the Virtual Hearings: Six Characters in Search of an Author <i>Paula Costa e Silva</i>	145
 <i>Part III Confidentiality, Privacy and Security</i>	
A Judge's Perspective: Privacy and Confidentiality in Voluntary Commercial Arbitration <i>Rui Torres Vouga</i>	159
An Arbitrator's Perspective: Confidentiality – Privacy – Security in the Eye of the Arbitrators or the Story of the Arbitrator who Became a Bee <i>Marc Henry</i>	181
A Lawyer's Perspective: Confidentiality, Privacy and Security in Arbitration in Times of Covid <i>Sofia Ribeiro Mendes</i>	205
An Arbitration Center's Perspective: Confidentiality, Privacy and Security <i>Joana Jerónimo Soares Correia</i>	233

List of Abbreviations

AAA	American Arbitration Association
CAC	Commercial Arbitration Centre (Portuguese Chamber of Commerce and Industry)
CIArb	Chartered Institute of Arbitrators
CPR	International Institute for Conflict Prevention and Resolution
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes
ISO	International Standards Organization
LCIA	London Court of International Arbitration
NYC Bar	New York City Bar Association
ODR	Online Dispute Resolution
PAL	Portuguese Arbitration Law
ROA	Revista da Ordem dos Advogados
SCC	Stockholm Chamber of Commerce
UNCITRAL	United National Commission on International Trade Law
ZPO	<i>Zivilprozessordnung</i> (German Code of Civil Procedure)

Introduction

One of the lines of research pursued by the Private Law Research Centre at the Faculty of Law of the University of Lisbon concerns *Private Law in the Digital Age*.

This topic includes online dispute resolution, a practice which, after growing slowly but surely over several years, has been taken up much more widely as from mid-2020, due to the constraints on in-person proceedings imposed by the COVID-19 pandemic. In view of the impossibility of participants appearing safely in person for proceedings before state courts and arbitral tribunals, the response to this problem has been to use online forms of communication. Unprecedented use has thus been made of digital platforms, making it possible to maintain a reasonable pace in proceedings.

However, the shift to online means of communication in the conduct of dispute settlement mechanisms has posed a plethora of challenges, relating, *inter alia*, to questions of procedure before state courts and arbitral tribunals. This was the cue for holding a webinar on *Online dispute resolution: new challenges*, which took place on 29 June 2021 and was organised jointly by the Private Law Research Centre at the Faculty of Law of the University of Lisbon and by the Portuguese Arbitration Association.

As central topics for exploration at this event we chose “Due process guarantees and online dispute resolution”, “Online trial hearings – in particular, evidence” and “Confidentiality, privacy and security”.

In order to provide differing points of view and stimulating debate, we invited a judge, an arbitrator, a lawyer and the representative of an arbitration centre to share their knowledge and experience on each of the topics. As a result, the webinar featured illuminating contributions from António Abrantes Geraldes, Catarina Monteiro Pires, Diego P. Fernández Arroyo, Joana Soares Correia, Juan Serrada Hierro, Luís Filipe Pires de Sousa, Marc Henry, Nuno Lousa, Paula Costa e Silva, Pilar Peralles Viscasillas, Rui Vouga, and Sofia Ribeiro Mendes, who subsequently submitted their articles, which are published here.

To all contributors, whose biographies can be found below in this book, we wish to express our sincere gratitude for their collaboration. Our thanks are also due to Nomos, which promptly agreed to publish this work.

Lisbon, April 2022

*Dário Moura Vicente
Elsa Dias Oliveira
João Gomes de Almeida*

Editors

Dário Moura Vicente is a Full Professor at the Faculty of Law of the University of Lisbon, where over the past 30 years he has taught Private International Law, Comparative Law, Civil Law and Intellectual Property Law. He was the Chairman of the Scientific Council of the same Faculty between 2020 and 2022. Admitted to the Portuguese Bar (*Ordem dos Advogados*) in 1987. Has participated as arbitrator, counsel and expert in numerous domestic and international arbitrations. Member of the ICSID panels of arbitrators and conciliators and of the arbitration rosters of several arbitration centres in Angola, Brazil, Cape Verde, Mozambique and Portugal. Member of the ICC Commission on Arbitration and ADR. Chairman of the Portuguese Arbitration Association.

