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Portugal

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Introduction – a law written by practitioners

Arbitration in Portugal is governed by Law 63/11 of 14 December (the Law),[1] which came in force in March 2012.[2]

The main characteristic of this law is that it was not prepared by any governmental body, but drafted by local practitioners[3] and subject to wide public discussion by the arbitral community before its final approval by Parliament. That process was instrumental in obtaining a law that looks to the needs of users and reflects the more recent developments at an international level.

Five years have passed and it is safe to say that the Law has not generated major criticisms or application problems and arbitration continues to grow steadily as a favourite dispute resolution method. If in the not-so-distant past the attractiveness of arbitration was a consequence of the lesser effectiveness of state courts, in the past decade arbitration has become the best way to solve certain types of dispute, particularly complex procedures requiring a reasonable degree of specialisation, especially those related to international trade and investments.

However, at that time there was insufficient accord to extend arbitrability to some fields of practice where arbitration could be used. In particular, the Law did not regulate arbitration dealing with corporate disputes.

Although hardly anyone adamantly denied that these disputes could be subject to arbitration, some of them have particular characteristics that may make the functioning of arbitration with all the necessary security impossible in practice.

Several practitioners and scholars expressed the need for reform in this matter and, once more, the arbitral community decided to take the initiative and propose an amendment to the arbitration regime.

In the first half of 2016 a task force was set up within the Portuguese Arbitration Association and it published a draft law regulating arbitration dealing with corporate disputes.[4] This text (the Project) is now open to discussion and once that process is completed, it shall be sent to the Ministry of Justice for further discussion in Parliament.

Together with the Project, a draft regulation for institutionalised arbitration for this kind of dispute was also prepared and subject to public discussion.[5]

These proposals shall be addressed below.

Arbitration dealing with corporate disputes

Starting with definitions, when we say 'corporate disputes' we are referring to disputes between shareholders and the company (eg, regarding the interpretation or the enforcement of by-laws); disputes between the company (or its shareholders) and its directors or other officials; disputes regarding the validity of shareholders' resolutions; disputes between the company and shareholders (or between shareholders themselves but involving the company) regarding the rights and obligations of shareholders vis-à-vis the company; and disputes broadly defined as regarding the enforcement of corporate rights, which are typified in the Law.

The Law does not apply to disputes that relate to shareholders' agreements or other types of agreement in which the company is not a party.

According to Portuguese law (although this is disputed by some scholars), shareholders' agreements are merely private agreements between shareholders and the disputes that arise between the parties to those agreements could always be settled through arbitration, as would be the case with any other contract.

Being private contracts, shareholders agreements' are not enforceable against the company, which cannot be a party to them (this is often a cause of some surprise to foreign practitioners and frequently the reason underlying some disputes).

Returning to 'corporate disputes', the Law provides that any dispute regarding economic interests may be submitted to arbitration (article 1). In addition, disputes not involving economic interests may also be referred to arbitration, provided they concern matters where the parties are able to settle. Finally, arbitral tribunals may also be requested to interpret, complete, adapt or supplement existing contracts.

In view of this wide arbitrability criterion, there was little doubt that these disputes could in principle be submitted to arbitration.[6]

The problem was how to ensure the rights of other shareholders not directly involved in the dispute could be safeguarded. An example: if a shareholder disputes the validity of a shareholders' resolution, he or she may file a claim against the company challenging it. However, it is necessary to safeguard the rights of other shareholders that could be jeopardised by this dispute and therefore the draft law mandates that they shall have to be informed of the claim and have the opportunity of participating in the proceedings, if they wish to do so.

The issues become even more complicated when there are types of companies where the identity of the shareholders, holding bearer shares, may be unknown.

In Portugal, the cases defined above as corporate disputes are subject to mandatory registration at the Commercial Registry (state courts are obliged to certify that the registration was completed). This means that anyone can request information from the Commercial Registry Office and learn of whatever corporate disputes exist.

In state courts, there is free access to court files, so it is possible for any interested party to be informed of what is happening in a particular case.

Finally, civil procedural law ensures and facilitates (provided that some requirements are met) that a party with a legitimate interest in the dispute may participate in it.

The problem is that this system, although full of safeguards, is not functioning because the commercial courts have a large backlog of all sorts of cases.

Consequently, the legislature is obliged to create mechanisms that may allow these disputes to be dealt with by arbitral tribunals, without losing the safeguards granted by the state courts.

