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Portuguese Arbitration Law: A Gateway to Portuguese-Speaking Countries?

Miguel Pinto Cardoso (Linklaters) · Wednesday, March 7th, 2012

The new Portuguese arbitration law that shall enter into force on 14 March 2012 represents a remarkable evolution in the arbitration framework in Portugal.

The former Portuguese arbitration law was published in 1986 (not following the UNCITRAL Model Law) and despite being considered a progressive law at the time it was clear that it lacked the ability to respond to some of the issues that have been raised in more recent times. On this point, it should be noted that the 1986 law was amended in 2003, but only a few changes were introduced (dealing with very specific procedural aspects in the context of arbitration proceedings).

For a long time the legal community demanded a new arbitration law that could bring to Portugal a regulatory framework more suited to dealing with the current (and more sophisticated) disputes and providing arbitral justice with higher degree of legal certainty. This aspiration of the Portuguese legal community must be understood in a context of a lack of responsiveness on the part of the Portuguese State's courts, particularly with regard to delays in the trial of cases and to the lack of specialisation of the Portuguese courts and judges in some areas of law.

In this context, in February 2009 the former Portuguese Government (Sócrates Government) invited the Portuguese Association of Arbitration to prepare a new draft law on arbitration. The initial draft was presented in March 2009 and after public debate, many ebbs and flows and a change of government, the Portuguese Association of Arbitration presented its final draft in July 2011 to the Passos Coelho Government. The project has been discussed in the Portuguese Parliament, which, after including some amendments, approved it in October 2011.

The approval of this new law should be understood within a context of promotion of alternative means of dispute resolution on the part of the Portuguese government, in order to mitigate the above mentioned structural problem of excess of pending proceedings. This problem has led to the circumstance that the Memorandum of Understanding on Specific Economic Policy Conditionality, executed on 17 May 2011 between Portugal, the European Central Bank, the European Commission and the International Monetary Fund, specifically provides for several measures to tackle this problem, including the approval of a new arbitration law.

This new law, published on 14 December 2011, is also intended as a means to achieve the objective of promoting and developing the Portuguese jurisdiction as a seat for international arbitration proceedings, particularly in relation to disputes involving entities linked to Portuguese-

speaking countries (Brazil, Angola, Cape Verde, Mozambique, East Timor and São Tomé e Príncipe). The fact that Portuguese is one of the most widely spoken languages in the world (the 7th most spoken language, with approximately 240 million speakers) should not be disregarded, particularly when investors in those fast growing economies are selecting a neutral forum for settling their disputes.

In its drafting, the new arbitration law is clearly influenced by the UNCITRAL Model Law (2006 version) and, regarding some specific aspects, by solutions adopted by several other European arbitration laws (notably the German, Swiss, Spanish, French and English arbitration laws). The noteworthy hallmarks of the new legislation are the following:

a) The main criterion of arbitrability of disputes has been changed: the disposability of rights standard was replaced by the economic nature of the disputed interest standard.

b) The negative effect of the principle of kompetenz-kompetenz has been specifically addressed by the new law, conferring jurisdiction on the State courts to primarily rule on the competence of arbitral tribunals only in cases where the arbitration agreement is manifestly null and void, inoperative or incapable of being performed. As a result of the protection of the negative effect of the principle of kompetenz-kompetenz, it is expressly determined that parties cannot resort to anti-suit injunctions to prevent the constitution or functioning of an arbitral tribunal.

c) It is established that in what refers to arbitration matters State courts can only intervene when such intervention is expressly provided for in the arbitration law.

d) An innovative regime is introduced to expressly regulate issues related to multi-party arbitration, particularly as to the constitution of the arbitral tribunal. In this regard, and taking into consideration the Dutco lessons, this new law provides for the possibility (as opposed to the obligation) of the State court appointing all members of the arbitral tribunal where multiple parties fail to jointly appoint an arbitrator.

e) Dealing with an issue which was not regulated in the former law, it is now provided that in the absence of agreement between the parties concerning the fees and expenses of arbitrators, these fees and expenses shall be set by the arbitral tribunal taking into account the complexity of the disputed issues, the value of the dispute and the time spent on the arbitral proceedings. If the parties do not agree with the amounts set by the arbitral tribunal, they may request the court to establish the amounts it considers appropriate. This is a very important development, because it was relatively simple for a non-cooperating party to avoid the constitution of the arbitral tribunal (particularly in ad hoc arbitrations) by simply failing to reach an agreement regarding this matter.

f) Following closely the amendments to the UNCITRAL Model Law in 2006, the arbitration law provides for the possibility of arbitral tribunals adopting interim measures, which may require assistance on the part of State courts for their enforcement. In this regard, it is also established that the arbitral tribunal may issue preliminary orders, which will remain valid and effective for a period of 20 days from the date of issue.

g) In contrast to the option followed by some recent arbitration laws, the Portuguese legislation expressly provides for a system of third party intervention. The new regulation on this matter is conservative, establishing as essential requirements for third party intervention that the third party be bound by the arbitration agreement and, in the case of subsequent adherence to the arbitration agreement, the acceptance of such adherence by all other parties and by the arbitral tribunal.

h) A regime for the interpretation, amendment or clarification of an arbitral award is now specifically provided for in the new law.

i) In respect of international arbitration, and following the examples of the Swiss and Spanish laws, there is an express adoption of the principle that States (or State-controlled entities) cannot resort to their internal law to contest the arbitrability of the dispute or their capacity to submit themselves to arbitration.

j) Also with regard to international arbitration, the new arbitration law provides for the material validity of an arbitration agreement that meets the requirements set out (i) by the law chosen by the parties to govern the arbitration agreement or (ii) by the law applicable to the merits of the case or (iii) by Portuguese law.

k) With regard to recognition and enforcement of foreign arbitral awards, the new arbitration law fully replicates the New York Convention regime and expressly confers jurisdiction on a high court regarding issues of recognition.

In conclusion, the regulatory framework for arbitration in Portugal has profoundly changed and emphasises the arbitration-friendly environment that already existed in Portugal.

The publication of this law has aroused great interest not only within the arbitral community, but also within the academic and judiciary communities. This interest has resulted in a large number of events for the presentation and discussion of the law. A special reference must be made to the dissemination work that has been done by the Portuguese Association of Arbitration with the general public and, in particular, with the users of arbitration and the judges of the State courts.

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