

Kluwer Arbitration Blog

State Court Assistance Moving Forward in Portugal?

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The recent Portuguese Voluntary Arbitration Law, which has been in force since 14 March 2012, (English version available [here](#)), was received with great enthusiasm amongst the legal community, which claimed for a new arbitration law that could bring to Portugal a regulatory framework closer to the UNCITRAL Model Law on International Commercial Arbitration.

The goal was not only to make Portugal more attractive as a seat for international arbitration proceedings – mainly in the context of the emerging economies of the Portuguese-speaking countries such as Brazil, Angola and Mozambique amongst others – but also to provide the arbitral justice with a higher degree of legal certainty. In fact, although the State courts have always adopted an arbitration-friendly approach, the former arbitration law (published in 1986) had become unable to respond to the present reality of increasingly complex and sophisticated disputes.

The State court assistance to arbitration proceedings was scarcely regulated in the 1986 Voluntary Arbitration Law. One of the matters which was not regulated by the previous arbitration law was the granting of interim measures within arbitration proceedings. In respect of court assistance on this subject, and also in what concerns the assistance in taking evidence, the new Portuguese Voluntary Arbitration Law provides a full regulatory framework, taking a step further in comparison to the UNCITRAL Model Law in some aspects, notably in what concerns international assistance.

The new Portuguese Voluntary Arbitration Law establishes (article 38, paragraph 1) that “*When the evidence to be taken depends on the will of one of the parties or of third parties and these refuse to cooperate, a party may, with the approval of the arbitral tribunal, request from the competent State court that the evidence be taken before it, the results thereof being forwarded to the arbitral tribunal*”. The source of inspiration of this provision is obviously article 27 of the UNCITRAL Model Law.

In what concerns the **request for court assistance in taking evidence**, article 27 of the UNCITRAL Model Law establishes an optional approach: either the arbitral tribunal on its own motion or a party with the approval of the tribunal may file the request. This is the solution adopted, for instance, in the Spanish Arbitration Law (article 33, paragraph 1, of the Law 60/2003, of 23 December) and in the German Code of Civil Procedure (§1050° of the ZPO). The authors of the Portuguese Voluntary Arbitration Law, supporting the view that the obtaining of evidence must be regarded as essentially a matter for the parties, have chosen to grant them the initiative to file the request for court assistance in taking evidence. However, the parties’ request is subject to the

approval of the arbitral tribunal, in order to prevent abuse of court assistance and ultimately ensure that the arbitrators have the leading role in conducting the proceedings.

The solution provided in the Portuguese Voluntary Arbitration Law as to the **method to perform** such assistance is that the court will take the evidence itself. Although it is not expressly provided in the law, there is the possibility – which is expressly foreseen in §1050° of the ZPO – that the arbitrators attend the court hearing at which the evidence is taken (though without intervention).

Regarding **international State court assistance** in taking evidence, the new Portuguese Voluntary Arbitration Law takes a step forward in comparison with the UNCITRAL Model Law. In fact, article 1(2) of the Model Law limits the scope of application of article 27 to the territory of the *lex loci*, making a request from a foreign court for assistance in taking evidence impossible (contrary to the solution established regarding the recognition or enforcement of interim measures issued by an arbitral tribunal seated abroad). Article 38(2) of the Portuguese Voluntary Arbitration Law establishes that Portuguese State courts shall provide the same assistance in the taking of evidence to arbitral tribunals seated in Portugal or abroad. The same solution was adopted in Germany and in the UK (§1025(2) and §1050 of the ZPO; Section 43 of the Arbitration Act 1996) and, although it is not expressly provided in the Spanish Arbitration Law, some “books of authority” argue it is therein provided, at least, implicitly (article 33 of the Law 60/2003, of 23 December).

In the subject matter of **interim measures and preliminary orders**, the Portuguese Voluntary Arbitration Law (articles 20 to 29) basically implemented, with no changes, the regime established in the UNCITRAL Model Law, following the 2006 review (articles 17 to 17°-I).

The Portuguese Voluntary Arbitration Law (article 20(1)) widely recognises the power of the arbitral tribunal to grant interim measures: “*Unless otherwise agreed, the arbitral tribunal may, at the request of a party and after hearing the opposing party, grant the interim measures it deems necessary in relation to the subject matter of the dispute*”. The principle is that **the arbitral tribunal may grant any kind of interim measures** deemed appropriate, with no restrictions, except for the ones established in the said provision: (i) the parties have agreed otherwise, determining some restrictions or denying at all, through an opt-out provision, the power of the arbitral tribunal to grant interim measures; (ii) *ex parte* interim measures are not allowed (only preliminary orders may be granted without notice to the other party).

It should be noted, as such, that the **lack of *ius imperii*** does not affect the range of power of the arbitral tribunal to grant interim measures, it just **limits its power to ultimately enforce** these measures in case they are not voluntarily observed. In fact, it should be stressed that most of the time interim measures consisting of orders or prohibitions to the party – such as an order to keep performing contractual obligations, to produce a document, to deposit certain assets in charge of a third party or the prohibition to adopt certain conduct – are voluntarily observed by the party against whom they are granted, as the parties are sufficiently persuaded by the fact that the non-fulfilment of an interim measure ordered by the arbitrators will affect their credibility towards them.

Furthermore, Article 27(1) of the Portuguese Voluntary Arbitration Law provides that “*An interim measure issued by an arbitral tribunal shall be binding on the parties and, unless otherwise provided by the arbitral tribunal, shall be enforced upon application to the competent State court, irrespective of the arbitration in which it was issued being seated abroad, subject to the provisions of article 28*”. This provision also resolves the **problem of recognition and enforcement of**

interim measures issued in arbitrations seated abroad, which under the terms of the 1958 New York Convention are not generally deemed as “awards” falling within the subject matter of the Convention, despite the fact that some courts have held the contrary – as referred to in the *ICCA’s Guide to the Interpretation of the NYC* – as they do not comprise a final decision.

The **grounds for refusing recognition or enforcement of an interim measure** in Portugal are listed in article 28 of the Portuguese Voluntary Arbitration Law, corresponding essentially to the grounds for refusing recognition or enforcement of arbitral awards made in arbitrations taking place in a foreign country (article 56), which in turn are the ones established in article V of the 1958 New York Convention and article 36(1) of the UNCITRAL Model Law. There are, however, specific additional grounds for which recognition and enforcement of an interim measure may be refused by a State court only:

- (a) at the request of the party against whom it is invoked, if the court is satisfied that: (i) the arbitral tribunal’s decision, with respect to the provision of security, has not been complied with; and (ii) the interim measure has been revoked or suspended; and
- (b) if the State court finds that the interim measure is incompatible with the powers conferred upon the State court, unless the State court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance.

As such, considering the grounds listed above, the State courts where recognition or enforcement of the interim measure is sought **shall not undertake a review of the substance of the interim measure**, as expressly mentioned in Article 28(2) of the Portuguese Voluntary Arbitration Law. The judgment of a State court deciding on the recognition or enforcement of the interim measure is not subject to appeal (Article 27(4)).

Finally, a last remark to underline is that article 29 of the Portuguese Voluntary Arbitration Law provides for a **concurrent competence of the State courts to grant interim measures** either before or during the arbitral proceedings, even when these are seated abroad, taking into consideration the specific features of international arbitration.

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