Elsa Dias Oliveira is an Associate Professor at the Faculty of Law of the University of Lisbon where she teaches *inter alia* Arbitration Law, Private International Law, International Contracts and Civil Law. She has published several articles and books also on arbitration, including *Arbitragem Voluntária: uma Introdução*. She is also President of the Arbitration and Dispute Resolution Center of the Faculty of Law of the University of Lisbon. She has been a member of the Board of the Portuguese Arbitration Association (APA) since July 2021 and is a member of the International Academy of Comparative Law (IACL) and of the Private Law Research Center of the Faculty of Law of the University of Lisbon.

João Gomes de Almeida is an Assistant Professor at the Faculty of Law of the University of Lisbon where he teaches *inter alia* Private International Law, International Commercial Law and Civil Procedure Law. He is a member of the Pedagogical Board and Vice-President of the Arbitration and Dispute Resolution Center of the same Faculty. He is a member of the International Academy of Comparative Law (IACL), European Association of Private International Law (EAPIL), the Portuguese Arbitration Association (APA) and the Private Law Research Center of the University of Lisbon Faculty of Law. He also works in legal practice and as a legal consultant.

Contributors

António Abrantes Gerales is a retired Judge of the Supreme Court of Justice. Published books: *Recursos em Processo Civil; Temas da Reforma do Processo Civil*, vols. I, II, III and IV; *Código de Processo Civil Anotado*, vols. I and II (as co-author); *Recursos no Processo do Trabalho; Temas da Responsabilidade Civil*, vols. I and II; *O Novo Regime do Processo de Inventário e outras Alterações na Legislação Processual Civil* (as co-author).

Bruno Sousa Rodrigues is a Brazilian attorney at law, admitted to the bar in 2012. He is a lecturer and doctoral researcher at Sciences Po Law School, with scholarly interests gravitating around international arbitration, public and private international law, transnational legal theory, and legal sociology. He regularly acts as tribunal secretary in international arbitrations and currently serves as Academic Coordinator of the Sciences Po Law School LLM in Transnational Arbitration & Dispute Settlement. Bruno is also a Director of the *Clube dos Arbitralistas Lusófonos*, a founding member of the *Instituto de Arbitragem da Bahia* and a member of the European Society of International Law.

Catarina Monteiro Pires is a full-time Professor of the Law Faculty of the University of Lisbon and holds a Ph.D in Private Law from the same Law Faculty, where she teaches Law of Obligations and International Commercial Law. She is author of several books in the fields of the Law of Obligations and of International Commercial Arbitration. She acts as an arbitrator in national and international, *ad hoc* and institutional, commercial arbitration proceedings, both as co-arbitrator and as president and specialises in arbitration in Portuguese-speaking countries (Portugal, Brazil, Angola and Mozambique). She is on the list of arbitrators of local and international arbitration centers, namely those of the South China International Economic and Trade Commission (Shenzen Court of International Arbitration), the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC), the Business Mediation and Arbitration Chamber – Brazil (CAMARB), the Brazilian Mediation and Arbitration Center (CBMA), Câmara de Arbitragem do Mercado | B3 (Brazil) and the Commercial Arbitration Centre of the Portuguese Chamber of Commerce and Industry (Portugal). In legal practice since 2004 at the law firm of *Morais Leitão, Galvão Teles, Soares da Silva & Associados*.

