other than the courts of England and Wales... Moreover he should not be permitted to apply to the Courts of India to seek their intervention in enforcement proceedings in this jurisdiction."

Closing observations

The judgment confirms that the English court retains the jurisdiction to grant anti-suit injunction relief in respect of proceedings in breach of an arbitration agreement brought before the courts of countries outside the European Union. This is a welcome decision, in particular to parties outside the European Union who choose London as a seat. It remains to be seen whether the *West Tankers* decision will affect London's popularity as a seat of arbitration in agreements between EU parties. While the ability of the English court to grant anti-suit injunction relief is probably not a determinative factor in the choice of London as a seat, parties contracting with recalcitrant counterparties based in the European Union may wish to consider a seat in another jurisdiction where the courts are able and willing to grant anti-suit injunction relief to restrain proceedings within the European Union in breach of an arbitration agreement, for example Hong Kong.

FRANCES VAN EUPEN
ASSOCIATE IN ALLEN & OVERY LLP'S HONG KONG OFFICE

Portugal

COMPETING RIGHTS OF ACCESS TO JUSTICE AND PARTY AUTONOMY TO SELECT ARBITRATION

Wall Street Lda and WSI Consultoria e Marketing Lda v Centro de Inglês S. Bárbara Lda

Access to justice; Arbitration agreements; Constitutionality; Enforcement; Portugal

Supervening hardship; access to justice; party autonomy; arbitration agreements; constitutional rules; cost of arbitration

Wall Street Lda and WSI Consultoria e Marketing Lda v Centro de Inglês S. Bárbara Lda: In Portugal, the courts have determined that the right of access to justice trumps the enforceability of an agreement to arbitrate in circumstances where one of the parties cannot afford the costs of arbitration but would be entitled to legal aid for court proceedings.

Case No.753/07 Constitutional Court Award No.311/2008, Constitutional Court, August 1, 2008

The conflict between the right of access to justice and the respect of private autonomy of the Parties has been considered by the Constitutional Court of Portugal. The current world financial ordeal stresses further this conflict given that more and more companies will fail and face difficulties with the costs of conducting arbitral proceedings.

In an appeal aimed at checking the adequacy of the exception of breach of the arbitration agreement with the rules of the Portuguese Constitution, the Portuguese Constitutional Court reviewed for the first time the potential conflict between the right of access to justice and the right to enforce an arbitration agreement.

This judgment was issued on May 30, 2008 and published in the official gazette on August 1, 2008.

Fact Summary

The appellants, Wall Street and WSI, asked the Constitutional Court to consider the constitutionality or otherwise of the norm according to which the dilatory exception of breach of the arbitration agreement set forth in art.494 j) of the Portuguese Civil Procedure Code is not applicable in cases when one of the parties cannot bear the associated costs of arbitration.

The appellants were interested in reversing the prior judgments issued by the first instance court of Braga and by the Appellate Court of Guimarães, which had held that art.20 of the Portuguese Constitution mandates that the right of access to justice supersedes the right to have the arbitration agreement observed by the parties to such agreement. The appellants argued that the interpretation made by these courts was in itself unconstitutional once it breached the principles of confidence and determinability of the applicable law inasmuch as the exception set forth in the Portuguese Civil Procedure Code was not subject to any restrictions.[1]

It was also declared that the claimant in those proceedings, Centro de Inglês, had not itself initiated the arbitral proceedings and hence it was unaware that the respondent could not fund the costs arising therefrom. The proportion

and schedule of payment of such costs is a decision of the parties to the arbitration agreement. Arbitration was never initiated. The appellants were sued in the judicial courts in breach of the arbitration agreement. The party in financial difficulties lodged the action in the judicial courts and then responded to the exception of breach of arbitration agreement invoking such financial difficulties.

The respondent defended the previous judgments.

Portuguese Jurisprudence

As seen above, both the courts of Braga and Guimarães rejected the argument that the arbitration agreement should be enforced even though the respondent could not afford to pay the costs of the arbitration. They did so on the basis of access to justice being a fundamental right, superior to the right of the parties to insist on performance of the arbitration agreement. The Appellate Court of Guimarães judgment further notes the doctrine of the Supreme Court[1] judgment of January 18 2000[2].

In the Supreme Court judgment of January 18, 2000, when faced with a similar situation the Supreme Court had ruled that access to state courts should be allowed whenever a party to an arbitration agreement faces a supervening impoverishment that renders impossible for that party to find the funding needed to set up and continue the arbitral proceedings. Otherwise the party in question would be factually prevented from the defense of its legally protected rights and interests.

