Bilateral Arbitration Treaties: A Few “Bits” More and No “Buts” Within the Portuguese Jurisdiction

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In his “Kiev Arbitration Days” after-dinner speech in November 2012 (“BITS, BATS and BUTS”), Gary Born presented a suggestion that can leave no one indifferent (speech published as “Essay” by Young Arbitration Review, March 2014 Edition). His idea is to take advantage of the legal framework and experiences gained from the world of investment arbitration and bring that framework and those experiences into international commercial arbitration.

Simply put, investment arbitration stems from Bilateral Investment Treaties, which grant foreign investors the right to arbitrate disputes arising from an investment, carried out in the territory of a contracting state, against that host state.

The proposal that Gary Born has put forward can be simply described as adapting this legal structure to international commercial arbitration in the following terms: two states will enter into a bilateral treaty providing for arbitration as a mechanism to solve disputes between nationals or entities located in the territory of each contracting state arising from any business transaction carried out between those different nationals or entities. The arbitration will be set forth as a default mechanism. In fact, both parties will retain the right to contract out of arbitration and elect recourse to national courts according to general rules applicable to litigation between parties located in different countries.

I believe that this idea is a compelling proposition for the future of international commercial arbitration.
The advantages of the Bilateral Arbitration Treaties (BAT) are obvious with regard to increasing commercial transactions, facilitating commerce between nations and establishing an environment of trust between businesses.

Naturally, this consideration has to be grounded in a bias in favor of arbitration as a means to resolve disputes by contrast to recourse to national courts. Those who have prejudice (or even strong beliefs) against arbitration may never be convinced of the advantages of a BAT. This debate is an old one, and I cannot bring any new or pertinent contribution to it. Therefore, we may dispense with any consideration about the advantages of arbitration by contrast to the judicial court system.

However, regarding the BAT, we cannot fail to answer two fundamental questions.

Firstly, what is the real advantage of a BAT? What are the problems that a BAT addresses and are

they in need of a solution?

Secondly, is a BAT feasible in each and every national legal system? What are the national constraints for such a measure within the Portuguese jurisdiction?

With regard to its advantages, the BAT may well provide a straightforward answer to problems related to the arbitrability of disputes, which will inevitably be reduced – if not eliminated – between the two contracting states. A clause open to all commercial contractual relationships with specific exclusions, such as areas of the law where arbitrability is questionable or even prohibited in one or both of the jurisdictions involved, will definitely avoid the risks of a challenge to the arbitral award on those grounds.Therefore, problems of conflicts of positive and negative jurisdiction of the arbitral tribunal will also be reduced, if not eliminated. Where any dispute arising from a contract falls within the scope of the definition clause of the BAT, all doubt concerning the "competence" of the arbitral tribunal to solve that dispute would be removed. Issues with pathological arbitration clauses will virtually disappear. Indeed, the BAT can define what kind of arbitration shall take place: if it will be an institutional arbitration or an "ad hoc" arbitration, and in the case of institutional arbitration, can even provide for a certain institution or a certain type of institution. The BAT can also provide for the place of arbitration, the language, number of arbitrators, and so forth. In other words, the BAT can define typical issues that arise in any international arbitration, but can also prevent any challenge to the validity and enforceability of the arbitration clause.

