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## Arbitration - Portugal

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### Enforcement of awards under New York Convention

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#### Facts

#### Supreme Court decision

#### Comment

The Supreme Court recently held that an arbitral award under the New York Convention can be enforced automatically in Portugal without having been reviewed or confirmed.<sup>(1)</sup>

#### Facts

The plaintiff filed an enforcement request against the defendant in court. The request was based on a foreign arbitral award - issued by the Zurich Chamber of Commerce's Court of Arbitration - and the convention applied.

The defendant objected, stating that the award had not previously been reviewed or confirmed in Portugal and therefore could not be enforced. The first instance court found this to be true and subsequently rejected the request.

The plaintiff appealed to the Lisbon Court of Appeal, which affirmed the decision. The plaintiff appealed to the Supreme Court.

#### Supreme Court decision

The Supreme Court reversed the previous decisions, holding that the foreign arbitral award could be automatically enforced in Portugal without review or confirmation. This conclusion was based on Articles 48, 49 and 1094 of the Civil Procedure Code, read in conjunction with Article III of the convention.

First, the court held that according to Portuguese law, a domestic arbitral award is enforceable in the same way as a court decision, without the need for review or confirmation.<sup>(2)</sup>

Second, the court noted that a foreign arbitral award is enforceable in Portugal only if it has been previously reviewed and confirmed by a court. However, this general rule applies only if no relevant convention, treaty or law states otherwise.<sup>(3)</sup> In this case the convention - specifically Article III - was applicable.

The court stated that the first sentence of Article III should be read with the second. In mentioning "domestic arbitral awards", the second sentence establishes a comparison between foreign and domestic arbitral awards. Therefore, since domestic arbitral awards are not subject to court review and confirmation as a precondition of enforcement, the same is true of foreign arbitral awards.

#### Comment

The Supreme Court's decision, which appears to be highly favourable to arbitration, is unprecedented. Until now, Portuguese case law has followed the principle that in order for a foreign arbitration award under the convention to be enforced, it must have been reviewed and confirmed.<sup>(4)</sup>

The Supreme Court's reasoning may not necessarily be incorrect. Article III of the convention is often regarded as being unclear and allows scope for the kind of comparison between foreign and domestic arbitral awards that the Supreme Court made in this case. Portuguese case law has previously upheld the same equivalence, albeit without jumping to the conclusion.<sup>(5)</sup>

The equivalence of domestic and foreign awards is the key point for the Supreme Court. If the comparison is accepted, there is no reason why a foreign arbitration award under the convention should require review and confirmation before being enforced, since a domestic award does not.

Although the court's comparison may be valid, the same cannot be said of its conclusion. One of the historical reasons for the second sentence of Article III is that in certain jurisdictions, domestic arbitral awards must be confirmed for exequatur. This is not the case in Portugal. Therefore, it might be argued that the Supreme Court's conclusion would make sense only in a jurisdiction where such prior review and confirmation is needed.

However, this decision - which is highly innovative internationally, let alone in Portugal - may not be an arbitration-friendly

development; it is probably not the best interpretation of the convention. The concept of 'conditions that are no more onerous', as incorporated into the final sentence of Article III, may be construed as a prohibition against more complex conditions or costs for the process, rather than as an obligation to apply the internal rules for national arbitral awards. No arbitration scholar is known to have proposed such an interpretation of the article, and Albert van den Berg's provocative proposal of a new convention maintains the system of revision and confirmation, with a new text that would not allow for the interpretation adopted by the Supreme Court.<sup>(6)</sup>

Nonetheless, the decision demonstrates the court's significant tendency in favour of arbitration. Although its decisions are not binding, its reasoning in this dispute marks a major change in Portuguese case law.

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

- (1) Supreme Court decision of March 19 2009 in *Colectânea de Jurisprudência STJ*, 2009, 214, volume I, pages 147 to 149.
- (2) Article 48(2) of the Civil Procedure Code.
- (3) *Id*, Article 49.
- (4) See, for instance, the Lisbon Court of Appeal decision of June 8 2010 (Case 243/10.9YRLSB-7) in DGSI; and the Évora Court of Appeal decision of January 31 2008 (Case 1141/06-2), in *Colectânea de Jurisprudência*, 2008, 204, volume I, pages 252 and 253.
- (5) See the Supreme Court decision of April 22 2004 (Case 04B705) in DGSI and in *Colectânea de Jurisprudência STJ*, 2004, 176, volume II, pages 50 to 52; the Lisbon Court of Appeal decision of February 20 1997 (Case 1369), in *Colectânea de Jurisprudência*, 1997, volume I; and the Évora Court of Appeal decision cited above. See Luís de Lima Pinheiro, "Arbitragem Transnacional - a Determinação do Estatuto da Arbitragem", Almedina, 2005, pages 297 and 298, and Maria Cristina Pimenta Coelho, "A Convenção de Nova York de 10 de Junho de 1958 Relativa ao Reconhecimento e Execução de Sentenças Arbitrais Estrangeiras", in *Revista Jurídica*, 20, 1996, AAFDL, Lisbon, pages 50 to 51 and 64 to 65.
- (6) See Van den Berg, "Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards"; ICCA Conference, Dublin, 2009.

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