

Artículos

THE NEW PORTUGUESE ARBITRATION IS ON THE RIGHT TRACK

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RESUMEN

La nueva Ley de Arbitraje Voluntaria de Portugal (Ley 63/2011) ha sido preparada por la Dirección de la Asociación Portuguesa de Arbitraje, a pedido del Gobierno. La ley sigue las soluciones de la Ley Modelo UNCITRAL y también se inspira en las más modernas leyes arbitrales, como es el caso de Alemania, Suiza, España, Inglaterra y Perú. Además de ampliar el ámbito de la arbitrabilidad, admite las órdenes de procedimiento *ex parte*, las medidas cautelares y es muy explícita sobre la necesidad de independencia e imparcialidad de los árbitros.

Las reglas de la cooperación con el Poder Judicial son mucho más claras, reforzando los deberes de los Tribunales, pero manteniendo la autonomía de las decisiones arbitrales, que no pueden ser analizadas si hay motivos para anulación, pero entonces, de acuerdo con estándares internacionales.

La intención del Gobierno y del Parlamento ha sido también crear una ley comprensible para las empresas extranjeras y sus abogados y que no tenga interferencias de las reglas procesales internas. Con eso se piensa que ciudades portuguesas puedan ser elegidas como sede para arbitrajes internacionales, sobretudo en relación con países de lengua portuguesa como Brasil, Angola y Mozambique.

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I. WHO, WHAT, WHEN, WHERE, WHY

The new Portuguese Voluntary Arbitration Law (LAV) has been prepared as a draft by the Board of Directors of the Portuguese Arbitration Association (APA), pursuant to a request from the Portuguese Government in February 2009. This request was very uncommon, as usually public administration legal staff works with a scholar for starting up the legislative process. After more or less three months the first draft was finalised, but the complexities of Portuguese political process made the process up to the actual enactment of the law a lengthy one.

The idea of the APA Board was to provide a draft fully inspired by the UN-CITRAL Model Law, and therefore a quite different document from the existing law (Law 31/86). The reasons were obvious. Arbitration is an international playing field and trying to be original is quite often the road to irrelevance. Portugal is very well placed to receive international arbitration. It is not a large and strong European country, it is peaceful, enjoyable, very open to foreigners and with connecting flights to many cities in the European and Atlantic coast. The Judiciary is not very efficient but as a whole is qualified, decent, arbitration friendly and respectful of the Rule of Law. Portuguese speaking countries have more than 250 million inhabitants, some of them with very strong birth rates, and therefore our common language will be among the three most international languages in the XXI Century. Portuguese legal practitioners and clerks are normally able to speak English and Spanish and some of them even French. Portugal has very strong contacts with Africa and South America. An arbitration cluster may grow in the coming years and the LAV is an essential tool for that possibility to materialize. And, therefore, the Portuguese Parliament's acceptance of inspiration from the Model Law was explicitly justified by the intention of establishing the country as a natural seat for international arbitrations, notably those involving parties from Portuguese-speaking countries, Spain, South America and Africa.

The normal parochial resistance to the LAV draft, as it did not follow the Portuguese traditional legal process, could have jeopardized all the process. As a matter of fact, in 2010 the APA draft was modified at the government level to accommodate the old principles of the Portuguese civil procedural code. This would insulate in practical terms the arbitral legal rules from the tendencies of the more modern reforms in Europe (German, Spanish and Swiss laws, among others) and others parts of the world. The APA refused to support the modifications. The political crisis and a new legislative election put an end to this «counter-reform». The new majority requested once more the APA to present the original draft, and with minor modifications, as a consequence of the public debate and the political process, the law has been enacted in December 2011 as Law 63/11.

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 (the «Troika», as it is

known) in the first half of 2011. This document included a deadline for a new arbitration law to be enacted before the end of 2011.

This request of the Troika is understandable. The courts are not able to answer to the growing workload of cases and this is creating difficulties for companies, increasing the costs of context and noted down as a negative aspect when investment decisions are considered. The former Law 31/86 was at the time of its enactment a modern and rather interesting law, but the evolution of arbitration case law and legal studies in 25 years made it inadequate to the needs of domestic, let alone international, arbitration.

