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Where does Portugal stand in the Magnificent Confusion of An Arbitration Agreement With No Express Choice of Law

Carolina Apolo Roque (CMS Portugal) · Thursday, September 12th, 2019 · Young ICCA

With as many as nine identified approaches to the potential applicable law to the arbitration agreement, Marc Blessing, as an experienced author, arbitrator and lawyer, could not help but ask: "Are we thus faced with a magnificent confusion?".[1)] This post focuses on the approach that would most likely be followed in an international arbitration seated in Portugal, shedding light on where it stands in this magnificent confusion.

Agreements to arbitrate are usually the last issue to be addressed in contract negotiations. The so-called *Midnight Clauses*, where the parties to the agreement fail to include important details – such as the law applicable to the arbitration clause – are likely to result in lengthy and onerous proceedings. When there is no choice by the parties concerning the law applicable to the arbitration agreement, the tribunal is left to decide which of the possible laws is the most appropriate. Among the potential options, the decision is generally between the substantive provisions of the applicable substantive law, *i.e.*, the law of the underlying contract, or those of the procedural law, *i.e.*, the law of the seat of the arbitration, which establishes the *lex arbitri*.

In order to do so, the tribunal will determine the applicable law resorting to a choice-of-law rule: for instance, it will analyse if there was an implied choice by the parties when signing the arbitration agreement or what is the law with which it has its closest connection to. In the case of Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA, 2012 EWCA 638 it was argued that, in the absence of an indication to the contrary, it is reasonable to assume that the parties intended all of their relationship to be governed by the same law. Thus, the law of the main contract should be extended to the arbitration agreement. On the other hand, in the case of FirstLink Investments Corp Ltd v. GT Payment Pte Ltd and others, 2014 SGHC 12, the law of the seat was seen as an implied choice by the parties as to the legal framework of the arbitration proceedings, *i.e.* the foreign controlling law and the supervisory courts. However, these approaches have been considered as uncertain and complex.

To ensure some certainty to those involved in the proceedings, some national laws and arbitral institutions have determined a conflict of law rule concerning this issue.[2)] In Portugal, Law 63/2011 established the new legal framework for voluntary arbitration proceedings. Based on the UNCITRAL Model Law, it introduced some changes while taking into account the desire to promote Portugal as a seat for international arbitration. The existence of Chapter IX, dedicated particularly to international arbitration, displays the "arbitration-friendly regime" intended in the

Portuguese law.[3)]

On what concerns the substantive validity of the arbitration agreement and (objective) arbitrability of the dispute, Art. 51(1) provides for a conflict of law rule similar to the one found in Art. 178(2) of the Swiss Private International Law Act. According to Art. 51(1) of the Portuguese arbitration law, the agreement to arbitrate will be deemed valid and the subject-matter will be considered arbitrable if they meet the requirements set under (i) the law that the parties decided to apply to it, *or in the absence of a choice*, under (ii) the law applicable to the subject-matter of the dispute, *i.e.*, the law of the main contract or (iii) the Portuguese law as the law of the seat, whichever is most favourable to arbitration.

This conflict of law rule establishes an approach pursuant to the validation principle, instead of determining a default criterion such as the law of the contract or of the seat. This means that the tribunal will favour the application of the body of law which tends to uphold the validity of the arbitration agreement, rather than the one that would defeat it.[4)] The Swiss approach, followed in the Portuguese law, has been considered to overcome the complexities and uncertainties associated to traditional choice-of-law rules by upholding the parties' purposes and commercial expectations.[5)]

Nonetheless, the first criterion remains the will of the parties, as it should. This is in accordance with the position adopted by the Portuguese law to firstly, respect the principle of party autonomy and secondly, to protect the trust of the involved parties on what concerns the validity and effectiveness of the arbitration agreement to the greatest possible extent.[6)] Thus, in the absence of an express choice by the parties, the tribunal must keep in mind that it shall resort to the law which ensures the validity of the arbitration agreement. Otherwise, an agreement to arbitrate would be nothing but a "mere waste of paper".[7)] By granting multiple options, the Portuguese law seeks to reflect the parties' intention of submitting every dispute arising under the contract to arbitration.

