

## Arbitration - Portugal

### Interim measures in support of arbitration

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April 15 2010

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

The Évora Court of Appeal recently confirmed that interim measures ordered by a court can assist arbitration.<sup>(1)</sup> The ruling also addressed the question of when a deadline to file main proceedings is satisfied by arbitration.

#### Facts

Despite the existence of an arbitration agreement between the parties, the claimant applied to the court for an interim measure against the defendant, which was granted. The defendant appealed, but was unsuccessful.

The claimant then filed main proceedings with the arbitral tribunal in accordance with the arbitration agreement and asked the court to maintain the interim measure. Portugal's civil procedure states that an interim measure expires if the claimant fails to file main proceedings within 30 days of notification of the relevant order.<sup>(2)</sup>

The defendant objected, stating that the 30-day deadline had elapsed and that therefore the interim measure had already expired. However, the court disagreed and maintained the interim measure.

The defendant appealed to the Évora Court of Appeal.

#### Decision

The appellate court upheld the first instance decision on two grounds.

First, the court stated that interim measures can support arbitration; there are no grounds in law to argue otherwise.

Second, as the tribunal had not been constituted at the relevant time, the 30-day deadline in respect of the main proceedings was satisfied by the claimant's request to the other party to begin the formation of the tribunal.<sup>(3)</sup>

#### Comment

The decision is entirely consistent with Portuguese case law and academic opinion on interim measures in support of arbitration, which support the view that a request for an interim measure in court does not violate an arbitration agreement.<sup>(4)</sup> Rather, it is a legitimate means of making arbitration a more effective dispute resolution method - an opinion supported by Article 9 of the UN Commission on International Trade Law Model Law on International Commercial Arbitration and by many international arbitration experts.<sup>(5)</sup>

The key point of the decision relates to the 30-day deadline for filing main proceedings and the fulfilment of this condition by arbitration. In this case, as the arbitral tribunal had not been formed at the time, the only way of ensuring that the claimant could file main proceedings within the deadline set by procedural law was to assume that such a deadline is satisfied by a request for the formation of an arbitral tribunal. Therefore, the appellate court's decision, although apparently unprecedented, was correct.

For further information on this topic please contact [José Miguel Júdice](#) or

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## Endnotes

(1) Case 2985/08-2, January 29 2009.

(2) Article 389(1)(a).

(3) In accordance with Article 11 of Portugal's Arbitration Law.

(4) See, for example, Armindo Ribeiro Mendes, "As medidas cautelares e o processo arbitral (Algumas notas)" in *Revista Internacional de Arbitragem e Conciliação*, II, 2009, Almedina, page 81; Paula Costa e Silva, "A Arbitrabilidade de Medidas Cautelares", *Revista da Ordem dos Advogados*, 63 (2003), page 234; and Manuel Pereira Barrocas, "Manual de Arbitragem", Almedina, 2010, page 245. Relevant Portuguese decisions include: two Lisbon Court of Appeal decisions in Cases 6985/2003-7 and 0006361; Coimbra Court of Appeal's decision of April 9 2002 (see *Colectânea de Jurisprudência*, 2002, volume II, pages 14 and 15); and Évora Court of Appeal's decisions on December 16 2003 (*Id.*, 2003, XXVIII, volume V, pages 263-266) and July 12 1984 (*Id.*, 1984, IX, volume IV, pages 187 and 286).

(5) See, for example, Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration*, Kluwer Law International, 2005, pages 66-109 and Mohammad-Ali Bahmaei, "L'Intervention du juge étatique des mesures provisoires et conservatoires en présence d'une convention d'arbitrage – droits français, anglais et suisse", *Librairie Générale de Droit et de Jurisprudence*, 2002, pages 31 and 141-149.

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