Document information

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Jurisdiction

Portugal

Court

Supreme Court of Justice of Portugal

Arbitrators/Judges

Maria Olinda Garcia, Justice
Catarina Serra, Justice
José Amílcar Salreta Pereira, Justice

Case date

16 October 2018

Case number

Case No. 2258/16.4T8CBR.C1.S1

Parties

Respondent/Appellant, BB – ..., Lda. (Portugal)
Claimant/Appellee, AA, Unipessoal, Lda. (Portugal)

Key words

Negative effect of the arbitration agreement
Principle of kompetenz-kompetenz
Unilateral revocation of arbitration agreement
Just cause
Loss of good repute of the arbitration centre
Change of circumstances
Legal effect of the arbitration agreement
Breach of time limit to issue an award
Lis pendens
Obligation to arbitrate
Denial of justice
Constitutional dignity of arbitral tribunals
Role of the state courts
Party autonomy
Procedural cooperation

BB – ..., Lda. v. AA, Unipessoal, Lda., Supreme Court of Justice of Portugal, Case No. 2258/16.4T8CBR.C1.S1, 16 October 2018

José-Miguel Júdice

Headnote

The Supreme Court confirmed the negative effect of an arbitration clause, in tandem with the principle of kompetenz-kompetenz, and dismissed the claim of unilateral revocation of an arbitration clause by a party, not provided for in Portuguese arbitration law. It further clarified that in cases of termination of arbitration proceedings due to breach of the deadline to issue the award, the arbitration agreement remains valid and binding, and reiterated the constitutional status of arbitral tribunals in Portugal, operating pursuant to a law that provides safeguards for parties that choose to arbitrate and also relying on the state courts.

See the full text of this case on KluwerArbitration.com at KLI-KA-ONS-19-1-004.pdf

Summary

Facts of the case

AA, Unipessoal, Lda., ("**Developer**") and BB – ..., Lda. ("**Contractor**") entered into a construction works contract on 13.09.2012 to construct a hotel in Portugal. This contract included an arbitration clause that, in the event dispute(s) should arise, referred the parties to the arbitration centre of an association of works developers ("Associação dos Industriais da Construção Civil e Obras Públicas").

Despite the fact that an arbitration case was already pending, on 22.03.2016 the Developer filed a suit in the state courts, arguing that the Contractor had breached the contract.

Question in Dispute

The main question in dispute was whether the state courts of Portugal had jurisdiction to hear this case in light of the existence (or not) of an underlying arbitration clause (pursuant to Articles 4, 5 and 18 of the Portuguese Arbitration Law, "**PAL**").

Arguments of the Parties

The Developer (Claimant) argued that it had revoked the arbitration clause on 09.11.2015 through a communication in writing, on the grounds of just cause and incidental loss of good repute of the arbitration centre. The Contractor (Respondent) replied alleging that, on the one hand, the state courts lacked jurisdiction to hear the case since the parties had entered into an arbitration agreement, and on the other hand, there was an arbitration case pending between the same parties, regarding the same facts and the same claims, pleading the defence of lis pendens.

On 04.11.2016, the court of first instance dismissed the proceedings in a preliminary judgment, based on the arguments put forth by the Contractor.

The Developer appealed, the Contractor failed to reply, and the Court of Appeal revoked the decision of the court of first instance, ordering the case to be heard in the state courts.

First, the Court of Appeal concluded that the Developer had demonstrated that it had terminated the arbitration clause (without any objection from the Contractor) before filing the suit in the state courts. Thus, under Article 5(1) PAL, and because this was a scenario of an arbitration clause that was manifestly invalid, inoperative, or unenforceable, the state courts had the powers to reach a finding regarding the jurisdiction of an arbitral tribunal

Second, and regarding *lis pendens*, the court noted that the case file showed that the arbitral proceedings had been terminated in the meantime due to breach of the time limit to issue the award. In light of this, the Court of Appeal stated that a delay in obtaining a decision by an arbitral tribunal amounted to a denial of the fundamental right of access to justice and entitled the party that was "dragged" into the proceedings (in this case, the Developer) to invoke justified non-compliance with the arbitration agreement, and thus, resort to the state courts. The Court of Appeal held that a break of the monopoly of the State regarding its judicial function could only be permitted if arbitral tribunals allowed parties to achieve the same goals pursued in the state courts. This court added that, because of the change of circumstances, under Portuguese law, the same conclusion could be reached.

