The International Arbitration Review

Editor
James H Carter

Law Business Research

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Second Edition

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EDITOR'S PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another. The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more lawyer hours of reading than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. But there is a niche to be filled for analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world is consumed with debate over whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter
Dewey & LeBoeuf LLP
New York
July 2011

Chapter 32

PORTUGAL

José Carlos Soares Machado and Mariana França Gouveia[*]

I INTRODUCTION

i Structure of the law

Portugal has not adopted the UNCITRAL Model Law ('the Model Law'). The Portuguese Arbitration Act (Law No. 31/86, 29 August, amended by Decree-Law No. 38/2003) was approved in 1986 ('the Arbitration Law'), and was based on standard laws enacted prior to 1985, which preceded the Model Law, as was also the case in the instance of the French Arbitration Law.

The 1986 Arbitration Law is silent on a number of issues, such as interim measures, multiparty arbitrations and challenge of arbitrators. Scholarship and jurisprudence have been resolving these issues according to international standards, but there are still some difficult topics to be addressed with consistency.

The general provisions of the Arbitration Law follow international standards as to the possibility of submission to arbitration, constitution of the arbitral tribunal, arbitration proceedings, award, annulment and international arbitration. This chapter shall aim to address each of these aspects.

Under the Arbitration Law, all persons may enter into arbitration agreements relating to rights they may freely dispose of. The concept of inalienable rights has been extensively discussed by scholars and is nowadays strictly defined. Given this, it is fully accepted by the courts that all commercial disputes can be subject to arbitration.

Recent laws have also admitted arbitration in previously unthinkable areas such as enforcement proceedings and tax law. Arbitration was definitely a central focus of the prior government.

The arbitration agreement must be in writing, but Portuguese law adopts the broad definition of written form established in the New York Convention.

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The arbitral tribunal is competent to rule as to its jurisdiction – the well known principle of Kompetenz-Kompetenz. The law does not provide for the 'negative' effect of this rule, according to which national courts may not decide on the arbitral tribunal's competence prior to its own ruling. Portuguese scholarship and judiciary have nevertheless supported that this provision is applicable, but only in cases where the lack of jurisdiction is not obvious.

The Arbitration Law provides that the number of arbitrators may be chosen freely by the parties to the arbitration agreement, but must always be uneven. If the parties are silent about the number of arbitrators, the law establishes that there will be three: two appointed by each one of the parties and the third chosen by the two party arbitrators.

The arbitrator must be an individual – it is not possible under Portuguese law to appoint a legal entity. All arbitrators must be independent and impartial – the arbitration statute refers to the rules established in the Civil Procedure Code for national court judges. These rules naturally impose high standards of independence and impartiality.

If one party does not appoint its arbitrator or if the parties do not agree, when required (sole arbitrator or arbitrator nominated by both parties), they can apply to the national court to appoint the arbitrator in question. The national court – a court of appeal (*Tribunal da Relação*) – shall then have to examine the validity of the arbitration agreement, but only to rule on grounds for invalidity, such as the possibility of submission to arbitration or lack of written form.

As soon as the sole, or the third, arbitrator is appointed, the court must grant the award within six months. This limit can be extended by agreement of the parties, but only once for a maximum period of six months. The parties may nevertheless agree on a different time limit in the arbitration agreement or in the procedural rules.

The Arbitration Law offers great flexibility on procedural matters. The few provisions address issues such as moment to draft the rules, due process principles, representation of the parties and cooperation of national courts when third parties or any of the parties do not voluntarily cooperate in the taking of evidence.

Parties and arbitrators thus have a great amount of power to create a 'tailor-made' procedure. Parties may create the rules in the arbitration agreement, which is relatively uncommon, or prior to the appointment of first arbitrator. As soon as the first arbitrator is appointed, the competence to create rules is exclusively assigned to the arbitral tribunal.