However, as it occurs with any other UNCITRAL inspired national law, specificities and differences between the model and the resulting national law exist. Scrutiny by international practitioners of the LAV is therefore very important for the advance of arbitration in Portugal and will help arbitrators and state courts to better understand and more accurately apply the LAV.

II. THE MORE RELEVANT AND POSITIVE MODIFICATIONS

Many of the important modifications implemented are basically translation of the UNCITRAL Model Law rules and therefore international practitioners will be very much at ease in understanding the actual meaning of the articles of the LAV. Precedents and doctrine of other Model Law inspired national laws will also be relevant for the interpretation of the Portuguese law. It does not seem necessary to explain the LAV contents in detail when writing for an international audience, as it is the case; however, it makes sense to draw international practitioners and actors' attention for a number of changes that are more relevant to international companies, their counsel and the international arbitration community and also to those innovations which analysis by non-Portuguese experts may be warranted in view of their specificities and even controversy.

A. Arbitrability

One very important innovation of the LAV relates with the criteria for the acceptance of arbitration as a dispute resolution solution in Portugal. The Law 31/86 only permitted to submit to arbitration disputes not related to inalienable or undisposable rights. This solution was actually based in a controversial concept that Courts of law should have the exclusive right to analyse and decide this kind of situations, as arbitration would be per se a risky system, eager to enter into solutions that were not in accordance with the material law of the case.

The LAV opened a wider gate for arbitration and now it is possible to submit to arbitration any dispute concerning patrimonial rights over economic interests — art. 1 (1). 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 — art. 1 (2). Public law, tax and labour arbitration is implemented by special laws.

This evolution, increasing the field of commercial arbitration, is consistent with the trend of the last decades in which Portugal implemented one of the most advanced systems of arbitration in public law matters, not limited to PPP's and public concession contracts, but also related to traditional administrative law issues (administrative contracts, the set aside of administration deliberations, etc). Some issues of labour law are also arbitrable. More recently, Portugal admitted the arbitrability of tax law matters, albeit with some conditions, but in any event a very innovative evolution in the international arena.

B. Independence, impartiality and neutrality of the arbitrators

The only reference in the Law 31/86 to the requirements that arbitrators had to fulfil vis-à-vis the parties, their representatives or the subject matter was the assimilation of the arbitrators to judges in what concerned ethical rules. This was simultaneously too little (as a number of situations arise with arbitrators that could never exist in the context of exclusivity that exists in the Judiciary) and too much (as it might jeopardise the very fabric of the arbitration process in a very small market with not so many skilled and experimented practitioners, for example by not giving relevance to the possibility of disclosing situations that, if not timely considered relevant by the parties for a challenge, will have no consequences).

The LAV implemented a set of specific rules related with the independence and impartiality of all the arbitrators (article 9) and also for the 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 if the challenge is refused and/or the challenged arbitrator decides not to step aside.

A professional culture that considers a challenge as a personal attack to the ethics of the arbitrator or judge, in the context of the cosiness of the Portuguese market coupled with the rules that applied under the previous law makes the case law about these issues almost inexistent and the few state court's precedents are mostly based on a very easygoing and lax attitude. However, even before the LAV was enacted, a change of attitude started to become apparent, even in the judiciary, with the Supreme Court declaring—in a decision that may be criticised in other aspects—that independence and impartiality of all the arbitrators is a fundamental requisite in any arbitration. This was now consolidated with the new clear approach of the LAV, together with the efforts of the APA (that even implemented a Code of Conduct), which hopefully will make this issue an unavoidable part of the Portuguese arbitration system and help to transform arbitration into a more transparent and credible dispute resolution system. Challenges, that in previous years would never surface, are now being considered in institutional and ad hoc arbitration. This means that case law by the courts will help the practitioners to anticipate the outcome of challenges and stimulate po-

tential arbitrators to consider disclosing with more accuracy the situations that might bring future problems.

