

An Arbitration Center's Perspective: Confidentiality, Privacy and Security

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A. ARBITRARE's Mandate

The Arbitration Centre for Industrial Property, Domain Names, Trade Names and Corporate Names¹, known as ARBITRARE, is a Portuguese Arbitration Centre which was set up in 2009 with nationwide jurisdiction. It is a part of the network of Portuguese arbitration centres supported by the State.

This State support, in the form of funding, allows ARBITRARE to offer its services at a very affordable cost, counteracting one of the features of arbitration, which is that it is more expensive, as a rule, as a means of dispute resolution than the traditional justice offered by state courts.²

1 See ARBITRARE's official website, available at: <http://www.arbitrare.pt>

2 For example, for a dispute concerning a single .PT domain name, the procedural costs are 270 € plus VAT. These costs comprise the fees of the arbitrator, the fees of the mediator and the administrative costs of the proceedings.

Any disputes involving economic interests in matters of industrial property, .PT domain names, trade names and corporate names, may be submitted for resolution by the Centre's arbitral tribunal. This must be done under an arbitration agreement, provided that sole jurisdiction over the dispute is not assigned by special law to a state court or to compulsory arbitration before another arbitral court.

B. Parties involved in Disputes submitted to ARBITRARE

The disputes submitted to ARBITRARE may be those between private parties³ or between private parties and the Portuguese registration bodies legally empowered to grant or refuse registrations. These bodies are the National Institute of Industrial Property (INPI), competent for granting industrial property rights, the association DNS.PT (DNS.PT), responsible for the management, registration and maintenance of the .PT country code top-level domain (ccTLD), and lastly the Institute of Registration and Notary Affairs (IRN), competent, *inter alia*, for granting trade names and corporate names to legal persons.

It is mandatory for those three Portuguese registration bodies to refer disputes to ARBITRARE. INPI and IRN are bound by law⁴ and DNS.PT is bound by its own rules⁵ to refer dispute resolution to ARBITRARE. This means that when private parties opt to refer a decision taken by one of these bodies to arbitration, the organisation in question cannot refuse the arbitration option because they are obliged to accept arbitration with ARBITRARE.

C. Procedure

Arbitral Proceedings before ARBITRARE fall into three stages. The first stage consists of the parties to the dispute submitting procedural documents. The proceedings begin with the submission of an initial petition by the claimant through ARBITRARE's Online Platform for Dispute Resolution available on its website. Where no prior arbitration agreement

3 Private parties may be natural or legal persons.

4 Ministerial Order (*Portaria*) no. 1046/2009, 15 September.

5 *PT Domain Names Registration Rules*, 2014, Legal Deposit no. 376640/14.

exists, ARBITRARE will notify the defendant and any affected parties⁶ and inquire whether they agree to resolving the dispute through ARBITRARE. If they do not agree, the case proceeds no further.

If arbitration is accepted or if a prior arbitration agreement exists, ARBITRARE will check the initial petition, and subsequently notify, firstly, the defendant and then the affected parties, giving them the option of submitting, respectively, a written answer and allegations.

Where the defendant has lodged a counterclaim, the claimant is notified that he may present a response to the counterclaim.

The second stage of the proceedings is mediation. This stage is optional and is prior to the constitution of the arbitral tribunal. It will only take place if all the parties to the dispute agree to refer it to mediation. In contrast to the majority of international mediation service providers, ARBITRARE currently only offers mediation services within the context of arbitration. This means that the parties must first request arbitration in order to then have the possibility of resolving the dispute through mediation.

If the parties reach a mediated settlement agreement, the arbitral proceedings are closed. In cases where the mediation settlement agreement is not binding, parties may request its homologation by the arbitral tribunal thus giving it the same value as an arbitral award.

If the parties fail to reach a settlement at the mediation stage, or if mediation does not take place because the parties refused it, the arbitration proceedings are resumed, and this is the third and final stage.

At this stage, once the arbitral tribunal is constituted⁷, its award must be rendered within three months.

Under the Portuguese Law on Voluntary Arbitration⁸, the arbitral award has the same binding effect on the parties as a court judgment and may be enforced as such.

D. Online Platform for Dispute Resolution

ARBITRARE was a pioneer in Portugal in offering an online platform for conducting arbitration proceedings.

6 Affected parties are persons or entities that may be directly harmed by the occurrence of the arbitral proceedings.

7 The arbitral tribunal is considered constituted on acceptance of their appointment by all the arbitrators.

8 Law no. 63/2011, 14 December.

ARBITRARE has offered an online platform on its website since 2009, enabling its users to submit disputes for voluntary arbitration in the Centre's areas of competence.

