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The New Portuguese Arbitration Law

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1. The relevance and main goals of the new Portuguese Arbitration Law (PAL)[1]

The PAL is the most recent national arbitration law, truly and decisively inspired by the UNCITRAL Model Law and it has been enacted in a jurisdiction which is already wide open to the international market.

This enactment has been possible, in what is quite often a conservative and parochial legal environment, because of a change in the usual manner of legislating in Portugal. The Portuguese government usually asks respected scholars, even if they are not familiar with legal practice, to draft laws, which are then reviewed by the government's internal legal advisers. However, this time around the government assigned this task, in February 2009, to the Board of Directors of the Portuguese Arbitration Association (APA). This Board is composed entirely of experts in arbitration law, some of them with extensive experience as arbitrators, including in international arbitrations. The work was done on a *pro bono* basis and, after three Justice Ministers and two governments[2], and almost three years later, the draft has been approved by Parliament virtually without modifications. The Portuguese law is therefore the product of experience and knowledge with almost no political interference. One of the main reasons for the final acceptance of the APA's draft was probably the "Memorandum of Understanding" entered into between Portugal and the European Commission, the European Central Bank and the International Monetary Fund in the first half of 2011. This document included a deadline for a new arbitration law to be enacted before the end of 2011.

The previous law (Law 31/86) – albeit not actually a law completely inspired by UNCITRAL – was considered an interesting document 25 years ago, but was rendered obsolete by the evolution of arbitration case law and

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1 Law 63/2011, December 14. An unofficial English translation is attached to this article, ASA Bull. 1/2012, p. 13.

2 The first of the Justice Ministers accepted the draft, but had no possibility of passing it in parliament. The second decided to change the draft on the advice of unknown legal advisers that tried to break away from the UNCITRAL Model Law, but elections put an end to that project. The newly elected government decided to accept the APA's draft.

studies and was no longer adequate to the needs of domestic let alone international arbitration[3]. The PAL is therefore very innovative when compared with the 1986 law[4], but almost all the innovations are in line with the more modern national arbitration laws (such as the German, Spanish and Swiss laws, among others).

The main idea behind this new law was to make the Portuguese legal environment friendlier to arbitration. The Portuguese Government's acceptance of inspiration from the Model Law was explicitly justified by the intention of creating an arbitration cluster in Portugal and establishing the country as a natural seat for international arbitrations, notably those involving parties from Portuguese-speaking countries, Spain, South America and Africa.

2. The More Relevant Changes

The fact that the PAL was inspired by the Model Law renders it unnecessary to go into much detail in this text about all the modifications introduced. However, for Portuguese practitioners and scholars it is a true revolution, fully updating the Portuguese system with few solutions in common with the 1986 law. Therefore, the focus of this article will be on some of the changes that are more relevant to international companies, their counsel and the international arbitration community.

The first innovation of the Portuguese Arbitration Law concerns the definition of what can be submitted to arbitration (article 1). The criterion of the 1986 law was to admit any but only disputes not relating to inalienable rights. In the PAL it has become wider and it is now possible to submit to arbitration any dispute concerning rights over economic interests. Furthermore, even disputes that do not relate to rights over economic interests may be referred to arbitration as long as the parties have the right to enter into a settlement in respect of those rights.[5]

One second and very important improvement concerns the insulation of arbitration from the Portuguese Civil Procedure Code (PCPC), which was not at all evident in the 1986 law. The risk that the other party might argue that the PCPC applied to arbitrations in Portugal amounted to a significant

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3 Which continues to be defined in the PAL as arbitration in which the interests of international commerce are at stake.

4 Some examples are the new rules about independence and impartiality of arbitrators, the acceptance of preliminary orders and interim measures, the absence of the right to appeal to the judicial courts against an arbitral award.

5 This means that, for example, criminal or family law related disputes cannot be submitted to arbitration, but disputes related to companies may.

limitation on the choice of Lisbon or any other Portuguese city as the seat of an international arbitration or on international practitioners acting as counsel or arbitrators in Portugal. With the PAL it is made unambiguously clear even in domestic arbitration that the PCPC is not relevant.

