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ARBITRATION IN PORTUGAL: HOW THE COURTS ARE REACTING

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The growing sophistication of many modern-day legal disputes in Portugal had gradually led those involved in the legal world to search for practical solutions which may provide decision-making mechanisms that are more appropriate for dealing with specific problems, and enable them to avail themselves of means and resources which are not normally available in the courts. Together with the period of crisis which the justice sector is currently undergoing in our country (with judgements in first instance rendered quite often only 4 to 6 years after the initial request for relief), this had led to an increasing belief in arbitration as the dispute resolution mechanism par excellence.

Arbitration is the "justice of business people" and is especially appropriate for the resolution of commercial disputes. These disputes require the person weighing up the issues involved to be particularly sensitive to the actual interests concerned, as well as a departure from purely formal decisions, and sufficient knowledge of the relevant business sector to enable the award to take into account practices and expertise that are very often incomprehensible outside of that particular context.

Up to now the Portuguese arbitration community is not organized and, being so, the progress of this way of settling disputes has been slower than possible.

Portugal is one of the signatories of the New York Convention and, therefore, guarantees internationally recognized to arbitration processes are fully inserted in Portuguese legislation. Portugal has an Arbitration Act in force since 1986 that took into consideration the then recent Uncitral rules. More recently some amendments took place to solve some aspects of the law that were jeopardizing to true advantages of the arbitral proceedings. It was, for instance, the need of the parties to agree on the object of the case. In case of lack of agreement State courts would decide about the object, what would mean many months of time wasted.

Being so, and if analysed only from a legal standpoint, Portugal is a country where arbitration has all the conditions to be practiced without disturbance, also because the set aside of an arbitral award is possible only in very few situations, all of them totally acceptable from an international point of view.

However, unfortunately, the real world is not so bright as it appears. Portugal, quite often,

shows a tendency to have regulations that are modern (eventually bringing our country to the level of the most advanced jurisdictions), but a judicial system and a legal community that acts as if the regulations were not exactly what they seem.

The Judiciary has still a strong bias against resolution of conflicts outside the State Courts. If allowed, a lot of the Portuguese Judges would decide against arbitration, as they consider it as a breach into the monopoly that, as a Profession, they rather prefer to preserve. Judges in Portugal are a separate profession from lawyers, and they begin very young as trainees at a kind of pos-graduated studies given in the "Centro de Estudos Judiciários" (CEJ), a school that is controlled actually by the Judges and Public Prosecutors.

The fact that non-Judges, without any preparation in the CEJ, are able to make awards, normally on very sophisticated and/or valuable cases, quite often without appeal to the State Courts, is considered as a kind of infection risk. If the legal community is adapting to the advantages of Arbitrators towards Judges on commercial and other matters, that could give the public opinion and the Parliament a tendency in favour of destroying the monopoly or limiting it thereto.

Another problem from the desired development of arbitration is the fact that the Portuguese Procedural Code (PPC) is an aged text (from 1939), not adapted to the needs of modern world, the possibilities opened by the information society and the autonomy of the parties. The PPC has been approved during the Dictatorship of Professor Salazar and is a document with a strong control ideology, given almost no room for adapting the regulations to the specific needs of certain conflicts.

In a lot of arbitrations one of the parties wishes to avoid the award as is obvious that the relief sought will be granted. Being so, the lack of clarification of the way of harmonization between the Arbitration Act and the PPC creates opportunities for technicalities being used to try the set aside awards on grounds that, even not allowed apparently by the Arbitration Act, could be considered if the PPC applies to the arbitration proceedings.

In the last twenty years the movement towards arbitration has improved very much. Just as a way of example myself and other partners of my law firm (PLMJ) is currently involved in more than 30 arbitrations, as members of the panel or counsel. The courts have been called much more in the last years to analyse arbitration matters, and some precedents are being published what would be of help to practitioners.

If we analyse in detail the precedents we can also make the conclusion that the evolution towards accepting arbitration (at least as a fait accompli) is a fact. Later on we will revisit this evolution. But we think the international and national arbitration community shall not consider that Portugal has already attained a level equivalent to the most arbitration friendly legal environments. A lot of work shall be done and the pedagogic actions shall be a priority.