However, this first version of the online platform was developed and implemented at an embryonic stage of the ARBITRARE project, in 2008, by a team without experience in handling arbitration proceedings.

For this reason, the platform fell short of expectations and technical intervention was recurrently needed to resolve hitches in the proceedings. For example, if the arbitrator chosen by the parties decided not to accept his/her appointment, the procedure to appoint a new arbitrator had to be carried out off the platform, by email, and ARBITRARE had to request technical support for the new arbitrator to be entered in the platform, so that he/she could access it.

Meanwhile, in 2017, ARBITRARE was contacted by a – fortunately well-intentioned - hacker, alerting the Centre to the existence of vulnerabilities in the platform, with threats and attempts to intrude on the system. At this point, it became clear that, after nine years of intensive use, this version of the platform had become obsolete (entirely normal for this type of software).

Despite the security challenges that ARBITRARE faced with its first online platform, the overall picture was a positive one, considering that it allowed the Centre to offer dematerialized services over a period of ten years (with a few limitations related to the conduct of arbitration proceedings, as mentioned above).

In early 2017, ARBITRARE decided to invest in the development and implementation of a new Online Platform for Dispute Resolution, hereinafter referred to as 'platform'.

The Centre carried out an exhaustive survey of the requirements for the new platform (drawing on the workflow of the proceedings, communications within the platform, with the possibility of inserting notes in the proceedings, counting deadlines, and always with the concern of not being dependent on anyone (except for occasional bugs)).⁹

It took almost twenty months of intense work to conclude the new platform, which was launched at the end of December 2018 integrating all ARBITRARE's procedural experience over ten years.

The new platform is intuitive for all users as it always indicates the actions that have to be carried out and what action the proceedings is waiting to be performed.

9 ARBITRARE consulted four different companies.

Regarding this new platform, ARBITRARE's aim was to ensure security and operational autonomy, avoiding the need for intervention by technicians in resolving basic issues such as those mentioned.

E. Security, privacy and confidentiality in ARBITRARE's Online Platform for Dispute Resolution

ARBITRARE's Online Platform for Dispute Resolution offers its users the highest standards of security and privacy and enables the service to honour its obligation of confidentiality.

The platform complies with a series of non-functional requirements (defining the platform properties and restrictions) relating to reliability, supportability, usability, technology and security. We will look briefly at each of these issues.

– Reliability

Reliability refers to the quality of the service provided by a given system and the trust that can justifiably be placed in that service. ARBITRARE's platform was designed to minimise failures, offering data integrity and 99% service availability.

– Supportability

The platform was designed to support the following browsers: Google Chrome 56, Firefox 52 and Microsoft Edge 14.

– Usability

The platform was implemented in compliance with the best User Experience Design practices in order to guarantee a high quality of experience for users interacting with it.

System efficiency was paramount, organising pages in a sequential and easy-to-follow workflow, minimising both the need for user eyes and hand movement and the need for navigation between pages.

The platform is tolerant to common human errors. The navigation buttons have exit confirmation messages and some pages offer the possibility of undoing or redoing changes. Whenever an error occurs, the messages displayed to users give clear and constructive information.

– Technology

The platform was developed using .NET technology: ASP.NET MVC and MS SQL Server 2016 Express or higher.

– Security

The platform was developed and implemented with extensive security mechanisms in order to avoid different types of vulnerabilities, such as:

Injections and common security breaches:

- SQL, SO, LDAP, XSS injection prevention;
- CSRF attack prevention;
- All redirections on the Platform are validated.

Communication and configuration of web services

- All communication is via HTTPS (HTTP over SSL);
- Sensitive data (such as usernames, password, tokens, etc.) never appear in the URL;
- Sensitive data, such as passwords, are never present in the software code;
- A user session is associated with an IP address and it is not possible for that session to change address.

Authentication

- When changing password, the previous password is always required;
- Passwords are encrypted, and never directly recorded in a database;
- Password recovery features never display either current or new passwords;
- No user information is given during login or password recovery.

Authorisation

- Each user has a clearly defined set of permissions;
- All access is logged, whether successful or unsuccessful.

Session management

- Sessions are unique to each user and are not shared;
- Sessions are invalidated from the moment they are no longer needed and/or after an inactivity timeout.

Logging and Error Management

- Sensitive information that is not needed is neither collected nor stored;
- Registration expires after a given period and is then deleted.

I. Privacy

In 2018 ARBITRARE approved a specific privacy policy for the platform, which ensures the privacy and security of users' data, informing them about the processing of their data, as well as their rights as data subjects.