Under Article 16 of the Arbitration Law, procedural rules shall ensure procedural equality of the parties, the right to defence and a fair opportunity to respond to all points of law and facts. Basic and fundamental principles of the Law are the equality of treatment between parties and the absolutely mandatory previous summons of the defendant.

Any type of evidence admitted by the Civil Procedure Code may be produced in the arbitral proceedings. This provision has been a bone of contention for Portuguese scholars, since some understand it as a limitation of evidence admitted in arbitral proceedings and others believe that it merely establishes that the evidence admitted by national procedural law is admissible in arbitration but does not exclude other types of evidence.

The major problem arises from the admissibility of testimonies of a party itself. Under the Civil Procedure Law, parties cannot be witnesses and may only be heard

to admit facts. It has been debated whether that may or may not be different in the arbitration context.

Where authorised by the arbitral tribunal, a party may request assistance in the taking of evidence from national courts. In such a case, evidence is taken and weighed up by national courts and sent to the arbitral tribunal, which shall analyse it together with the rest of evidence.

The award must be approved by a majority of the arbitrators and shall always include the grounds upon which it has been based. It may not award a higher amount or analyse and take a decision in relation to a matter other than that submitted by the parties.

The arbitral award has the same status as a judicial award – *res judicata* effect and immediate enforceability. Under Portuguese law there is no need to recognise the arbitral award, which may be enforced the day it has been granted. The enforcement proceedings are presented to a national court, and start with immediate seizure of the debtors' assets. The entire proceeding is conducted by a private clerk (*agente de execução*) and is nowadays a truly quick and effective process.

The Arbitration Law adopts two methods to challenge the arbitral award: appeal on the merits, and annulment of the award. Parties may waive their right to appeal either in the arbitration agreement or at a later date. The right to annulment may not be waived. The appeal is regulated by the Civil Procedure Code, as a regular appeal (*apelação*) to the second-instance court.

Article 27 of the Arbitration Law establishes the grounds for setting aside the arbitral award. Some Portuguese scholars and judiciary have defended the strictness of these grounds, while some argue that other reasons are suitable for annulment.

The main conflict is about violation of public policy, which is not mentioned in Article 27. The absence of such provision is probably justified by the fact that in 1986, when the law was approved, the possibility of using arbitration was not as broadly available as it is nowadays.

There are five grounds provided by Portuguese law for setting aside the award:

a if arbitration could not be used when the right in dispute cannot be waived;

b lack of jurisdiction of the arbitral tribunal, which occurs when the arbitration agreement is void (for example, due to lack of written form);

c invalid constitution of the arbitral tribunal, which occurs when, for example, the appointment of arbitrators did not follow the provisions set by the parties or by law; in both cases, the defendant shall argue the grounds in its defence or, within a reasonable time limit;

d lack of due process, as provided by Article 16 of the Portuguese Arbitration Law: the award may also be challenged if the arbitrators did not sign or substantiate it. The requirement of proper reasoning of the award is considered a constitutional guarantee of fair process; and

e if the court rules *extra petita*. Following the international standard that limits the arbitrators' powers to the remedy sought by the parties, any award that exceeds the remedy sought is void. This will also apply when the award does not rule on an issue addressed by the parties.

ii Distinctions between international and domestic arbitration law

The Arbitration Law is to be applied to any arbitration that is held in Portugal. Arbitration is considered international whenever international issues are at stake; but the distinctions between international and domestic arbitration law are few.

Parties may choose the law applied by arbitrators. Where such choice is not made, the tribunal shall apply the most appropriate law to the dispute. It is also permitted for the tribunal to settle the case on an amicable basis.

Portugal is a party to the New York Convention, but with the reciprocity reservation, which means that only the awards rendered in states that are parties to the Convention follow this regime.

Accordingly, foreign arbitral awards rendered in countries that are not signatories to the New York Convention must follow a recognition procedure governed by the Civil Procedure Code and decided by the court of appeal.