Court decisions unfriendly of arbitration can be found in Portugal. But also it is possible to discover a quite opposite trend, and ourthesis is that step by step (and with some main and important exceptions) things are improving. The big problem is that Portugal as not a precedent rule (as common law countries) and it happens too often that the same court (even the Supreme Court) rules in opposite directions in their decisions. This creates a big difficulty for practitioners and the same happens with arbitrators (when it takes place in Portugal or the exequatur is asked in this country).

This means that the trend in favour of arbitration is not safe enough to avoid risks. Same examples, on different however important questions related to arbitrations can be found.

Beginning with the most outrageous decisions I noticed, in 1995 (File nº 087521) the Supreme Court (STJ) did not accept the (agreed by the parties) applicability of English law for a contract between two Portuguese companies and so set aside an arbitral award. Even worse, the same high court decided in 1994 (File nº 084722) that without an international treaty or convention between the countries of the parties, their will is not enough for allowing to submit to arbitration a conflict. Some years before, in 1991, the STJ even decided (File nº 33936) that in domestic arbitrations, the arbitrators would have to be Portuguese.

No precedents can be traced against these unbelievable decisions, but both our law firm's and ours experience shows that probably today no State Court will decide like this. We could find a decision, albeit of a lower level court, the Appeal Court of Lisbon (File nº 86901 – 1995), stating that the parties are allowed in international arbitration to choose non Portuguese procedural rules and submit the conflict to the law of another country, even when the place of arbitration is in Portugal.

Other examples can be brought on other important aspects of UNCITRAL culture. For instance, in 1994 the STJ (File nº 087738) decided that the arbitral tribunal can never define the object of the arbitration, if not agreed by the parties. In the same direction (even if the "object of the arbitration" question is slightly different from it) went the Appeal Court of Oporto (Files nº 231441 - 2002 and nº 9220917 - 1993). In contrary, in 2002 the Appeal Court of Lisbon (File nº 47281) stated expressly applied the Kompetenz-Kompetenz principle. The same court, also in 2002, applied Kompetenz-Kompetenz to allow the arbitrators to decide if the relevant facts justified to consider the arbitration clause applicable.

However, on the specific aspect of the definition of the actual object of an arbitration conflict the First Instance Courts (their decisions are not normally published) were deciding in a way that was norrowing the power of the arbitrators. This tendency was jeopardizing efforts to convince the business community that arbitrations is an speed alternative to slow judicial process, as the party that not could not convince the other on the definition of the object of the conflict should go to the first instance court for having the object defined by a Judge. So, in 2003, the

Arbitration Act has been amended to expressly open the possibility for the Arbitral Tribunal to define the object as referred by each one of the parties. This amendment was a consequence of pressure from the arbitration community and, above all, from the Portuguese Bar Association.

Another important area of problems is related with the capacity of the Arbitral Tribunal to organize freely the proceedings. In 1999 (File nº 98B1128) the STJ decided that the arbitral tribunal is not empowered to organize the proceedings without the agreement of both parties, being obliged in these situations to use the PPC. This precedent would oblige any Arbitrators (and mostly the President) to be familiar with Portuguese internal procedural rules, and precedents thereto, to avoid risks.

A very common question (and not only in Portugal) is the fact of one the parties to an arbitration agreement having not (or trying to convince that is has not) the financial means for supporting the costs of arbitration. Portuguese courts have already decided this kind of issue, and once more the precedents are not unanimous. The Appeal Court of Oporto (File nº120301 – 2001) decided that if that situation arises without fault, the Party in question shall revert to State Court where legal aid is available, arbitration being no longer possible. The Appeal Court of Lisbon (File nº 13096) and the STJ (File nº 99A1015 – 2000) took similar decisions in different cases. However, the same STJ, in 2003 (File nº 3B1604), decided in an opposite direction, stating that a Party signatory to an arbitration clause (international arbitration) without the means to enter into an arbitration should not survive as a going concern, this problem being not a reason to allow it to refuse the arbitral tribunal. In same direction the STJ (File nº 01B4182) decided that the fact legal aid does not apply to arbitration proceedings cannot be a motive to refuse the arbitration clause and so arbitration can happen against a party with financial difficulties.

