

# State Courts' Decisions on Reduction of Arbitrators' Fees: Comparing Apples to Apples or Apples to Oranges?

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### **1. Legal and practical background**

Pursuant to Article 17(3) of the Portuguese Voluntary Arbitration Law (Law no. 63/2011 of 14 December – hereinafter “LAV”), any party may request the competent state court to reduce the amount of the fees fixed by the arbitrators if they were not agreed before the constitution of the Arbitral Tribunal.

This provision, which is similar to Section 28 (2) of the English Arbitration Act, tries to avoid situations of conflict of interest between the parties and the tribunal, as it may be difficult to refuse excessive values for fees decided quite often unanimously by an acting tribunal.

This rule only applies to *ad hoc* arbitration because in institutional arbitration the rules of the centres typically regulate this matter (and therefore the parties agree with the fees before the constitution of the arbitral tribunal).

In Portugal, business players are progressively engaging with “institutional arbitration”. However, *ad hoc* arbitrations are still very common. This situation may give rise to requests to reduce arbitrators' fees in state courts because *ad hoc* arbitration clauses do not typically provide any guidance on arbitrators' fees.

The problem comes up most commonly in the case of arbitration subject to Law no. 62/2011 of 12 December. This law created “mandatory arbitration” for disputes when a party invokes industrial patent rights related to brand name medicines when generic medicines want to enter the market. Normally one of the parties would prefer to use the state courts and when not allowed to do so, is unhappy with the arbitration arrangements. This paves the way for refusing to use institutional arbitration and it is less likely they will look at arbitrators' fees as a fact of life, but rather as a cost they would prefer to avoid. Hence, this represents one of the scenarios where parties have frequently requested the state courts to intervene in order to reduce arbitrators' fees that have been unilaterally fixed by arbitral tribunals, in the absence of agreement between the parties before the constitution of the Tribunal.

## 2. Facts in dispute in Judgment no. 1068/13.5YRLSB-6 of the Lisbon Court of Appeal

In Judgment no. 1068/13.5YRLSB-6 of the Lisbon Court of Appeal, as consequence of a request for authorisation submitted to INFARMED (the Portuguese Medicines and Health Products Regulatory Authority) to introduce several generic medicines onto the market, the Claimants initiated a mandatory arbitration in order to prevent the Respondents from carrying out any activities that might violate the alleged rights of the Claimants over a registered European Patent.

Once the Arbitral Tribunal had been constituted, the parties agreed that, in the absence of agreement between the parties, the Arbitral Tribunal should fix the amount of these fees. As the parties did not reach an agreement, the Arbitral Tribunal, taking into account the amount in dispute, as well as the complexity of the case, including the time spent, fixed the three arbitrators' fees at a total amount of EUR 60,000.00.

Consequently, the Respondents filed an application with the Lisbon Court of Appeal asking for the reduction of the arbitrators' fees to a total amount of EUR 15,000.00 pursuant to Article 17(3) of the LAV.

The essential question was to decide whether a total amount of EUR 60,000.00 for arbitrators' fees fixed by the Arbitral Tribunal itself within the arbitral proceedings with an amount of EUR 14,000,000.00 in dispute should be reduced.

The argument of the Appellants (Respondents in the arbitral proceedings) was essentially anchored in aspects such as (i) the lack of complexity of the dispute, (ii) the amount of fees agreed in other equivalent arbitral proceedings and, (ii) the amounts fixed in the most recent awards of the Lisbon Court of Appeal on the reduction of arbitrators' fees.

On the other hand, the Arbitral Tribunal and the Claimants considered that EUR 60,000.00 was a reasonable remuneration principally because of (i) the amount, the relevance and the complexity of the issues in dispute, (ii) the high academic levels of the arbitrators and (iii) the fact that the Respondents had not proposed any alternative amount for the fees. Furthermore, the Arbitral Tribunal pointed out that the Respondents had not notified the Arbitral Tribunal regarding their intention to apply to a state court for a reduction in the fees, thus undermining any chance of the arbitrators to resign as they would have done.

