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Arbitration - Portugal

Supreme Court rules on grounds for annulment of arbitral awards

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Background

Under arbitration law in Portugal,⁽¹⁾ a party seeking to challenge an arbitral award may rely on the following mechanisms.

- Under Article 29 of the law and unless otherwise agreed by the parties, the arbitral award is subject to appeal, in similar terms to a decision rendered by a court of first instance.
- Under Article 27 parties may apply to set aside an arbitral award on the grounds that:
 - the dispute could not be settled by arbitration;
 - the award was rendered by a tribunal that did not have jurisdiction or was irregularly constituted;
 - a breach of fundamental principles - for example, the equality of the parties, the right to present a case or compliance with the adversarial process - occurred during proceedings;
 - the arbitral award was not duly signed or did not state the reasons on which it was based; or
 - the arbitral tribunal ruled on matters on which it should not have ruled or failed to rule on matters that it should have decided.

Additionally, Article 28(2) states that the interested party should apply for annulment within one month of receipt or notification of the award.

- Article 31 of the law and Article 815 of the Code of Civil Procedure provide that parties may rely on the same grounds to request refusal of enforcement (ie, opposition to enforcement proceedings), even if the time limit has elapsed.

In a recent decision⁽²⁾ the Supreme Court addressed the mechanisms available, under both arbitration legislation and the code, to parties seeking to challenge an arbitral award. The decision is seen to favour arbitration in general, but recommends amendments to the current legal framework for challenging arbitral awards.

Facts

The claimant applied for enforcement of a national arbitral award in the court of first instance. Upon receiving notice, the defendant opposed enforcement on several grounds and sought to set aside the arbitral award, stating that it had several material and substantive flaws and was therefore null and void.

The request was dismissed by the court of first instance and by the Coimbra Court of Appeal. The defendant did not appeal against the arbitral award or apply for its annulment.

Decision

The Supreme Court upheld the judgment of the Coimbra Court of Appeal and rejected all of the defendant's arguments. The court stressed that the grounds on which parties may oppose enforcement of an arbitral award are procedural in nature, as stated in Article 27. The court therefore opined that it was not within the scope of the opposition, nor within the jurisdiction of the court, to revise the grounds on which the award was based.

The decision is favourable to arbitration, as the Supreme Court wisely refused to review the award's reasoning and application of the law.

Comment

As the Supreme Court accurately pointed out, the code and the arbitration law regime are both generous to parties seeking to challenge an arbitral award. Appeals of awards should be the exception, rather than the rule, but the existing legal framework is likely to frustrate the intentions of parties submitting their disputes to final and binding arbitration. This approach is out of step with other modern arbitration regimes throughout the world.

The ability to oppose the enforcement of an award, on the same grounds as are admissible for annulment proceedings and regardless of time limit, leaves an arbitral award in a state of unnecessary and unexpected uncertainty. It enables a party to challenge the binding effects of the award more than once and during an unreasonably extended period.

Several problems are likely to arise as a result. If a party applies to set aside an award on one of the grounds already declared, it is unclear whether that party can still oppose enforcement on grounds other than those that have been invoked

previously.

Moreover, Portuguese commentators argue that the code's grounds for annulment are not exhaustive - for example, the violation of public policy principles is usually regarded as providing a further justification for annulment. Thus, in connection with the extended time limit available to parties, the binding effects of an arbitral award may be challenged beyond any reasonable period of time by disputing both its procedural and substantial aspects.

In addition, it is unclear whether the grounds for annulment also apply to enforcement proceedings based upon on a duly recognised foreign arbitral award.

New draft law

A draft law prepared by the Portuguese Arbitration Association, at the request of the minister of justice, provides a different approach, which is arguably better suited to overcoming these problems and providing parties and arbitrators with a clear and modern system of regulation.

Under Article 39(3) of the draft law, parties may appeal an arbitral award only if the parties have so agreed in the arbitration agreement. This approach radically differs from the current legal framework and would bring it in line with legislation in other countries.

The draft law also outlines the grounds for annulment of the arbitral award in different terms. The grounds as presented in the draft law are inspired by United Nations Commission on International Trade Law's Model Law. Articles 46(3)(a)(i-iv) and 46(3)(b) of the draft law reflect the grounds for annulment stated by Articles 34(2)(a)(i-iv) and 34(2)(b)(i) of the Model Law. Article 46(3)(a)(v) reproduces the grounds stated by Article 27(e) of the existing arbitration law, and has no corresponding article in the Model Law.

Under Article 54 of the draft law, application for annulment on the grounds of violation of public policy principles is foreseen by awards (as rendered by arbitral tribunals with their seat in Portugal) in arbitrations that are considered to be international. Additionally, under Article 46(6) of the draft law, a party may apply for annulment within 60 days of notification of the arbitral award.

In a similar way to the current legal framework, the draft law also states that the grounds for annulment also apply to requests to oppose the award's enforcement. It is now clear that a party may rely on such grounds only within 60 days of notification. Once this time has elapsed, parties may not rely on such mechanisms to prevent enforcement of an award.

Finally, the aforementioned grounds do not apply to foreign arbitral awards which have already been subject to the recognition procedure. The draft law does not anticipate the possibility of opposing enforcement of duly recognised foreign arbitral awards, which seems to be the correct approach. The party against which recognition and enforcement is sought has had the opportunity to present its arguments in the recognition procedure. Such parties should not be able to oppose enforcement on different grounds which could - and should - have been presented in the original claim.

For further information on this topic please contact [José Miguel Júdice](#) or [Jorge Bastos Leitão](#) at AM Pereira, Saragga Leal, Oliveira Martins, Judice e Associados - Sociedade De Advogados by telephone (+351 21 319 7300), fax (+351 21 319 7400) or email (josemiguel.judice@plmj.pt or jorge.bastosleitao@plmj.pt).

Endnotes

⁽¹⁾ Unless otherwise provided, this update refers to the Law on Voluntary Arbitration (31/86, as amended by Legislative Decree 38/2003). Unless otherwise stated, this update refers to awards rendered by arbitral tribunals with their seat in Portugal.

⁽²⁾ Supreme Court Judgment of February 11 2010.

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