One important innovation relates to neutrality, namely the President of the Panel. In the case of international arbitrations, the LAV states—in article 10 (6)—that the appointing authority must consider nominating a president or sole arbitrator from a different nationality of the parties. Neutrality is therefore and from now on accepted as a rule of law in Portugal.

This article 10 (6) faces a market normally insulated from the international context, at least when both lawyers to the parties are Portuguese. The appointment of foreigners to act as arbitrators in Portugal is almost inexistent—all the opposite to Brazil, for instance—, unless an international institution like ICC is called to nominate the president for the panel. It may happen that the consequences of this innovation will not appear immediately, but it clearly opens the door for international companies, appearing as parties in arbitrations in which the seat is in Portugal, to request the appointing authority to nominate a foreigner as President, increasing in practical terms the equality of weapons and, in the process, ventilating the very system. The hope of the APA, when it decided to include this rule in the draft, was to open the Portuguese arbitration market to international practitioners, thus contributing to the arbitration modernisation process and to making Portugal a more convenient seat for arbitrations.

C. Interim measures

A very important innovation has been the clarification of the possibility from now on of the arbitral Tribunal granting preliminary orders and interim measures (articles 20 to 29), 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 LAV opens the door to some measures in principle not allowed by the Portuguese Civil Procedure Code (CPC), notably measures for the protection of evidence.

Before the LAV was enacted, a very important part of scholars in Portugal were clearly against the acceptance of the arbitral Tribunal's power to grant interim measures and procedural orders (in the UNCITRAL Model Law sense). The doubts about the final decision of state courts, if requested to decide about an arbitral Tribunal interim measure as well as practical reasons resulted in rendering this possibility almost inexistent. The LAV kept the door open for state court's interim measures in arbitration (art. 29), even when the arbitral Tribunal is already in place. The LAV explicitly allows, when necessary or convenient, the request for assistance of the state courts for the enforcement of interim measures granted by the arbitral Tribunal (art. 27). This assistance is also admitted for arbitrations not seated in Portugal, upon the arbitral Tribunal or one of the parties' request.

D. The assistance and control of national courts

In the Portuguese tradition, state courts and arbitral Tribunals lived in separated worlds. Judges and arbitrators were not working together, coming to the same professional events, exchanging experiences. Needless to say that under the 1986 law set aside proceedings could be filed before the courts and, after some initial hesitations, interim measures that had been requested to state courts in connection with arbitration proceedings began being granted. And, here and there, judicial courts nominated presidents of Tribunals in the very few cases in which in ad hoc arbitrations (in any case, the great majority of the arbitrations in Portugal) arbitrators were not able to agree on a name to be the president of the Tribunal or a party failed to appoint an arbitrator. The lack of experience and attention of the courts (in the case, appeal court's presidents) to arbitration matters, produced a number of nominations of president not always fit for the job and this situation only increased the tendency for avoiding the last resort process of nomination by the Appeal Courts.

The LAV is already creating a new trend. Cooperation is increasing, events are shared, judges have begun to make much more reasoned sentences in set aside cases, leading members of the Judiciary are even writing comments and articles about arbitration. And this is a very important evolution as the LAV clarified and increased the need for much stronger and intimate assistance to and control of arbitral Tribunals by state courts. Not only may the parties to arbitration seek interim measures from the state courts (arts. 7 and 29), when deemed appropriate, but also the parties and the arbitral Tribunal may ask for the courts' assistance in enforcing any of the Tribunal's interim measures not voluntarily accepted by the party against whom they have been ordered (arts. 28 and 29). 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 (art. 38).

A very relevant improvement concerns the rules for multi-party arbitration (art. 11) and the possible intervention of third parties in a new or even pending arbitration case (art. 36). The LAV drafters paid respect to 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 thus preventing the appointment of a joint co-arbitrator, the appointment of all the arbitrators will fall onto the President of the Appeal Court, unless the parties decide otherwise. The appointing authority is then empowered to either apply the *Ducto* doctrine or just appoint one or some of the co-arbitrators, in accordance with the specific circumstances of the case.