The Lisbon Court of Appeal decided that, although arbitral tribunals do not fall within the definition of state courts as sovereign authorities, they should be considered in accordance with the Portuguese Constitution true "courts", even though in an autonomous category.

In light of the above, arbitral tribunals are not exempt from applying constitutional principles, namely respect of the application of proportionality criteria, as well as the fundamental constitutional principle of prohibition on going beyond what is necessary (*proibição do excesso*) provided in Article 2 of the Constitution. Hence, arbitral tribunals are forbidden from fixing amounts for the fees that are clearly inappropriate in view of the service provided. The reason for this is that it may jeopardise the "equivalency" of the service provided, even if the amount in dispute is significantly high, as was the case here.

Therefore, the Lisbon Court of Appeal decided that, even taking into consideration the high economic value of the dispute and the technical quality of the arbitrators, the advantages that the legislator intended with the intervention of an Arbitral Tribunal, as well as the procedural activities already completed - all factors tempered by the application of the proportionality criteria - that the appropriate amount of the arbitrators' fees would be EUR 10,000.00 for each arbitrator.

### **3. The risk of replicating appeal court's argument in *ad hoc* arbitral proceedings**

Although the decision summarised relates to a “mandatory arbitration”, it represents a trend that may be replicated mainly in *ad hoc* arbitrations.

Consequently, there is a potential risk that Portuguese courts, reflecting a trend of lack of sensitivity to arbitration and an alleged pursuit of constitutional principles such as the proportionality criteria, will unconsciously choose the path of comparing judges' remuneration with arbitrators' fees in these cases.

This approach deserves criticism.

Firstly, while establishing the three criteria to be taken into consideration in order to fix the amount of fees - i.e. (i) the complexity of the issues decided, (ii) the amount in dispute and (iii) the time spent or to be spent on the arbitral proceedings - Article 17(2) of the Arbitration Law is inherently already intended to give effect to the principle of proportionality. As such, it is in the real world application of these three criteria that courts are requested to assess whether a reduction of arbitrators' fees should be granted.

Secondly, although the application of constitutional principles to arbitral proceedings is not under discussion, this should not be converted into a simplistic measurement of the functions that fall within the competence of judges and arbitrations tempered by the application of the proportionality criteria. Actually, the application of the proportionality criteria is founded on the very essential assumption that one is comparing “apples to apples” and not “apples to oranges”. Hence, the proportionality criteria must be applicable taking into consideration that the service provided by arbitrators may be “equivalent” to the service provided by judges in the sense that both systems resolve disputes. However, we must never ignore the fact that the mechanisms are intrinsically different and that the remuneration of arbitrators and professional judges are not requested or supposed to be equivalent.

The obvious solution is for the parties to agree to refer the fixing of arbitrators' fees to a specific institutional centre's rules or to fix the fees on their own (with the agreement of the arbitrators) before the tribunal is formed. Besides this, it may also be the role of arbitral tribunals, when notified to reply in court to any party's request for a reduction in fees, to bring to the judicial proceedings all the information that can guarantee a well-grounded decision by the state courts. This information should specifically detail: (i) the complexity of the case, (ii) the amount in dispute, (iii) the time spent and the tasks performed in relation to the case, as well as (iv) relevant information about the best national and international practices on arbitrators' fees, including the hourly rates of equivalent professionals when acting as counsel in similar disputes. As an example, a very quick research on the leading Portuguese institution (Arbitration Centre of the Portuguese Chamber of Commerce and Industry) website shows that, according to the Rules of Arbitration of the Centre in effect, a case with an amount of EUR 14,000,000.00 in dispute with an arbitral tribunal of three members represents a total amount of EUR 169,875.00 in arbitrators' fees (VAT excluded).