In the Project those concerns are addressed by establishing that corporate disputes can only be submitted to institutionalised arbitration. In Portugal there is a long-standing tradition of ad hoc arbitration, which, despite the development and good status of some local arbitration centres, continues to be a popular choice. Institutionalised centres, on the other hand, can only function if authorised by the Ministry of Justice and are subject to some state (and court) control in matters of legality and ethics.

The Project establishes that the arbitral proceedings dealing with corporate disputes are subject to mandatory registration at the Commercial Registry and establishes a number of obligations for the arbitration centres regarding publicity of the case, duty of providing information, etc.

Together with the Project, the task force also prepared a set of specific rules that may be adopted by arbitration centres to deal with these disputes. The purpose of these rules is to regulate the control of the registration process, the intervention of third parties and the granting of interim measures. Nevertheless, these rules were not conceived as mandatory and may or may not be adopted by arbitration centres.

The analysis of the wide range of corporate disputes foreseen in the Portuguese system and their particular characteristics is far beyond the scope of this chapter, so we shall go no further in that regard.

The second challenge that the Project had to address was how to include arbitration clauses in the by-laws of existing companies. For companies being incorporated, there would be no problem: just one more clause in the by-laws. But what should be done for existing companies? Considering the voluntary nature of arbitration, would it be necessary for all shareholders to agree on the insertion of an arbitration clause in the by-laws? Could that be imposed by a majority? In that case, should the opposing shareholders be allowed to withdraw from the company?

The matter has been subject to broad discussion, not only in Portugal, but also in other legal systems, and there are several options available internationally. The authors of the Project considered that there would be no reason to treat the insertion of an arbitration clause in the by-laws differently to any other amendment of the by-laws.

Therefore, provided that the requirements to proceed with such amendments are met – notably being decided in shareholders' meetings, with quorums for constitution and qualified majorities for decision – arbitration clauses may be inserted in the by-laws. Obviously, those clauses will only apply to future disputes. If the dispute is already under way, it is still possible to resort to arbitration, but in that case all the shareholders will have to sign the agreement to arbitrate.

It is interesting to note that, with the exception of this last case, this solution will imply that minority shareholders may be forced to participate in arbitration proceedings, even when they have not subscribed or agreed to the terms of the arbitration clause.

This solution is clearly intended to enhance the use of arbitration for corporate disputes, but it is likely to be challenged in the future.[7]

Finally, the Project establishes that the shareholders remain bound by the arbitration clause even if in the meantime they cease to be shareholders or if their term as director or any other official ends.

The public discussion of the Project will go on and will eventually result in the creation of a new law or an amendment to the existing law. Despite not knowing when that will happen, the creation of the task force and the public discussion of the Project show the clear commitment of the Portuguese arbitration practitioners to participating in the development of the law, so that it can meet the expectations of all who resort to it.

Other trends

Non-commercial arbitration

Arbitration is deemed so successful that it is being used to solve disputes in other fields of law: there is a long-standing tradition of arbitration in the administrative field and the Portuguese state actively promotes the inclusion of arbitration agreements in all sorts of administrative contracts and in the past decade many disputes have been solved through arbitration.

Similarly, arbitration has been extended to the settlement of tax disputes[8] between private citizens or companies and the tax authorities. Even though the state maintains some degree of control over the appointment of arbitrators in this case, it is a good sign of favor arbitratis in Portugal.

Following the same trend, as mentioned above, in 2011 a law[9] was enacted imposing that a category of disputes involving patent disputes over medical drugs had to be mandatorily resolved through arbitration. Although this type of procedure cannot be seen as voluntary arbitration (especially when the decision was driven by the purpose of clearing those disputes from state courts), it is again evidence of how arbitration is perceived as an alternative dispute resolution mechanism.

Notwithstanding the fact that some of these procedures deal with issues that are alien to commercial arbitration,[10] there is obvious common ground and there are a substantial number of decisions from appeal courts dealing with issues such as independence of arbitrators or costs confirming that.

Institutional arbitration versus ad hoc arbitration

Despite institutional arbitration centres existing for many years and the fact that international centres are widely accepted, ad hoc proceedings continue to be quite popular in Portugal. Although no official statistics exist, it seems that they continue to form the majority of new cases.

In an effort to change that situation, the Commercial Arbitration Centre of the Portuguese Chamber of Commerce and Industry (the leading national centre) has substantially revised its arbitration rules, and the new version of the rules came into force on 1 March 2014.[11]

Together with the new rules, a Code of Ethics was adopted which makes express reference to the International Bar Association Guidelines on Conflicts of Interest in International Arbitration.