These rules will be more relevant in the case of ad hoc arbitration and the envisaged solution —not exactly an application of the *Ducto* doctrine (as the appeal court's president may decide to keep the arbitrator that was nominated by one of the parties)— is a consequence of the fact that the arbitral community is

still very small, many contracts with arbitration clauses are drafted by lawyers without experience into the field and quite often counsels come to the arbitral process without any experience of or training in arbitration. It has been considered that the application of the Dutco doctrine without this nuance might create a negative attitude towards arbitration. It was also taken into account that said solution might be prone to fraud, as it would happen if two defendants would simulate a lack of capacity to agree upon the name of an arbitrator with the hidden intention of taking away Claimant's right to appoint an arbitrator. However, this solution will for sure be object of controversy in the future.

It is worthwhile to call the attention to the fact that the Portuguese Appeal Courts (actually only seven) will have the power to act in almost all situations in which the state courts are called to decide arbitration-related issues (art. 59). This avoids the risk of empowering hundreds of local courts to decide issues for which they would probably not be prepared, but also the practical risk of lack of quick decisions if the solution would have been to choose the Supreme Court as competent entity for the decisions.

E. The lack of the right to appeal against arbitral awards as a rule

Another substantial and very positive innovation of the LAV concerns the absence of the right to appeal against the arbitral award (art. 39 (4)). From now on—and for the arbitral clauses agreed after the enactment of the LAV—and in accordance with international standards, the only typically available means to react against an arbitral award will be an application for setting aside or an opposition upon enforcement request. In either situation the state court will not be allowed to examine the merits of the 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 be possible if the parties so agree in the arbitration agreement or by a special agreement entered later on. 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.

This evolution, that for an international practitioner may be considered evident, created some controversy in Portugal, as arbitration is not yet accepted by a large number of lawyers and judges as a natural dispute resolution solution, in which the parties nominate as a rule the arbitrators who will have the discretion to decide once and for all. To complicate matters more, lawyers in Portugal regularly appeal first instance state court sentences, even when the probability of success is minimal. The appeal against awards was justified by some practitioners as a kind of protection against wrong or at least bad decisions by Tribunals, albeit parties should only blame themselves for the choice of arbitrators, if this happened to be the case.

It is yet to be known whether the parties will use the possibility of explicitly including the right to appeal in the arbitral clause or arbitration agreement, but

in any case the explicit acceptance by the LAV for this alternative arrangement is clearly a tribute paid to tradition and, obviously, to parties' will.

F. The insulation of arbitration from the CPC rules

Another very important improvement concerns the insulation of arbitration from the CPC, which was not at all evident in the 1986 law. The strong tradition of procedure codes in southern Europe legal communities and the irrelevance of arbitration in the past created a tendency for applying or at least invoking the CPC at any given moment or situation.

Among other problems, this tendency renders the process more formal and inefficient and was a negative advertisement for the choice of Lisbon or any other Portuguese city as the seat of an international arbitration or. I remember cases in which international arbitrators could not hide their strong surprise when confronted by counsel with tricky or obscure articles of our CPC, normally as an argument against fair, adequate and very common orders by the Tribunal. The LAV has made unambiguously clear that even in domestic arbitration the CPC is not relevant, unless agreed by the parties.

G. The limits to the intervention of state courts when not necessary or convenient

The old 1986 arbitration law had some rather unfriendly solutions, in practical terms, to arbitration. If an award was set aside, and except when agreed otherwise by the parties afterwards, the new dispute would have to be taken to the state courts, as the arbitration agreement validity expired with the award and in relation to the case at stake. The same would happen when the parties did not agree to extend the legal 6 months period for the award to be issued for a subsequent period of 6 months (or when this extension expired without a Tribunal decision).