Diego P. Fernández Arroyo is a professor at Sciences Po Law School in Paris and honorary professor of the Universities of Buenos Aires and Cordoba. He teaches subjects related to international dispute resolution, arbitration, private and public international law, comparative law, and global governance, and he is the director of the Sciences Po LLM in Transnational Arbitration & Dispute Settlement. Prof. Fernández Arroyo is a member of the Curatorium of the Hague Academy of International Law, a member of the *Institut de droit international*, a former President of the American Association of Private International Law (ASADIP), and the current Secretary-General of the International Academy of Comparative Law. He has been a guest lecturer at a number of universities in Europe, the Americas, Asia and Australia and he has been a Global Professor of New York University. Prof. Fernández Arroyo is a member of the Argentinian Delegation before UNCITRAL (Working Groups on Arbitration and on ISDS Reform) since 2003. He is actively involved in the practice of international arbitration as an independent arbitrator. He has acted as co-arbitrator, President of the Tribunal and Sole Arbitrator in many arbitral proceedings, both *ad hoc* (including UNCITRAL) and institutional (ICC, ICSID, Milan Arbitration Chamber, Bogota Chamber of Commerce, Lima Chamber of Commerce, Brazilian Center of Mediation and Arbitration, etc.). He is a member of the ICSID panels of arbitrators and conciliators appointed by Argentina, and a member of the Permanent Court of Arbitration appointed by Argentina. Prof. Fernández Arroyo has published several books and a number of articles in publications in more than 20 countries. He is fluent in Spanish, French, English, Italian and Portuguese.

Joana Soares Correia was born in Lisbon, Portugal, on 5 July 1974, and graduated in Law from the Faculty of Law of the University of Lisbon in 1998. She completed a Post-Graduation Course in Forensics and Legal Counsel of Companies at the Portuguese Catholic University (2003) and attended the Postgraduate studies in Information Society Law at the Faculty of Law of the University of Lisbon (2000). After completing her internship with the Portuguese Bar Association (1998-2000), she held various positions in the area of Sports Law: Legal Advisor to the Minister of Youth and Sports (Portugal's 14th Constitutional Government); Director of the Legal Department of Portugal 2004 – Company for the Supervision and Monitoring of the Building of Stadiums and other Infrastructures for the Final Stage of the European Football Championship 2004, S.A., (2001-2005) and Legal Adviser to the Chairman of the Portuguese Sport Institute, I.P., the National Anti-Doping Council and the National Council Against Violence in Sports (2005-2009). She was a partner at the law

firm Fátima A. Rodrigues, Joana Borrvalho de Gouveia & Associates. In March 2009, she was invited to join the board of ARBITRARE, taking charge of the Legal Department. In July 2012, she was elected Chairman of the Board of ARBITRARE, her current position.

Juan Serrada Hierro is *Abogado del Estado* (State Attorney), chairman of CIMA and Secretary of the Corporación de Reservas Estratégicas de Productos Petrolíferos, responsible for managing Spain's strategic hydrocarbons reserves. In a career in public administration, and subsequently in the private sector and legal practice, he has held positions such as: Head of Technical Staff for the Minister of Finance and Legal Adviser to the National Airports Authority and the Government Delegation to CAMPSA, Deputy Secretary to the Board of Directors of the National Industrial Institute and Sociedad Estatal de Participaciones Industriales (state holding company for industrial sector), and Secretary to the Board and Advisor to a number of companies (Infinvest, Carcesa, Ence, Inisas, Iberia and Aerolíneas Argentinas). In legal practice he has represented several companies as well as acting as arbitrator in numerous cases. He is a Correspondent Member of the Real Academia de Jurisprudencia y Legislación (Royal Academy of Jurisprudence and Legislation, Spain).

Luís Filipe Pires de Sousa has been an Appeal Court Judge since September 2016, at the Lisbon Court of Appeal, and holds Master's Degree from the Faculty of Law, University of Lisbon. Published books: *Prova por Presunção no Direito Civil*, Almedina, 2017, 3rd ed.; *Direito Probatório Material Comentado*, Almedina, 2021, 2nd ed.; *Prova Testemunhal, Noções de Psicologia do Testemunho*, Almedina, 2021, 2nd ed.; *Processos Especiais de Divisão de coisa Comum e de Prestação de Contas*, Almedina, 2021, 2nd ed.; as co-author: *Código de Processo Civil Anotado*, Vols. I and II, 2nd and 1st editions respectively, Almedina.

Madalena Diniz de Ayala is a trainee lawyer and member of the litigation and arbitration team at Morais Leitão, Galvão Teles, Soares da Silva & Associados, LL.M International Business Law, Queen Mary University of London.