Another important area for international arbitration is how national State Courts accept the way that the Arbitral Tribunal considers adequate for the award as to the facts considered relevant to the decision and the legal arguments included thereto. If the State Courts can set aside a award based on the internal procedural rules and/or precedents related to the specific traditions on award righting, international arbitration suffers, as arbitrators cannot be familiar with details of local judicial styles.

We can also find on this question decisions going in different directions. The Appeal Court of Lisbon (File nº 69326 – 1994) stated that the Arbitrators are not obliged to answer to all the allegations of the parties, nor it is necessary for them to justify why they consider that enough evidence as not provided for some facts and that some other facts are irrelevant. This decision is obviously arbitration friendly as it allows for simplification. Similarly the STJ (File nº 78288 – 1990) said that if the award explains what is at stake in the case “with some detail”, identifies the arbitrators, refers the legality of the arbitration process, res judicata and its enforceability, that shall be considered enough for the national courts (it was the exequatur of an international

arbitration award prior to the Portuguese adhesion to the UN Convention). In the same direction the STJ (File nº 841/01) and also the Appeal Court of Lisbon (File nº 7318/00), stating that only the "absolute lack of motivation" by the arbitral tribunal could justify the set aside of the award. Also the STJ (File nº 86342 – 1995) stated that the motivation shall not exist, as if it is only defective, not perfect , erroneous or "insufficient" that will not suffice to set aside.

However the STJ (File nº 1B841 – 2001) decided that, as the justification for the award is not defined at the Arbitration Act, PPC shall apply, what opens room for putting in jeopardy a lot of arbitral awards if not familiar with Portuguese internal judicial criteria.
In the same direction in File nº 3570/01, the STJ sets aside an award based on the fact that some requests of one party, as the simple fact of agreeing with the reasons invoked against it was not enough as motivation. Also the Appeal Court of Oporto, in a recent decision (File nº 0324038 – 2003), stated that the " analysis of evidence" is a condition for not setting aside the award, as a simple clarification of what are the facts established and the means of evidence that justify the conclusion is not enough. The same court, however, in 2002 (File nº 0132080), referred that arbitration court shall not be bound to apply the strict formalistic rules that define the State Courts.

A major problem with Portuguese Arbitration Act is the wording that suggests that any arbitration shall last for 6 months, with the possibility of the parties giving to the Tribunal another 6 months time. In complex international arbitration, mostly where a lot of facts need to be analysed (for instance construction contracts) and/or expertise is necessary, it is almost impossible to have a award within these time limits.

Normally the Parties grant to the Tribunal (being common that arbitrators ask for it as a pre-condition for accepting the mandate) some discretionary power to fix the deadline for the award, and normally that fits all the need of safety for all the parties involved. However, once more, Portuguese courts have not a clear tendency to give comfort for those involved.

The STJ, in 1998 (File nº 92B217) decided that to invoke the 6 months deadline would constitute an abuse if right and so an illegality, when brought after some time of arbitral work in which the party or its counsel gave clearly the impression that they were aware of the risks and accepting that the process will continue as if the deadline would not be a problem. The same court (File nº 217/98) admitted that the additional six month period can be agreed though a tacit or implicit way. The Appeal Court of Lisbon (File nº 31792 – 1998) stated that the parties are empowered to fix – at the arbitration agreement or later on – a deadline for the rendering of the award or the way of defining that deadline. This shows a major flexibility, out of the 6+6 deadline. Also in 1995, the same Appeal Court decided that if the parties did not fix another deadline for rendering the award after 6 months caducity (i.e., forfeiture of the proceedings) will occur, what suggests the possibility of circumvent the caducity (and as a matter of Portuguese substantive law, caducity can be postponed by agreement of the parties).

However, in 1995, the Appeal Court of Oporto said that caducity applies if the award is not rendered within the time limits of 6+6 months (however, it is not clear if the decision was based on the lack of agreement between the parties to change this criterium, that then will apply in a subsidiary mode.

The Portuguese courts were obliged to look on other issues that quite often arise in arbitration. For instance in 2003 (File nº 03A3218) the STJ decided that it is possible to set aside only partially. Also the same court (File nº 96A049 – 1996) admitted that an arbitration agreement can be valid even if not signed by parties, as the written form is the only condition, as this an "ad probationem " formality, evidence can be provided that the agreement had been reached. Also the Appeal Court of Lisbon (File nº 885/96) accepted the validity of an arbitration clause that was only mentioned at an attachment to the contract.