There is also another important issue that can be addressed by a BAT: the recognition and enforcement of foreign arbitral awards. The New York Convention 1958 has been playing a crucial role in arbitration, and remarkably well. However, it is not enough. A BAT is in a better position to supplant the gaps of the New York Convention 1958 (and also the shortcomings of the Brussels Convention and European regulations on jurisdiction and the enforcement of judgments in civil and commercial matters), freeing all constraints to immediate enforcement of arbitral awards – at least – between a BAT's contracting states. Moreover, in the case of Portugal, there are strong cultural, historical and also economic relationships with its former colonies (Angola, Mozambique, Cape Verde, Guinea-Bissau, São Tomé, Timor). Presently, only São Tomé and Mozambique are parties to the New York Convention. For those countries, it may be easier to enter into a BAT than to adhere to the New York Convention. The advantages of a BAT are obvious with regard to those countries. On the other hand and more importantly, even between countries that are party to the New York Convention the procedure for the prior recognition of a foreign arbitral award is required for most of the contracting states. Portugal is one of the countries that still require prior recognition of a foreign arbitral award before it may be subject to enforcement. That is the reason why I stated above that the New York Convention is not enough.
A BAT is naturally in a favored position to drive the contracting states to dispense with the procedure of prior recognition. Is there any real advantage to dispensing with the "exequatur" phase? I believe that there are advantages if the "exequatur" is not required between two states that have established between themselves, by way of a BAT, equal legal standards for the arbitration framework. In fact, the prior recognition procedure does not make any sense if two states agree to such a bilateral agreement and should naturally cease with the creation of a default international arbitration instrument such as a BAT. Immediate enforceability must be an integral feature of this bilateral treaty. Finally, there are also doctrinal representations that scholars and commentators have addressed when confronted with the fundamental issue of the "lex arbitri" (the law of the arbitration) or the "lex arbitrii" (the law of the arbitrators). Although it is not advisable for lawmakers to intervene in doctrinal discussions, issues arising therefrom have particular significance when we question the potential applicable law to provide for the assistance of national courts, the appointing authority, provisional measures, etc. A BAT can therefore set forth what the law applicable to the arbitration will be, leaving behind uncertainty.

As far as the second crucial question posed above is concerned – the feasibility of the BAT in the light of the Portuguese jurisdiction – I believe that any constraints can be overcome. There is no constitutional constraint as arbitration is set forth in the Constitution of the Portuguese Republic as a means to serve justice in parallel (somehow) with the judicial system. As far as the level of consent is concerned, I believe that consent will still be a fundamental pillar of arbitration and will be not dispensed with: the parties will still be accorded the right to opt out of arbitration and in an experimental phase of the BAT, any of the parties could be entitled to declare in the underlying agreement that it wants to refer any dispute arising therefrom to the national courts. The arbitration clause of a BAT is no more than a mere "statutory implied term" that can be excluded by way of an express contractual provision. Ontologically speaking, there will still be relevant consent. Thirdly, the Portuguese arbitration legal setting provides for sufficient backup provisions, notably as far as the default appointing authority is concerned (according to the Portuguese Arbitration Act of 2011, the President of the Court of Appeal shall act as default appointing authority). The use of the UNCITRAL rules is perfectly suited to the Portuguese jurisdiction, if not for other reasons because the Portuguese Arbitration Act is based on the UNCITRAL Model Law.

As a final remark, I would say that I do not foresee any obstacles that could prevent the implementation of a BAT between Portugal and other jurisdictions, including those from the European Union. Cultural legal fears and prejudices may well take the stage and play a role which is hard to overcome. Nonetheless, those fears and prejudices are somehow rooted in misconceptions about arbitration itself, but they should not concern a Bilateral Arbitration Treaty. It is now up to the whole legal community to convince the legislators and foreign affairs ministries that such an instrument is in a very favored position to promote and fuel business transactions and commerce between nationals from different countries. Due to historical alliance reasons, I would suggest that the first step might be taken between the United Kingdom and Portugal. For geographical reasons, Spain should follow suit. African Portuguese speaking countries would be the next step. Finally, it goes without saying that a bilateral arbitration treaty should be seen as nothing other than an experiment. As happens in every experimental stage, care should be taken with serious rigor. It is therefore recommended that the BAT should be limited to specific areas of the law where the experience in arbitration is consolidated, such as commercial law and the like. Considering such an experimental phase, I might also suggest a "mitigated" form of referral to arbitration. In that event, the BAT could provide for arbitration as a default means to resolve disputes save in cases where one party (or both parties) unilaterally state(s) in the underlying contract that it (or they) want(s) to resolve its/their disputes in the national courts. This could also be set forth as transitory regime for a limited time frame.

* *This post is a summary of the article published by Young Arbitration Review, March 2014 Edition.*