The LAV philosophy —aiming at respecting the will of the parties and favouring arbitration— is the opposite. When choosing arbitration as the dispute resolution system, parties did not want to have state courts deciding their dispute and the mere possibility of that evolution reinforced the tendency for one of the parties to complicate the process when it thought that state courts were for that party finally a preferred solution or to force an agreement as everybody is aware of the delays in state courts processes. In situations like those referred above, and from now on, after the set aside of an award the case will continued to have to be decided by an arbitral Tribunal, the same or another one (art. 46, 9).

The same intention is present in another very innovative, even at the international level, solution (implemented through art. 45 (5)). After notice of the arbitral award is given to the parties, and even after revision of errors of the award, if any, the 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,

informing it of the grounds that —if not attended— will be used for requesting the set aside of the award.

Another example may be mentioned. When looking at a request for setting aside an award, the competent state court may, in accordance with art. 46 (8) and upon an application by one of the parties, 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 already available in the annulment proceedings, which is an attempt to eliminate the grounds for annulment and keep all the decision process inside the arbitral system and also to obtain a speedier final outcome.

III. AND ON THE DOWNSIDE...

As normally happens, law projects that go through a political process are quite often modified and therefore the final text is different and usually worse than the initial project. The LAV has been protected from this risk and, as a matter of fact, it corresponds almost completely to the opinion of APA Board, the drafters of the text. This is probably the reason why, as one of the members of the drafting team, I am just able to see, on the downside, the only relevant amendment to the APA draft that come out of the political process.

The 1986 law had no reference to the annulment of award on grounds of disconformities with public policy (*ordre publique*), but no problem ever arose in 25 years related thereto. The APA Board, after debate, considered that the risks of including an *ordre publique* clause in the LAV were higher then those of making no reference whatsoever to the issue. The Portuguese government ruled the opposite and wanted to propose to the Parliament for approval a text in which the lack of conformity with internal or national public policy would constitute grounds for annulment of the award.

While this specific solution 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; therefore, international practitioners would probably accept it as a normal consequence of sovereignty. But the fact is that in Portugal there is almost no scholar's studies related with this theme and precedents are very scarce. A risk could then exist that, through the consecration of public policy as grounds for annulment, a tendency would appear for the analysis by courts of the merits of the award upon request of the losing party, eager to have a second analysis of the case.

The APA Board finally convinced the Government to apply a much stricter and therefore less dangerous concept of *ordre publique*, limited to Portugal's «international public policy» (article 46 (3), (b), (ii)). As a consequence, internal public policy is excluded from the list of grounds for annulment of arbitral awards. This limitation, together with the fact that the Portuguese judiciary is strongly in favour of arbitration, may render this aspect meaningless in practical terms.

IV. FINAL REMARKS

Optimism about the future is the Deus ex-machina of personal progress. Optimism about a new law may be a strong help —if not even a strong push— in the right direction for its future interpretation. But we should never underestimate the tendency of the Portuguese to complicate what is simple and also the common use by the loser or weaker side in any conflict of a set of arguments that may be of help to annul an award or, even before, to try to put pressure into the Tribunal.

And it is also important to estrés the natural and usual mentality of jurists, that are very conservative on their approach to law and in the end of the day always prefer the devil they know (the old solutions) to the possible unknown new devil (the new solution). Through interpretation one may try to bring the solutions to something much less innovative, eventually close to the solution of the previous law, looking to the window glass with the lenses of the past.

But, albeit it may be seen as too revolutionary by many practitioners, the LAV is really very much into line with the estándar international solutions; younger and more specialized practitioners are entering the field, the legal community as a whole is now much more familiar with international arbitration, the universities are including arbitration theory and practice in their curricula. The help from leading international practitioners will also be very useful for the process of acceptance of the law from a sociological point of view. And we think that sympathy and solidarity is justified. The international arbitration community will benefit in the future of a law they easily understand. It may happen that for one reason or another Portugal will enter into the radar of international arbitration such as the stronger internationalization of Portuguese companies and the increasing economic relations with Portuguese speaking countries which may make Portugal a good choice for the seat of international arbitrations.