According to the applicable rules, the recognition of an arbitral award may be refused if:

a there are doubts as to the authenticity or the intelligibility of the award;
b the award is not final;
c there is another binding decision prior to the arbitral award over the same cause of action;
d if the defendant did not have the opportunity to present its defence; and
e the award is contrary to international public policy.

Portugal is also a party to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965 (ratified in 1984) and to the Inter-American Convention on International Commercial Arbitration signed in Panama in 1975.

Portugal has also entered into bilateral treaties on international judiciary cooperation with the PALOPs countries (Portuguese-speaking African countries).[1]

iii Structure of the courts

The Portuguese judicial system is a three-tier system of district courts, courts of appeal and one Supreme Court. There are no specialised courts for arbitration matters. The majority of issues are first decided by the district courts. The appointment of a missing arbitrator, the appeal of the arbitral award and the recognition of a foreign arbitral award are decided by the court of appeal. The setting aside of the arbitral award, cooperation in the taking of evidence or the granting of interim measures are decided by the district courts. Under the Arbitration Law anti-suit injunctions are not admissible.

1 With Angola in 1995, but in force since 2006; with Cape Verde in 2003, but in force since 2005; with Guinea-Bissau in 1988, but in force since 1994; with Mozambique in 1990, but in force since 1996; and with São Tomé e Principe, in 1976, but in force since 1979.

iv Local institutions

The most important arbitration institution is based at the Lisbon Commercial Association and was established in 1986 to facilitate and promote domestic and international arbitration. Its rules were changed in 2008, and generally follow the ICC Rules. The Oporto Commercial Association and the Bar Association also have important arbitration centres.

Under public initiative, several arbitration centres were recently created in different and, until now, highly improbable fields, such as consumer conflicts, administrative and tax disputes. These are centres with strong state support and very strict procedural rules. Only persons that belong to the centre can be appointed as arbitrator.

v Trends or statistics relating to arbitration

There has been a huge growth of arbitration in Portugal during the past 10 years. This increase is mainly due to the constant investment by public authorities who acknowledge that arbitration and other alternative methods of dispute resolution are a way to resolve problems relating to the national justice system, such as the excessive number of judicial law suits. This highly favourable trend is followed by jurisprudence as well as scholars, which increasingly support the most modern approaches even where the law is silent. Following this trend, law schools and universities have started to offer courses and have been promoting arbitration and other alternative methods of dispute resolution.

II THE YEAR IN REVIEW

An outline of recent decisions and other developments that may be of interest to practitioners and clients with a cross-border outlook, this section aims to raise issues that are topical in many jurisdictions, for general interest and comparison purposes.

i Developments affecting international arbitration

Legislation

The Portuguese arbitration community has consistently insisted with the Portuguese authorities that, after more than 20 years in force, the 1986 Arbitration Law should be changed and that new legislation should follow the Model Law approach. Following this trend, the Portuguese Arbitration Association ('the APA') presented to the government in May 2009 a proposal for a new arbitration statute incorporating the Model Law with minimal changes.

The government introduced some changes to the proposal and presented it to Parliament in January 2011. The project was approved by Parliament, but Parliament has been dissolved and all legislative proceedings ended.

The new government (resulting from the June 2011 general elections) is likely to propose to Parliament a new arbitration law based on the Model Law.

It is not foreseen that the new arbitration act will be effective prior to 2012. Until then the 1986 Act is still effective and in force.

Scholars and the judiciary have, nevertheless, been applying the APA Proposal in some aspects as not regulated by the existing Arbitration Law, as well as following international standards applicable to international commercial arbitration.

ii Arbitration developments in local courts

The Portuguese judiciary has given constant support to the autonomy of arbitral tribunals. However, there are still some misunderstandings in judicial jurisprudence as to some intricate aspects of the Arbitration Act.

Kompetenz-Kompetenz

In 2010 several superior court decisions ruled that the local court may not rule on the arbitral tribunal jurisdiction prior to its own ruling. A recent case decided by the Supreme Court of Justice on 20 January 2011 ruled precisely that the judicial court could not address the jurisdiction issue before the arbitral tribunal rules on it. The same ruling was made by the Lisbon Court of Appeal on 2 November 2010.