Marc Henry has been practicing arbitration and business litigation for more than 30 years. After having been a partner in English and American law firms, he joined in 2018 the French law firm FTMS, specialising in litigation and arbitration. Marc Henry has acted as counsel and arbitrator in both *ad hoc* and institutional procedures. He is also President of the French Arbitration Association (AFA), the second oldest arbitral institution in France. He has published many articles on arbitration in addition to lec-

turing on the same subject in Master 2, in particular at the University of Paris 1 Panthéon-Sorbonne, from where he holds a PhD in law. His PhD thesis on "The Duty of Independence of the Arbitrator" was published and won him an award.

Nuno Ferreira Lousa is Deputy Regional Managing Partner Europe at Linklaters and Head of Linklaters' Dispute Resolution practice in Lisbon. He is a renowned dispute resolution lawyer, having also extensive experience in regulatory investigations covering compliance, fraud and anti-corruption.

Paula Costa e Silva is a Full Professor of the Faculty of Law of the University of Lisbon, Fellow of the Chartered Institute of Arbitrators, Arbitrator at HKIAC, SCIA, P.R.I.M.E., CAM-CCBC, B3, CAC-ACL and elsewhere, and a practising lawyer registered with the Portuguese and Brazilian Bar Associations. Main publications on Arbitration: *Anulação e recursos da decisão arbitral* (1992), *A arbitrabilidade de medidas cautelares nos direitos português e brasileiro* (2005), *Execução de decisões arbitrais nacionais e estrangeiras* (2007), *A intervenção de terceiros no processo arbitral* (2009; 2010), *Ação modificativa do caso julgado arbitral* (2014), *A arbitrabilidade da pretensão de anulação* (2015), *Arbitragem societária* (2011; 2017), *Arbitration in swaps* (2017), *Arbitral Precedent* (2018; 2020), *A Consulta prévia, os tribunais arbitrais e o Supremo Tribunal Administrativo* (2019), *Judith Martins Costa - Crise e Perturbações no Cumprimento da Prestação* (2020), *Perturbações no Cumprimento dos Negócios Processuais* (2020), *Comentário às P.R.I.M.E. Finance Arbitration Rules 2022*, *A Decisão Arbitral: Acto Voluntário, Negócio Jurídico ou a Necessidade de uma ou Outra Linguagem* (2021), *Corrupção e negócio jurídico* (2022).

Pilar Perales Viscasillas is Professor of Commercial Law at Universidad Carlos III, Madrid (UC3M). National and international arbitrator. Independent director of MAPFRE, S.A., director of Moot Madrid, international legal competition, and Director of Studies for the Masters in International Legal Practice at UC3M.

Rui Torres Vouga first joined the judiciary in 1985 and has been a judge at the Lisbon Court of Appeal (civil divisions) since 2006. He has worked with CEJ (Centre for Judicial Studies), since 2008, training judges and investigating magistrates and lecturing to future judges on European Judicial Cooperation in civil and commercial matters. On this subject, he has published: 'O novo regime jurídico dos pactos de jurisdição (à luz do artigo 25.º do Regulamento BRUXELAS I revisto [Regulamento (UE) n.º 1215/2012, de 12 de Dezembro de 2012])' (2018), in *I Revista do CEJ*,

65-118; and, in December 2019, the ebook *Reconhecimento e execução de decisões no âmbito do Regulamento Bruxelas I-Bis*, available at: http://www.cej.mj.pt/cej/recursos/ebooks/civil/eb_Decisoes_Bruelas2019.pdf.

Sofia Ribeiro Mendes is the Arbitration Partner at the Lisbon office of DLA PIPER and a member of its International Arbitration practice. Sofia represents foreign and domestic clients in arbitration proceedings and sits regularly as Arbitrator in domestic and international arbitrations. Sofia graduated from the Faculty of Law of the University of Lisbon and has an LL.M. (Master of Laws in Arbitration Commercial and Corporate Law) from King's College, University of London. She is the author of several publications in Arbitration Law and lectures in several arbitration courses. She is a Member of the Board of Directors of the Portuguese Arbitration Association, a Member of ICC Commission on Arbitration and ADR (Portugal) and Co-Executive Coordinator of the Post-Graduate Programme in Arbitration at the Faculty of Law, NOVA University Lisbon.