Control of legality

Bibliographic reference

José-Miguel Júdice, 'BB – ..., Lda. v. AA, Unipessoal, Lda., Supreme Court of Justice of Portugal, Case No. 2258/16.4T8CBR.C1.S1, 16 October 2018', A contribution by the ITA Board of Reporters, Kluwer Law International

This time, it was the Contractor that appealed to the Supreme Court.

First, the Contractor argued, among other points, that the arbitration agreement was valid and enforceable. Second, it stated that, under Article 5(1) PAL, the state courts could only find an arbitration agreement invalid, inoperative or unenforceable when this was manifest, meaning, when the invalidity, inoperability or unenforceability was evident, without requiring the production of additional evidence. Third, it mentioned that a full assessment of these matters (which included analysing just cause and incidental loss of good repute of the arbitration centre) was reserved to the arbitral panel in light of Article 5(5) PAL. Fourth, it argued that it had objected to the unilateral revocation of the arbitration agreement, which the law did not account for (and that, even if admitted, the claim lacked legal grounds and judicial recognition). Fifth, it highlighted that when the Developer filed the suit before the Portuguese state courts, an arbitral case was already pending, and it only ended on 10.02.2017 (although the tribunal declared that that decision did not affect the binding effects of the arbitration agreement). Sixth, if finally added that, in any case, since then, new arbitration proceedings had been brought, an arbitral tribunal had been constituted and had even issued an order declaring that if falls within the jurisdiction of the tribunal to hear the merits, without any objection from the Developer. Thus, contrary to the arguments of the Developer, the obligation to arbitrate could not be considered impossible.

The Developer replied with the principal argument of the inadmissibility of the appeal at hand.

Judgment of the Court

The Supreme Court of Justice granted the appeal and revoked the previous decision, quoting earlier case law from the Supreme Court itself.

Regarding the existence of the arbitration clause, the Supreme Court of Justice pointed out that Article 4 PAL did not provide for the possibility of revocation of an arbitration agreement by a unilateral declaration of one of its parties (and cautioned that the terms “revoked” and “terminated” were used by the legislature outside the arbitration framework in different contexts, and with different meanings). Rather, it held that statute enshrined a rule of consensus, meaning that both parties could agree to revoke the arbitration agreement (in this case, it is possible even pending the arbitration and until the arbitral award is issued). Furthermore, the court stated that “just cause” or “change of circumstances” were undetermined concepts that could only be substantiated by means of production of evidence, which was absent from the file.

Thus, since this court could not conclude that the arbitration agreement was manifestly invalid, inoperative or unenforceable (the exception provided in Article 5(1) PAL), it ruled that the negative effect of the arbitration agreement should be applied, in combination with the principle of kompetenz-kompetenz, and the arbitral tribunal should be the entity first assessing its jurisdictional powers (the rule enshrined in Article 18 PAL).

Further, the Supreme Court clarified that the fact that the arbitral tribunal did not issue the award within the respective time limit, which led to an automatic termination of the arbitral proceedings, did not imply that it was impossible to obtain justice in the case at hand, since Article 43(3) PAL provides that the arbitration agreement maintains its binding effect. Thus, a new arbitral tribunal could be constituted, and new arbitration proceedings could be brought (as was the case).

Finally, the Supreme Court expressly stated that “*arbitral tribunals should not be looked upon with suspicion, as seems to happen in the judgment under appeal, as according to the applicable law, they do not have a status of minority or inferiority in relation to the state courts*” (unofficial translation). The court stressed that the existence of arbitral tribunals, a manifestation of party autonomy, was enshrined in Article 209(2) of the Portuguese Constitution and regulated by the PAL (which provides a set of rules and legal principles) and relied on the state courts to perform two important functions, both procedural cooperation and control of legality.

This decision reveals the developing expertise with which Portuguese high courts have considered both the technical aspects of arbitration law and the role and dignity of arbitral tribunals in the landscape of the pursuit of justice. This is in line with the best practices implemented both according to the New York Convention (see Article II(3)) and the UNCITRAL Model Law (see Articles 8 and 16) and confirms that the Portuguese judiciary favours the arbitral dispute resolution system.

José Miguel Júdice / Ana Coimbra Trigo

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