

Delivering expert knowledge  
to global counsel



## Arbitration - Portugal

---

### Back on the right track: Supreme Court rules on multi-contract arbitration

Contributed by **PLMJ - AM Pereira Sáragga Leal Oliveira Martins Júdice E Associados - Sociedade De Advogados - RL**

September 29 2011

#### Facts

#### Supreme Court decision

#### Comment

A recent case arose from a relationship between contractual parties and the disputed connection between three contracts, of which only the first included an arbitration clause. The Supreme Court held that the temporal, functional and economic connection between the contracts made clear that despite the autonomy of the contracts, the arbitration clause in the first contract applied to the third.<sup>(1)</sup> This reasoning was based on a close analysis of the dispute and was particularly influenced by a provision of the third contract which generally incorporating the first.

#### Facts

The parties have entered into three contacts:

- a promissory sale and purchase agreement for real estate, which was entered into on March 8 2005 and which contained an arbitration clause;
- a sale and purchase agreement for the real estate in question, which was entered into on March 9 2005; and
- a promissory agreement for payment of part of the price the real estate, which was entered into on the same day.

The third contract contained an explicit reference to the first. Clause 6 stated that:

*"the parties expressly undertake the obligations included in the sale promissory agreement entered into by them on 8/3/2005, particularly those arising out of the so-called Phase 2, said sale promissory agreement being annexed to this agreement."*

One of the parties filed suit against the other in court over an alleged default on the terms of the third contract. The defendant objected, stating that the arbitration clause in the first contract - which he believed was applicable by the operation of Clause 6 of the third contract - meant that the matter could not be referred to a court, but only to an arbitral tribunal. The plaintiff maintained that the reference in Clause 6 was irrelevant to the arbitration clause and that the parties were not bound by it.

The first instance court held that the arbitration agreement had been breached and therefore acquitted the defendant, as the parties should have resorted to an arbitral tribunal. However, the Lisbon Court of Appeal reversed this decision (for further details please see "A step back? Lisbon Court of Appeal decision contrasts with international practice"). According to the Lisbon Court of Appeal, the arbitration agreement in the first contract applied only to this contract. In order for an arbitration agreement to have existed in respect of the third contract, the parties would have had to establish this explicitly in the third contract; however, they had not done so.

## Supreme Court decision

The Supreme Court disagreed with the Lisbon Court of Appeal and found in the defendant's favour.

The court noted the closeness in time of the contracts, which were signed within a day of each other, as well as the obvious functional and economic connection between them, which was expressed particularly in the reference in Clause 6 of the third contract, which incorporated the first contract. Thus, it was clear that despite the autonomy of the contracts, the arbitration clause in the first contract applied to the third.

## Comment

The Supreme Court's decision is well reasoned and correct. The Lisbon Court of Appeal's reasoning was unclear and seemed inconsistent with Article 2(2) of the Voluntary Arbitration Law, which allows for an arbitration agreement in another document to be included by reference.<sup>(2)</sup> Therefore, it is unsurprising that the Supreme Court reversed the Lisbon Court of Appeal decision.

Many problems arise in the complex area of multi-contract arbitration. Nevertheless, the key point of the decision was the interpretation of the reference in Clause 6 of the third contract. Considering the facts of the dispute - especially the relevant timeframe, the functional and economic connection between the contracts and the reference in the third contract - the Supreme Court's interpretation seems entirely accurate and consistent with Portuguese law, as well as with international arbitration doctrine and case law.<sup>(3)</sup>

For further information on this topic please contact [José Miguel Júdice](#) or [António Pinto Monteiro](#) at PLMJ - AM Pereira, Saragga Leal, Oliveira Martins, Judice e Associados - Sociedade De Advogados, RL by telephone (+351 21 319 7300), fax (+351 21 319 7400) or email ([jmj@plmj.pt](mailto:jmj@plmj.pt) or [anpm@plmj.pt](mailto:anpm@plmj.pt)).

## Endnotes

<sup>(1)</sup> Case 5961/09.1TVLSB.L1.S1, March 10 2011, Justice Lopes do Rego.

<sup>(2)</sup> This provision reflects Article 7(2) (1985) and Article 7(6), Option I (2006 amendments) of the UN Commission on Trade Law Model Law on International Commercial Arbitration. On incorporation by reference in Portuguese law, see Carla Gonçalves Borges, "*Pluralidade de Partes e Intervenção de Terceiros na Arbitragem*", in *Revista Themis*, VII, 13, Almedina, Coimbra, 2006, pages 145 to 146.

<sup>(3)</sup> See Bernard Hanotiau, *Complex Arbitrations - Multi-party, Multi-contract, Multi-issue and Class Actions*, Kluwer Law International, 2005, pages 133 to 136.

---

The materials contained on this website are for general information purposes only and are subject to the disclaimer.

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription. Register at [www.iloinfo.com](http://www.iloinfo.com).

## Authors

### José Miguel Júdice



**António P Pinto Monteiro**