In addition, in 2015 more transparent rules for the selection of arbitrators by the Centre were enacted, applying best international practices.

Continuing the effort, in 2016, the Centre approved a set of fast-track arbitration rules (as well as mediation rules), which came into force on 1 March 2016.[12]

Favor arbitratis and state court support

The number of cases submitted to arbitration continues to increase and consequently the number of times the state courts are called to rule on set aside proceedings or other issues connected with arbitration is also growing.

Therefore a very reasonable number of decisions from the

Supreme Court and appeal courts addressing arbitration themes are being issued every year.

The subjects addressed in each case vary substantially, but there are some themes that are recurrently being addressed and, fortunately, consistently decided:

Kompetenz-Kompetenz

State courts have systematically refused to analyse allegations for the nullity of arbitration clauses, on the grounds that such competence belongs exclusively to arbitral tribunals and only in cases where it is evident that there is no arbitration clause may the state court decide on the matter directly.[13]

Conflicts of interest, independence and impartiality

There is a substantial number of recent appeal court decisions setting aside awards on the grounds of conflicts of interest, but also addressing independence and impartiality, making wide reference to international standards such as the IBA Guidelines on Conflicts of Interests in International Arbitration.[14]

International public policy

The state courts have been careful in highlighting the exceptional nature of international public policy (as opposed to internal mandatory rules) as grounds to set aside or refuse enforcement.[15]

Costs and arbitrators' fees

The former arbitration law did not address the issue of the arbitrators' fees. The new law requires that they are agreed upon, providing the parties with the opportunity to challenge the amount charged if there is no previous agreement. As a consequence of that, many decisions on the matter have been issued.[16]

Access to justice

The ongoing financial crisis is proving instrumental to a number of situations in which defendants (or even claimants) try to avoid arbitration based on lack of financial conditions to resort to it. Precedents are very case-specific.[17]

Closing remarks

No law is perfect and there is always room for improvement.

The fact that the arbitral community is committed to supporting the study and development of the Arbitration Law is a good prospect for the future of arbitration in Portugal.

Portugal has a modern arbitration law that clearly – and intentionally[18] – follows the standard established by the UNCITRAL Model Law. On the one hand, the Law is not a mere copy of the UNCITRAL Model Law text and some relevant changes were introduced to be more in line with the Portuguese legal tradition when the UNCITRAL Model Law solutions were not considered adequate or were too vague. On the other hand, the new Law applies to both domestic and international arbitration, even if some minor additional provisions regulate specific aspects of the latter. It is therefore a monist law.

The Law was drafted to take into account the issues that have been discussed by the international arbitration community and adopts solutions that are widely accepted. It limits, to the extent possible, the interference of state courts, highlighting the negative effect of the arbitral convention. The Law devotes special attention to the independence and impartiality of arbitrators, in line with the best international practices. It limits the possibility of challenging awards (or refusing enforcement). It regulates the granting of interim measures and provisional orders (following very closely, in this particular, the text of the Model Law). Finally, the few provisions dedicated to international arbitration (as mentioned above, it is a monist law) seek to facilitate the functioning of international tribunals in Portugal, grant liberty regarding the choice of law, rules, language, etc.

Portugal has an arbitration law that can be considered in accordance with best international practices and standards. As noted above, the law clearly favours arbitration, and the tradition of Portuguese courts has been to uphold the arbitral awards that are brought before them. The country has a vast legal community and a number of lawyers actively involved in arbitration, both as counsel and arbitrators.

Though located in the western extreme of Europe, Portugal continues to have a very strong relationship with its former African colonies (Angola, Cape Verde, Guinea-Bissau, Mozambique and São Tomé and Príncipe), and most of them still have their legal system based on the Portuguese matrix. Together with a common language, this commonality of law places Portuguese practitioners in a privileged position to assist in the development of international arbitration involving those countries.

The trend is therefore to take advantage of all these aspects and continue to develop arbitration in Portugal.

Notes

1 English, French and Spanish translations of the law are available at http://arbitragem.pt/legislacao/.

2 The previous law (Law 31/86 of 29 August 1986), although not specifically based on any other law, was inspired by French law and it contained solutions not substantially different from those adopted at those times in other countries, despite some particularities of the law that were a consequence of Portugal's civil procedural tradition. In fact, the main evidence of the relative success of that law was that it remained in force for 25 years, with only a minor amendment, and was not an obstacle for arbitration to flourish.

3 The board of directors of the Portuguese Arbitration Association, working pro bono. The authors of this text were part of the seven drafters.

