Again the “Incorporation” of the IBA Guidelines into a Code of Ethics: an “Investment in Virtue”?

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In many ways, Portugal is a remarkable arbitration-friendly jurisdiction. Not only a new UNICTRAL Model based law has been enacted a few years back now, but also its courts have proved to be very supportive of arbitration. The deference that they have been showing to the validity of the arbitration clause inserted in derivatives master agreements and to the principle of “competenz-competenz” is but a single example of this support. On the other hand, the arbitration community has been developing extraordinary efforts to show that Portugal is placed in the best position to play the role of an international arbitration hub for the Portuguese-speaking countries.

Some thought leaders applauded a few initiatives undertaken by one of the major arbitration players in Portugal. Indeed, while Michael McIlwrath considered the phenomenon of the “incorporation” of the IBA Guidelines on Conflicts of Interests into the Code of Ethics of the Lisbon Commercial Arbitration Centre as a step in the right direction, Catherine A. Rogers underscored the enactment of new criteria for the appointment of arbitrators of the said Arbitration Centre as a “positive move towards increasing party participation and confidence in arbitrator appointments by the CAC”, indicating the “Portugal’s aim to evolve from a respected domestic institution to a global competitor”.

However, two recent cases decided by the Central Administrative Court South (equivalent to the Court of Appeals for administrative matters) raise some concerns as to the real acceptance of the international standards by the Portuguese jurisdiction. In those cases, the Administrative Court had the chance to look at the "IBA Guidelines on Conflicts of Interests in International Arbitration when deciding challenges made against arbitrators in disputes involving Portuguese public entities.[fn]In Portugal, arbitration is admitted as means to solve disputes involving administrative matters and involving the State and other legal entities governed by public law – Art. 1(5) of the Portuguese Arbitration Law, enacted by Law No. 63/2011 of 14 December 2011.[/fn]

The first case related to a situation where the arbitrator appointed by the claimant (private company), holder of a public concession, was challenged by the respondent (a state instrumentality) in a dispute that arose in relation to the public concession contract.[fn]Case decided by the Central Administrative Court South on 30 August 2016, accessible at www.dgsi.pt, last accessed on 28 de Abril de 2017.[/fn] The challenge was drawn on the basis of the fact that the arbitrator had been vice-chairman of the general shareholders meetings' board of the institution bankrolling the holder of the public concession. The Administrative Court denied the challenge request and considered that the "IBA Guidelines on Conflict of Interests" are relevant but are nothing more than … guidelines. The Court went on as to state that "the guidelines are not applicable by themselves", and consideration should be given to the dimension of Portugal. Regulation such as the "Guidelines" were drafted for international arbitration "in a human and economic universe unparalleled in the peninsular West", stressed the Court.

In the second case, the critics went deeper.[fn]Case decided by the Central Administrative Court South on 16 February 2017, accessible at www.dgsi.pt, last accessed on 28 de Abril de 2017.[/fn] A private entity brought a claim in arbitration against the Lisbon Municipality. During the proceedings, it became apparent that the arbitrator appointed by the private entity had been appointed by the same company in three prior cases. That arbitrator had not made any disclosure prior to initiating his mandate. For those reasons (and other ancillary not relevant for this purpose), the Municipality challenged the arbitrator before the Administrative Central Court South.

The Court denied the challenge brought by the Lisbon Municipality, stating that the "IBA Guidelines" are not the Law of Portugal. In reaching this conclusion, the Court

found the following:

– the court characterized “quasi-law” or “soft-law” practices as stemming from the Anglo-Saxon traditions that are alien to the European Continental laws, and suggested it is inappropriate to import them into Portuguese cases;
– the court specifically criticized the various IBA guidelines on international arbitration as being neither applicable in domestic arbitration nor a source of Portuguese law;
– the court found that three appointments by the same party was an arbitrary standard used an “American and transnational mathematical fashion” to assess the lack of impartiality or independence of “professional arbitration lawyers” who may make their lives out of arbitration.
– thus, the court asked: why not four or five prior cases? Or in the previous four or five years?

The Court then found that being appointed by the same party on “two or three” prior occasions did not call into question the arbitrator’s independence.

The reasoning presented by these two decisions are in a staggering contrast with four other cases brought before the Supreme Court of Justice, and the Lisbon and Oporto Courts of Appeal, where it was considered that “particular weight should be given to the IBA Guidelines”.[fn]See decision of the Portuguese Supreme Court of Justice of 12 July 2017, decisions of the Lisbon Court of Appeal of 24 March 2015 and 29 September of 2015, and decision of the Oporto Court of Appeal of 3 June 2014, all accessible here.[/fn] In those other cases, the courts relied on the IBA Guidelines as a particularly useful instrument in deciding conflicts of interests.

What is the source of this apparent schizophrenia in Portuguese arbitration case law? In part it may be due to a split within the domestic arbitration community in which some traditionalists believe arbitrators capable of self-regulating their independence, while others express concerns about the need to safeguard appearances and assure a degree of oversight by the courts.

It is beyond doubts that Portugal is evolving into a more modern arbitration jurisdiction, equipped with all “state of the art” legal and regulatory instruments, but it is also true that this evolution may not be accomplished without stumbles and occasional “parochialism” along the way.

As I suggested before, the mindset underlying the “traditionalist” demeanor will

tend to look at a mere “reference” to the IBA Guidelines[fn]The provision at stake reads “bearing in mind the IBA Guidelines” (see my post).[/fn] as a true “incorporation”, therefore bearing the risk of bringing some binding meaning to those guidelines, which would tend to be “mathematically” applied.

That mindset was obviously echoed in those Administrative Court’s decisions. It is my hope that they are all but two isolated cases.

As Agostinho Pereira de Miranda once titled one article of his own”,[fn]“Investing in virtue: the duty of disclosure and the procedure to challenge the arbitrator”, originally: “Investir em virtude: dever de revelação e processo de recusa do árbitro”. See ”Revista Internacional de Arbitragem e Conciliação Vol. VI – 2013, Almedina.[/fn] I remain confident that these decisions do not signal a “disinvestment in virtue”.