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Arbitration - Portugal

Right to Plead Case versus Enforcement of Arbitration Agreement

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Background

For the first time the Constitutional Court has upheld the constitutionality of the rule in Article 494(j) of the Code of Procedure that allows the dilatory exception of breach of the arbitration agreement.⁽¹⁾ Such an objection may be enforceable against a party that is in a situation of supervening financial hardship which entitles it to legal aid (where the dispute relates to facts to which the party's situation may be attributable).

Portugal's higher courts have considered this question before.⁽²⁾ However, this is the first case in which the Constitutional Court has reviewed a commercial arbitration issue. The problem revolves around the principle that one party to an arbitration agreement may not be required to bear all of the costs associated with setting up and conducting arbitral proceedings.

The court upheld the private autonomy principle at constitutional level and recognized the existence and validity of arbitration tribunals (as does the Constitution). However, the court clarified that these principles should not be considered independently of other values enshrined in the Constitution. Where constitutional values conflict, the court must strike an appropriate balance between the interests at stake.

Facts

One of the parties to an arbitration agreement was in difficult financial circumstances and had been granted legal aid to bring its case before the courts. When served in the case, the counterparty claimed for breach of the arbitration agreement, as the parties had agreed to arbitrate disputes arising from the contract in question.

Decision

The court saw the question as one of conflicting rights. Respecting the arbitration agreement would leave one of the parties unable to plead its case, which would deny it effective access to justice, whereas granting jurisdiction to the courts would make the parties' agreement ineffective. The court found that the right to plead one's case (ie, the right to access to justice) should prevail.

The court stressed that the specific nature of an arbitration agreement makes it less significant than other manifestations of the principle of private autonomy. The court clarified that in concluding the agreement, the parties had decided merely to opt for an alternative jurisdiction. This demonstrated the ancillary nature of the agreement, as the parties' substantial positions regarding the contract remained unaffected.

Therefore, the court ruled that the article of the code which provides for the dilatory exception of breach of the arbitration agreement is unconstitutional when interpreted in a sense that covers the enforceability of the agreement against a party in supervening financial hardship that entitles the party to legal aid under Article 20 (1) of the Constitution.

In other words, a party that finds itself in a difficult financial situation and is eligible for legal aid in

accordance with the relevant law is not obliged to respect an arbitration agreement if this will require it to embark on subsequent proceedings for which no legal support for fees and costs exists (or where no provision is made for such support).

Comment

The court's reasoning is simple, although unfavourable to arbitration. However, it is complicated by a recent review of the legal aid regime whereby companies or other collective bodies operating for profit are ineligible for legal aid.⁽³⁾ Had the case arisen under the new legislation, the company would have been unable to apply for legal aid. Therefore, it seems that the above reasoning would not apply under the new legal criteria, as the company would be unable to meet the costs and fees of either judicial or arbitral proceedings. Thus, the decision is unlikely to jeopardize commercial arbitration, but in view of the delays in access to justice under Portugal's legal system, other cases to which the new legal aid rule does not yet apply are likely to suffer as a result.

For further information on this topic please contact [José Miguel Júdice](#) or [Joaquim Shearman de Macedo](#) at AM Pereira, Saragga Leal, Oliveira Martins, Judice e Associados - Sociedade De Advogados by telephone (+351 21 319 7300) or by fax (+351 21 319 7400) or by email (jmj@plmj.pt or jsm@plmj.pt).

Endnotes

(1) Constitutional Court Decision 311/2008, published in the *Official Journal* on August 1 2008.

(2) The decisions of the higher courts on this subject have not always been consistent. Examples of decisions acknowledging the right to litigate in the courts when facing economical hardship that would entitle a party to an arbitration agreement to legal aid include the Supreme Court judgments of January 18 2000 and October 9 2003, and the Lisbon Appeal Court judgments of June 5 2001 and January 17 2006. The Supreme Court judgment of November 28 2002 is an example of the opposing view (ie, that companies are not entitled to breach arbitration agreements on the basis of lack of funds, as companies exist solely for their own profitable ends).

(3) See Law 47/2007.

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