A third very relevant improvement is the possibility of the arbitral tribunal granting preliminary orders and interim measures (articles 20-9), in accordance with the 2006 version of the UNCITRAL Model Law. The preliminary orders are granted ex parte for the short period of time needed to have an interim measure decided. The PAL opens the door to some measures not allowed by the PCPC, notably by allowing measures for the protection of evidence.

Another very important aspect of the PAL is the clarification and improvement of the interaction between arbitral tribunals and state courts. Not only may the parties to arbitration seek interim measures from the state courts (articles 7 and 29), when deemed appropriate, but also the parties and the arbitral tribunal may ask the assistance of the courts in enforcing any of the tribunal's interim measures not voluntarily accepted by the party against whom they have been ordered (articles 28 and 9). Other forms of cooperation have also been clarified, such as the possibility of asking the court to hear witnesses when they refuse to participate in arbitral hearings (article 38)[6].

A very relevant improvement concerns the rules for multi-party arbitration (article 11) and the possible intervention of third parties in a new or even pending arbitration cases (article 36). In this respect, the PAL seems to be in line with the international standards: thus, all claimants and/or all respondents should mutually agree on one common co-arbitrator and the arbitrators chosen then appoint a president. Nevertheless, if there are conflicting interests between the individual claimants or respondents preventing the appointment of a joint co-arbitrator, the appointment of all the arbitrators will fall to the President of the Court of Appeal, unless the parties decide otherwise. The appointing authority is then empowered to apply the Dutco doctrine or to just appoint one of the co-arbitrators, in accordance with the specific circumstances of the case.

Another substantial advance of the PAL concerns the absence of the right to appeal against the arbitral award[7] (article 39 (4)). From now on an arbitral award can only be attacked by means of an application for setting aside or upon enforcement. In either situation the state court will not be

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[6] Article 38 clarifies that arbitral tribunals with a seat outside Portugal may also request the assistance of Portuguese state courts.

[7] The possibility of appeal was the rule for domestic arbitrations in the 1986 law, unless the parties agreed to exclude it.

allowed to examine the merits of an arbitral award but only to check whether the procedural rules related to due process have been respected in accordance with international standards. However, an appeal will only be possible if the parties make express provision for this in the arbitration agreement. Nevertheless, this possibility does not apply to interim measures or preliminary orders. In this case, there is no possible exception to the rule against appeals[8].

On the downside, reference can be made to the only relevant amendment to the APA draft. While this specific point was and is the subject of intense debate within the arbitral community in Portugal, internationally it may not be viewed as such a critical issue as even the UNCITRAL Model Law has a similar article. In contrast to what happened before, it will now be possible to argue that the award conflicts with Portugal's "international public policy" (article 46 (3), (b), (ii)) to try to set it aside[9]. The APA Board have been able to limit this possibility to international public policy of the Portuguese State and therefore internal public policy is excluded. This limitation, together with the fact that the Portuguese judiciary is strongly in favour of arbitration, may render this aspect meaningless in practical terms.

3. Some important rules for international practitioners and experts

The mere fact that the UNCITRAL Model Law is the true inspiration for the PAL is a justification for its analysis. As happens with any other UNCITRAL inspired national law, it is always possible to find differences between the model and the resulting national law. This scrutiny may also be important to help Portuguese practitioners and state courts to better understand and more accurately apply the PAL.

Among the more relevant points, it is worth mentioning that the independence and impartiality of all the arbitrators is now clearly included in the PAL (article 9) and also the rules for refusal or challenge of arbitrators (articles 13 and 14). When an arbitrator is challenged, the arbitral tribunal is empowered to decide, subject to recourse to the appropriate state court when

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8 While presumably parties involved in international arbitration generally want an award that is final, it should be noted as a curiosity that, in international arbitration cases and as per the letter of the law, it is not enough for the parties to expressly state in their arbitral agreement that they want to have the right to an appeal from the arbitral award. Such an appeal is only possible to another arbitral tribunal and provided the parties have regulated the terms of the appeal (article 53).