4 The text – in Portuguese – is available at www.arbitragem.pt/projetos/arb-societaria/regime-juridico-arbitragem-societaria-v-discussao.pdf.

5 The text – in Portuguese – is available at www.arbitragem.pt/projetos/arb-societaria/regulamento-arbitragem-societaria-v-discussao.pdf.

6 And that was also not a problem in the life of Law 31/86 of 29 August 1986, although the criterion was different.

7 Notwithstanding, if the Project is approved, it will not be the first time the Portuguese arbitrator imposes arbitration as a mandatory dispute resolution method for a category of disputes: in 2011 a law was enacted imposing that a category of patent disputes on medical drugs had mandatorily to be solved through arbitration and although that solution was seriously criticised, for a number of reasons, several hundreds of cases have been decided in the meantime.

8 See Decree-Law 10/2011 of 20 January, as amended by Laws 64-B/2011 of 30 December, 20/2012 of 14 May and 66-B/2012 of 31 December.

9 Law 62/2011 of 12 December.

10 And because of that, the Appeal Court of Lisbon in a decision of 14 May 2015 (Case No. 1109-14.9YRLSB-8 – available at www.dgsi.pt) has branded as unconstitutional some provisions of Law 62/2011 of 12 December and consequently refused to apply it in a particular case.

11 An English version is available at www.centrodearbitragem.pt/images/pdfs/Legislacao_e_Regulamentos/Regulamento_de_

Arbitragem/Rules_of_Arbitration_2014.pdf.

12 An English version is available at www.centrodearbitragem.pt/images/pdfs/Legislacao_e_Regulamentos/Fast%20Track%20Arbitration%20Rules%20english.pdf.

13 Decisions of the Appeal Court of Lisbon of 29 September 2015, case No. 827/15.9YRLSB-1 and of 24 March 2015, case No. 1361/14.0YRLSB.L1-1; Decision Appeal Court of Oporto of 3 June 2014, case No. 583/12.2TVPRT.P1; all available at www.dgsi.pt.

14 Decisions of the Supreme Court of Justice of 21 June 2016, case No. 301/14.0TVLSB.L1.S1, of 12 May 2016, case No. 710/14.5TVLSB-A.L1.S1 and of 9 July 2015, case No. 1770/13.1TVLSB.L1.S1; of the appeal court of Lisbon of 7 July 2016, case No. 508/14.0TBLNH-A.L1-2; all available at www.dgsi.pt.

15 Decisions of the Appeal Court of Lisbon of 14 April 2016, case No. 2455/13.4YYLSB-A.L1-2 and of 15 March 2016, case No. 871/15.6YRLSB-7; all available at www.dgsi.pt.

16 As examples, see Decision of 14 July 2016, case No. 660/16.0YRLSB-2; Decision of 12 February 2015, case No. 1551/14.5YRLSB-8; Decision of 15 January 2015, case No. 1362/14.8YRLSB.L1-8; Decision of 4 December 2014, case No. 1181_14.1YRLSB.L1-6; Decision of 1 July 2014, case No. 200/14.6YRLSB-7; Decision of 29 April 2014, case No. 1337/13.4YRLSB-7; Decision of 13 February 2014, case No. 1053/13.7YRLSB-2; Decision of 13 February 2014, case No. 1068/13.5YRLSB-6; Decision of 6 February 2014, case No. 866/13.4YRLSB-2; Decision of 3 October 2013, case No. 747/13.1YRLSB.L1-8; Decision of 10 September 2013, case No. 297/13.6YRLSB-7; Decision of 11 June 2013, case No. 955/12.2YRLSB-7; Decision of 2 May 2013, case No. 157/13OYRLSB; Decision of 11 July 2013, case No. 537/13.1YRLSB; all of the Appeal Court of Lisbon and all except the last two available at www.dgsi.pt.

17 See, for example, Decision of 22 September 2015, case No. 1212/14.5T8LSB.L1-7, available at www.dgsi.pt.

18 When discussing the revision of Law 31/86 of 29 August 1986, there were many opinions on the path to follow; notably, simply amending the law or approving a completely new document. Eventually, the latter option prevailed and the decision was taken to base the new text on the UNCITRAL Model Law. One of the purposes of changing the law was to make Portugal a more interesting seat for international arbitration, and that would be more easily achieved with a law following an internationally accepted standard.

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PLMJ is Portugal's largest law firm. It has one of the leading arbitration practices in the country and is the market leader as regards international arbitration.

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