The solution adopted in Portugal takes into account that often, either one of the possible applicable laws will grant a similar solution. The problem arises when one of them will determine the invalidity of the arbitration agreement – *e.g.*, when the law of the contract renders the agreement invalid. The tribunal will then have to analyse the will of the parties at the time of the signing and wonder if their intention was to refer to an invalid agreement to arbitrate their disputes.[8)]

And this is why the discussion between the law of the contract and the law of the seat may prove to be pointless. In fact, an absolute criterion which imposes either one of them can jeopardise the whole purpose of arbitration. While there are no known cases yet applying Art. 51(1) in Portugal, the pro-validation approach has been upheld in cases such as Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA, 2012 EWCA 638. In the award, Lorde Justice Moore-Bick found that while the law of the main contract is generally a "strong indication of the parties' intentions", that could not have been what they intended in that particular case. That was due to the fact that, under Brazilian law, *i.e.*, the law of the contract, the arbitration agreement would only be rendered enforceable with the consent of both parties, which could ultimately undermine its purpose. In its decision Lorde Justice Moore-Bick considered the overall framework and specific circumstances of the case, such as the parties' "fair and reasonable expectations" to resort to arbitration.[9)]

On a final note, it goes without saying that the solution adopted in Art. 51(1) of the Portuguese arbitration law derives from the intended "arbitration-friendly regime". Even though there are no

known cases applying the former provision in Portugal, it is worth noting that a conflict of law rule reflecting the validation principle, as in the Swiss and Portuguese law, has been considered by several authorities as the best approach in international arbitration since it is the one in accordance with party autonomy. While it is not the panacea for the absence of an express choice of law related to the arbitration agreement, it grants the broader discretion required for the tribunal to be able to decide in a case-by-case analysis. Should the occasion arise and one of the potentially applicable laws renders the arbitration agreement invalid or ineffective in some way, a tribunal deciding under the Portuguese arbitration law will have to wonder whether that would be the parties' intention when entering into the agreement. Thus, while accessing whether to apply one law over the other, the tribunal shall bear in mind (i) the principle of party autonomy as well as (ii) the parties' early intention of having a valid and effective arbitration agreement.[10)]

Having said that, the optimum solution will always be an express choice of the law applicable to the arbitration agreement *before* the dispute has arisen. When discussing an arbitration clause, one must bear in mind that *a stitch in time saves nine*.

References

?1 "The Law Applicable to the Arbitration Clause" 1999, in *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, ICCA Congress Series 9.

?2 *See e.g.* Section 48 of the Swedish Arbitration Act and Article 16.4 of the LCIA Rules.

?3 J. Miguel Júdice & P. Metello Napóles, *"Portugal"* in Global Arbitration Review 2015.

?4 G. Bermann, *International Arbitration and Private International Law,* The Hague Academy of International Law 2017, p. 159.

?5 G. Born, *International Commercial Arbitrations,* Kluwer Law International 2014, p. 542.

?6 D. Moura Vicente *et al.*, *Lei Da Arbitragem Voluntária Anotada,* Almedina 2015, p. 134.

?7 Hamlyn & Co. v. Talisker Distillery, 1894 AC 202, 215 HL.

?8 C. Monteiro Pires & R. Dias, "Arbitragem Internacional e Autonomia Privada: Primeiras Reflexões" in *Estudos Comemorativos dos 30 Anos do Centro de Arbitragem Comercial da Câmara de Comércio e Indústria Portuguesa,* 2019, pp. 233-253, p. 246.

?9 M. Blessing, p. 172.

?10 C. Monteiro Pires & R. Dias, p. 246.

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