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## Arbitration - Portugal

### A step back? Lisbon Court of Appeal decision contrasts with international practice

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**Facts**  
**Decision**  
**Comment**

In a recent decision the Lisbon Court of Appeal apparently subscribed to a strict interpretation of Article 2(2) of the Voluntary Arbitration Law, which sets forth the requirements for an arbitration agreement.

#### Facts

The claimant and respondent entered into a sale promissory agreement for real estate, which contained an arbitration agreement. The following day, the parties executed both the deed of sale and a giving in payment promissory agreement regarding the price of part of the real estate purchased. This form of payment had already been foreseen in the sale promissory agreement, but had been qualified as an exchange. The parties agreed that the mechanisms set forth in the sale promissory agreement for the exchange should apply to the giving in payment.

Clause 6 of the second promissory agreement stated that:

*"[t]he parties expressly undertake the obligations included in the sale promissory agreement entered between them on 8/3/2005, notably those arising out of the so-called Phase 2, said sale promissory agreement being annexed to this agreement".*

The claimant filed suit against the respondent in a judicial court. In its response, the respondent invoked a violation of the arbitration clause. The court of first instance recognised the arbitration clause and referred the parties to arbitration. The claimant appealed this decision.

#### Decision

The court of appeal overrode the court of first instance's decision stating that "what was at stake was the giving in payment promissory agreement". The court acknowledged that obligations foreseen in the sale promissory agreement accrued to those foreseen in the giving in payment promissory agreement. However, it emphasised that while "absorbing" obligations of the first promissory agreement, the second promissory agreement was an autonomous agreement.

The court concluded that the arbitration agreement set forth in the sale promissory agreement was valid only for said agreement, and that in order to consider that an arbitration agreement existed in respect of the giving in payment promissory agreement, the parties would have had to have established it in this second promissory agreement, which they had not done.

#### Comment

Although the reasoning for this decision is not very clear, it appears that the court subscribed to the view that agreements from which a dispute stems must directly contain arbitration agreements. If so, this is inconsistent with the Voluntary Arbitration Law, which expressly foresees that an arbitration agreement may be included in a document to which the document signed by the parties refers. It is further inconsistent with recent decisions of the Lisbon Court of Appeal (eg, its decisions of January 13 2010 and November 25 2009).

Furthermore, the decision is contrary to the principle of favouring arbitration. While it may be debatable whether on occasion this principle has been taken too far, considering the specific circumstances, this does not seem to be such a case, particularly in light of:

- the wording of the clause in question;
- the fact that the two agreements were entered into one day apart; and
- the relationship between the two promissory agreements.

It remains to be seen which decision (in case of appeal) the Supreme Court of Justice will uphold, and whether this decision represents more than a mere momentary inflexion in the Lisbon Court of Appeal's tendency of interpreting Article 2(2) of the Voluntary Arbitration Law broadly in line with international practice and theory.

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