9 For awards rendered in international arbitrations, the wording of the law – article 54 – is slightly different and refers to a result "manifestly incompatible with 'international public policy'").

the challenge is rejected or the arbitrator decides not to step aside. In the coming years this will generate case law that will help to anticipate the possible solutions.

Related to this point is the specific rule that, in the case of international arbitrations, the appointing authority must consider choosing a president or sole arbitrator of a different nationality to that of the parties. Neutrality is therefore accepted as a rule of law (article 10 (6)) in Portugal. The hope of the APA, when this rule was included, was to open the Portuguese arbitration market to international practitioners and, in the process, to contribute to the arbitration modernisation process.

Another relevant aspect is the intention to reduce to a minimum the need to refer to state courts matters that the parties wanted to be decided through arbitration. One example, which is very innovative even at the international level, is the solution of article 45 (5). After notice of the arbitral award is given, each party may ask the arbitral tribunal to reconsider and make an additional decision if and when the tribunal did not decide part of the relief sought. This is intended to avoid the need to ask the state courts to set aside the award.

With the same aim, as of now, if the state court sets aside the award in whole or in part, only a new arbitral tribunal has the power to decide the case (article 46 (9)). Under the previous legislation, after any annulment, the case would have to be brought to the state courts (as the arbitration agreement would lose validity) unless both parties agreed to submit the case to another arbitral tribunal.

However, when confronted with a request for annulment of an arbitral award the state courts may also choose a solution which is again very innovative. In accordance with article 46 (8), upon an application by one of the parties, the state court may decide to stay the annulment proceedings and ask the arbitral tribunal to re-examine the award with the benefit of the submissions of the parties in the annulment proceedings in an attempt to eliminate the grounds for annulment.

Finally, it is important to point out that the seven Portuguese Appeal Courts will have the power to act in almost all situations in which the state courts are called to decide arbitration-related issues (article 59). This avoids the risk of empowering hundreds of local courts to decide issues for which they would probably not be prepared.

4. Final Remarks

Self-fulfilling prophecies are quite often, like second marriages, the triumph of hope over experience. The Portuguese judicial system is very reactionary when it comes to innovation and practitioners – judges and lawyers alike – very often "forget" reforms and look to the new laws with the lenses of the past. The PAL is quite revolutionary in Portugal, and the fact that the legal community is now much more familiar with arbitration, the universities are including arbitration theory and practice in their curricula, and step by step more lawyers are involved in arbitration and quite a few even in international arbitration, is cause for hope that arbitration in Portugal, even domestic arbitration, will be modernised quickly and that full advantage will be taken of this form of dispute resolution.

The attention of the international arbitration community to the PAL will be very helpful in consolidating this trend. However it is obvious that Portugal now has the advantage of a modern law that is easy to understand and work with and international practitioners, international companies and other entities will be much more at ease doing business in or with Portugal, even when there is the possibility, as a result of the contract negotiation process or conflict of law rules, that a dispute may be decided by arbitration in Portugal.

This new law will also make international law firms and clients more open to considering Lisbon as the seat for arbitrations, particularly when they relate to Portuguese-speaking countries like Brazil and Angola and other African countries, or to Spanish-speaking countries including both Spain and South American countries.

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Manuscripts and related correspondence should be sent to the Editor. At the time the manuscript is submitted, written assurance must be given that the article has not been published, submitted, or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within eight to twelve weeks. Manuscripts may be drafted in German, French, Italian or English. They should be submitted by e-mail to the Editor (mscherer@lalive.ch) and may range from 3,000 to 8,000 words, together with a summary of the contents in English language (max. ½ page). The author should submit biographical data, including his or her current affiliation.

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Switzerland is generally regarded as one of the World's leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world's best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

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