Interim measures

The Lisbon Court of Appeal held that the arbitral tribunal may order interim measures, but only if it can enforce them (i.e., if it does not imply powers of authority (*ius imperii*)). The decision was taken on 21 January 2010.

Arbitrability and extension of arbitration agreement to third parties

On 13 January 2010, the Lisbon Court of Appeal recognised as valid an arbitration agreement set out in another contract to which the parties referred. In this same decision the court ruled that the dispute over the amount of a retirement pension was not submissable to arbitration, even if that was not the case of the right to receive the pension.

Evidence – testimony of parties

Another recent decision, ruled by the Oporto Court of Appeal on 1 February 2011, decided that a party could be heard as a witness, which is not permitted under Portuguese civil procedural law. The ruling marked a clear difference between state courts and arbitration with respect to procedural rules.

iii Investor–state disputes

Portugal is a member to the Washington Convention but has never been party to an ISCID case, neither has any Portuguese company. Only recently did the Portuguese government appoint arbitrators that in fact had been entitled to be appointed since 1997.

III OUTLOOK AND CONCLUSIONS

Today arbitration is well established and commonly used in Portugal. As the previous cases brought before court have demonstrated, arbitration is well understood and its rules are solidly implemented in the Portuguese legal community.

An important step will be given with the approval of a new arbitration act, based on the Model Law. Some essential issues will need further discussion, especially multiparty arbitration, interim measures and public policy as grounds for setting aside the award.

There has been much debate about the circumstances that allow the introduction of third parties to proceedings. Some scholars maintain that the introduction of a third party must be agreed by the parties, while others maintain that agreement should not be mandatory. The discussion also focuses on the types of relationship between the parties that may become a party to proceedings. When the third party does not have exactly the same interest as the original party, there must be clear criteria as to the admissibility of its involvement. These criteria are not consensual and we can predict a lot of discussion on them.

Another issue that has created some controversy is preliminary orders. We think that the international controversy on these interim measures has actually had echoes in Portugal. The problem refers to *ex parte* measures and its violation of the adversarial principle and, in consequence, due process. The proposal of the APA suggested its adoption in the new law, but the former government did not agree and eliminated it from the proposal sent to Parliament.

Another difficulty that the Portuguese parliament will have to address is the annulment of an award on the grounds of public policy. Again, the APA proposal recommended that this ground for setting aside should not be included, but the government decided to include it in its proposal.

The next few years will certainly bring great progress to arbitration in Portugal. The discussion about the new law and the constant legal education in this field in law schools will surely bring extensive debate in the arbitration legal community and will constantly keep us aware of the international developments in this area.

Appendix 1

ABOUT THE AUTHORS

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José Carlos Soares Machado graduated from the faculty of law of Lisbon University in 1976 and has practised law for more than 30 years. He has been consistently recognised as a leading civil and commercial litigation lawyer.

Since 2011 he has been a partner and head of the litigation and arbitration department at SRS Advogados, one of the most important law firms based in Lisbon.

He is a professor at the law faculty of Nova University of Lisbon and a member of the ILA International Commercial Arbitration Committee. He has also been the representative of the Minister of Justice on the Portuguese Insolvency Administrators Supervisory Committee since 2005.

Mr Soares Machado is a former president of Lisbon Bar Council, as well as a member of the Portuguese Bar Association National Board of Directors, and of its National Supreme Council. He is also an arbitrator at its arbitration centre.

He is the author of several published works on constitutional law, corporate law, real estate law, and professional ethics.

He is a member of the Portuguese Arbitration Association and has been an arbitrator in numerous cases. He has also represented clients in numerous arbitrations before *ad hoc* and arbitration centres tribunals.

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She has been of counsel at SRS Advogados litigation and arbitration department since 2010, and an associate professor at the law faculty of Nova University of Lisbon since 2003.

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