That r Supreme Court judgment is not, however, the only decision on this matter handed down by the higher Portuguese courts. But, the decisions of the higher courts on this subject have not always been consistent.

Examples of decisions acknowledging the right to litigate in the courts when facing economical hardship that would entitle a party to an arbitration agreement to legal aid include the mentioned Supreme Court judgment of January 18, 2000, and the Lisbon Appeal Court judgments of June 5, 2001 and January 17, 2006.[3]

The Supreme Court judgment of October 9, 2003[4] is an example of the opposing view. The case dealt with the recognition of a foreign award under the 1958 New York Convention. The appellant thereto argued that the recognition of an award under the convention should be refused when the same is contrary to the public order principles of Portugal. Among other arguments, the appellant stated that it could not afford the expenditures in connection with the arbitration proceedings in the Netherlands and forcing arbitration of the dispute was therefore in breach of the right of access to the courts.

The Supreme Court reiterated the principle according to which no one should be denied the right to have access to courts for reasons of lack of financial means, in accordance with art.20 [1] of the Portuguese Constitution. However, the Supreme Court stated that this principle is not applicable to entities that only exist inasmuch as they can raise funds for their existence. The entities the judgment refers to are legal persons with lucrative purposes, such as companies. The Supreme Court noted that the legal aid regime in force did not recognize the right to full support of commercial companies, but only the waiver of the obligation to pay court fees. Therefore, it dismissed the appeal lodged and confirmed the exequatur granted.

Consequently, there is a discussion in the jurisprudence regarding the protection that should be granted to commercial companies that have entered into arbitration agreements and that become at a later stage unable to meet the costs to arbitrate a dispute. It is in the light of these

[1] The Supreme Court of Justice of Portugal is the highest instance court dealing with civil (including employment) and criminal matters.

[2] BMJ No.493 (2000), pp.327 et seq.

[3] Col. de Jur. 2001, III, pp.110 et seq, and 2006, I, pp.78 et seq.

[4] Case No.1647/02 (Pires da Rosa) in *www.dgsi.pt*.

dissenting views that the Constitutional Court was called to decide on the constitutionality of the issue.

Held

The Constitutional Court upheld the private autonomy principle at constitutional level and recognized the existence and validity of arbitration tribunals (as does the Constitution). However, the court clarified that these principles should not be considered independently of other values enshrined in the Constitution.

Where constitutional values conflict, the court must strike an appropriate balance between the interests at stake.

The court saw the question as one of conflicting rights. Respecting the arbitration agreement would leave one of the parties unable to plead its case, which would deny it effective access to justice, whereas granting jurisdiction to the courts would make the parties' agreement ineffective. The court found that the right to plead one's case (ie, the right to access to justice) should prevail.

The court stressed that the specific nature of an arbitration agreement makes it less significant than other manifestations of the principle of private autonomy. The court clarified that in concluding the agreement, the parties had decided merely to opt for an alternative jurisdiction. This demonstrated the ancillary nature of the agreement, as the parties' substantial positions regarding the contract remained unaffected.

Therefore, the court ruled that the application of the rule was in breach of the constitution when interpreted in a sense that covers the enforceability of the agreement against a party in supervening financial hardship that entitles the party to legal aid under art.20(1) of the Constitution.

In other words, a party that finds itself in a difficult financial situation and is eligible for legal aid in accordance with the relevant law is not obliged to respect an arbitration agreement if this will require it to embark on subsequent proceedings for which no legal support for fees and costs exists (or where no provision is made for such support).

Comment

The judgment of the Constitutional Court respects commercial companies that have entered into an arbitration agreement (within a contract) and does not take into consideration the views expressed in the Supreme Court judgment of October 9, 2003.

In that sense, it constitutes an unfriendly decision towards commercial arbitration that should be noted.

It should furthermore be noted that a recent review of the legal aid regime[5] determined that companies or other collective bodies operating for profit are ineligible for legal aid. Therefore, the jurisprudence reviewed and the Constitutional Court judgment considered a legal framework whereby commercial companies were entitled to a certain degree of legal aid (exemption of court fees), which does not occur anymore.

Had the case arisen under the new legislation, the respondent would have been unable to apply for legal aid. Therefore, it seems that the above reasoning would not apply under the new legal criteria, as the company would be unable to meet the costs and fees of either judicial or arbitral proceedings.

[5] See Law 47/2007.

[6] Senior Associate at PLMJ.

[7] Founding Partner at PLMJ.

JOAQUIM SHEARMAN DE MACEDO[6] AND JOSÉ MIGUEL JÚDICE[7]