When registering on the platform, users have to read and accept this Privacy Policy, which states:

- The personal data collected and processed for user authentication on the platform (name and email address) and for filing of proceedings (name, nationality, address, post code, locality, country, email address, tax identification number, language, mobile phone number and IBAN);
- The purposes and legal grounds for processing personal data, and how long it is stored.

ARBITRARE processes the personal data of platform users:

- For authentication on the platform as an authorised user, allowing them to file and access dispute resolution proceedings;
- For all purposes necessary in managing dispute resolution proceedings, including contacts via the platform, email and/or telephone, notifications, answering questions, satisfaction surveys and evaluating the services provided;
- To fulfil any legal obligation to which ARBITRARE is subject.

The legal grounds for processing are pre-contractual due diligence at the request of the data subject, the provision of alternative dispute resolution services, in the form of mediation and/or arbitration, in matters relating to industrial property, domain names, trade names and corporate names, and the fulfilment of legal obligations.

Users' personal data, collected and processed in the course of dispute resolution proceedings, is stored until the data subject requests its deletion, provided five years have elapsed since the end of proceedings. If the data subject requests the deletion of his/her personal data, ARBITRARE must delete the arbitral proceedings from the platform, as well as from any document stored in a physical medium relating to the proceedings.

Personal data which has been collected and processed for purposes of user authentication on the platform is stored until the data subject asks for it to be deleted.

If a user completes a form on the platform without actually submitting it, the draft will be erased one month after it was created or updated.

II. Confidentiality

Lastly, as regards confidentiality, the Portuguese Law on Voluntary Arbitration establishes the following in Article 30, paragraph 5:

5 - The arbitrators, the parties and the arbitral institutions, if applicable, are obliged to maintain confidentiality regarding all information they obtain and documents brought to their attention in the course of the arbitration proceedings without prejudice to the right of the parties to make public procedural acts necessary to the defence of their rights and to the duty to communicate or disclose procedural acts to the competent authorities, if so imposed by law.

This means that arbitrators and arbitral institutions are subject without reservation to the duty of confidentiality. Parties are subject to the same obligation, but with the exemptions indicated in the final part of the paragraph.

Despite that principle of confidentiality, there has been debate about the possibility of keeping arbitral proceedings confidential, in view of the public importance of certain matters addressed in proceedings and, in some cases, the need to ensure transparency in arbitration, when, for example, the State is involved as a party.

Arbitration law in some countries, such as in France, provides for the principle of non-confidentiality of the arbitral proceedings, highlighting only its reserved nature, except when the parties have agreed otherwise.

In reality, arbitration is often chosen by parties to resolve their disputes precisely for the confidentiality it offers, in contrast to the public proceedings in state courts.

In view of the above, it is our conviction that arbitration proceedings conducted on ARBITRARE's platform comply with the confidentiality principle.

Finally, it should be noted that, in spite of this principle, many of the arbitral awards made by arbitral tribunals constituted under the aegis of ARBITRARE are published on its website¹⁰. Upon notification of the arbitral awards, ARBITRARE informs the parties of its intention to publish them, in order to allow the parties to exercise their right to object to the publication, as required by the Portuguese Law on Voluntary Arbitration¹¹.

10 See <http://www.arbitrare.pt/en/awards/>

11 Article 30 para. 6, Law no. 63/2011, 14 December.

In this way, ARBITRARE has been contributing to the dissemination of important arbitration case law in its areas of competence.

F. ARBITRARE's Track Record

Over the twelve years¹² of its history, ARBITRARE has received 382 arbitral proceedings, which amounts to an average of 32 cases a year.

Of these 382 cases, 115 ended with an arbitral award and five with a mediation agreement. The remainder were either terminated by agreement or failed to proceed for other reasons (non-payment of the procedural costs or non-acceptance of the arbitration agreement).

Since the start of the ARBITRARE project, the fact that it offers an online platform for arbitral proceedings has allowed the Centre to host several international proceedings filed by foreign companies, without offices in Portugal, who have had recourse to ARBITRARE, for example, on matters concerning the transfer of a particular domain name infringing a trademark of the company in question. With the onset of the pandemic, the advantages offered by the platform became even more evident and ARBITRARE started to hold the trial hearings online, as well as mediation sessions.

Despite its positive track record, ARBITRARE is aware that further efforts are needed to bring alternative dispute resolution, such as mediation and arbitration, to the attention of the business community in Portugal, as truly effective and efficient avenues to resolving disputes relating to industrial property, domain names, trade names and corporate names.

ARBITRARE therefore has a continued role to play in disseminating alternative means of dispute resolution, highlighting the various advantages they offer.

12 From 2009 to 31 December 2020.