Another interesting award (File nº 086342, already mentioned above) relates to a situation in which two arbitrators decided the award with the other dissenting, but a clarification had been agreed by the President and the former dissenter, against the opinion of the arbitrator that contributed to the award first decision. The STJ saw no problem on that and did not set aside the award. Also in the same area of potential problems, the Appeal Court of Lisbon considered valid and enforceable a award in the absence of one arbitrators that no longer appeared to take part in the decision and so tried to boycott the award (File nº 6097/02-8, of the same Appeal Court).

Portuguese Courts accept request for preliminary injunctions (Files nº 06361, 2000, and 711/96 Appeal Court of Lisbon) but no precedent has been found to see what would the courts decide on injunctions ordered by the arbitral Tribunal. Also very interesting is a decision of the Appeal Court of Oporto (File nº 9451263, 1995) which grants enforceability rights to the arbitral Tribunal, what seems to me plainly wrong according with the Constitution and the Law.

We found an award (File nº 0047281 - 2002) from the Appeal Court of Lisbon about impartiality of arbitrators. The decision is that as the arbitrators are nominated pursuant the will of the parties it is not possible to bring a request for the removal of one arbitrator as it would be an abuse of right.

Another award (File nº 3094 of 2004, Appeal Court of Lisbon) expressly accepts multiparty arbitrations when admitted at the arbitration clause.

Finally the important issue of non-arbitrability appears in some Portuguese court decisions, and show once more the risks of contradictory decisions.: one decides that a Tenants Regulation (Regulamento de Condominio) (the document that define the rules applicable to the matters related with the common area of a building) is title enough to have arbitration, even if the actual owners of the plot didn't sign formally any written agreement on arbitrability for their specific conflicts (File nº 9650553, 1996, Appeal Court of Oporto). The other, from the same Appeal

Court (File nº 0030614, 2000) states that this Regulation is not enough, a written agreement by the actual parties to the conflict on the arbitrability being necessary.

Another decision, also from Oporto (File nº 0121217, 2001) rules that when the request is related to rights of the personality (direitos da personalidade), even if the parties signed a arbitral convention cannot be arbitrated, as the decision considers that if undisposable rights (in the case at stake to right to sleep quietly at night, that was disturbed by a dog) are in discussion it is not legal the recourse to non State Courts. More recently another Appeal Court (Lisbon, File nr. 3317/2003-6) took a similar decision: It ruled that an Arbitral Tribunal could not decide on the termination of a lease agreement, as lease agreements are regulated by some rules that cannot be waived by the parties an therefore have to be construed as undisposable rights. As life is not easily encapsulated in very clear boundaries, these judgements can provide reasons for worry about arbitration in Portugal.

Looking to these examples, I think it is wise to recommend that Arbitrators for cases where Portugal is either the place of arbitration or local of enforcement, and also when Portuguese law is applicable, should look for some help of a Portuguese lawyer or jurist to have the risks of set aside of a award minimized. Also for another reason: Arbitration is still doing the first steps in Portugal. Practitioners are still not so defined as in other jurisdictions. The lack of a community of practitioners, even very informal, adds to the problem, as it is not possible to foresee the actors and to guarantee that all of them will react according to international patterns.

Even with all these problems and difficulties we feel very optimist on the future of arbitration in Portugal. No only for the reasons already stressed, but also because the positive economic and political evolution of the former Portuguese colonies is creating more conditions for transforming Lisbon into a regional arbitration centre, specialized in commercial disputes related to the former colonies.

Lisbon is very central to these countries as the flights for Portugal are much more frequent than to other destinations; also it has all the facilities for attracting arbitrations (translators, hotels, even good restaurants…). The local elites normally studied in Portugal, they have the same language, almost the same legislation and regulations and use Portuguese precedents at their national courts.

However the modernization of Portuguese arbitration law that applies to international conflicts is a precondition for that goal. If Portugal wants to be a player at the arbitration level, it is necessary to insulate the arbitrations located in Portugal from the local courts and their specificities, as other countries have done in the last years. I hope IBA will be of help to obtain it.

Lisbon, August 2005