

COIMBRA COURT OF APPEAL JUDGMENT NO. 477/11.8TBACN.C1

DATED 12 DECEMBER 2012, AVAILABLE AT THE DCSI WEBSITE¹

SUMMARY

Multi-contract structures are a common feature in international business transactions. Consequently, it is very usual that the same parties may have entered into a number of contracts, some of which provide for arbitration and others that do not. The judgment of Coimbra Court of Appeal considered this issue in this particular case, where there are three contracts, but only the contract concerning use of the logo and trademark has an arbitration clause.

The court of first instance was asked to hear the case and held that the parties were facing a dilatory exception for breach of a voluntary arbitration agreement, because article 18 of Portuguese Voluntary Arbitration Law 2011 (in force since 14 March 2012) gives the arbitral tribunal power to decide on its own jurisdiction. The arbitral tribunal may rule on its own jurisdiction, even if for that purpose it is necessary to assess the existence, validity or effectiveness of the arbitration agreement or of the contract of which it forms part, or the applicability of the said arbitration agreement. Thus, the first instance court decided that, despite the fact that the arbitration clause only appeared in one of the contracts, it should be extendable to the remaining contracts. Accordingly, the first instance court held that the arbitration tribunal had jurisdiction to hear the dispute in question.

The Coimbra Court of Appeal reversed the decision of the court of first instance, stating that:

- 1) When a legal action is brought to assess three contracts and an arbitration agreement exists in only one of them, there must be a case by case determination of what the will of the parties was in this respect.
- 2) As this is a case of contracts that are in a relationship of interdependence, if any one of them were declared null and void, this would, inevitably, and against the will of the parties, have repercussions on the other contracts. For this reason, it makes no sense to refer for consideration by the arbitral tribunal the only one of the three contracts where there is an arbitration clause, when they are all dependent each other.
- 3) On the contrary, in light of the provisions of article 91(1) of new Portuguese Civil Procedure Code, as the state court has jurisdiction to decide on all the issues raised by the parties in these proceedings, and

¹<http://www.dcsi.pt/jtrc.nsf/8fe0e606d8f56b22802576c0005637dc/077001f4e247540880257af00038beed?OpenDocument>

there is a union of contracts that are interdependent, the state court will also have jurisdiction to decide on the issues related to the only one of the three contracts in which the parties had agreed to submit disputes to the arbitral tribunal, by the extension of jurisdiction established in the said legal provision.

As a result, the Appeal Court decided to overturn the contested decision and accordingly dismissed the claim of infringement of a voluntary arbitration agreement and determined the proceedings should continue to be heard in the state court.

REPORTER'S COMMENT – Case law in some countries has agreed, subject to certain conditions, to extend the material scope of an arbitration clause contained in a contract to other contracts between the same parties that do not contain any arbitration clause. This can happen when the contracts are linked together by a nexus of connection.

The Coimbra Court of Appeal decision may be acceptable, because the contract concerning use of the logo and trademark (the one with an arbitration clause) is merely ancillary to the others and it is not the main contract. BERNARD HANOTIAU² said that the resolution of this kind of issue depends on the precise wording of the various contracts, as it is very doubtful that arbitration would be extended to contracts that are subject to the jurisdiction of the state courts

This shows that poor drafting of contracts is a main reason for unnecessary problems. In multi-contract transactions the parties should consider bespoke drafting to ensure that the arbitration agreements in the different contracts are compatible. Alternatively, an “Umbrella agreement”³ may be executed to satisfy the requirement for an arbitration agreement binding on all parties. Where consent of the parties is required for joinder or consolidation, parties are advised to consider bespoke drafting to record their consent in the arbitration agreements(s).

José-Miguel Júdice – Partner, PLMJ Law firm

Catarina Pinho – Associate, PLMJ Law firm

² In *Complex Arbitrations*, 2005, pages 109, 113, 133 and 153.

³“Umbrella agreement” refers to a master dispute resolution agreement incorporated by reference in various underlying contracts.