



PORTUGUESE COMMERCIAL ARBITRATION CENTRE FOLLOWS SUIT AND ENACTS NEW FAST TRACK ARBITRATION RULES

Expanding the pie or a sign the system needed mending?

By Sofia Martins and António Júdice Moreira



Recently everybody seems to be talking about fast track or expedited arbitration, but the issue is not new; it has been debated for at least well over a decade.

Redfern and Hunter, in 2004¹, addressed the issue stressing that fast track arbitration was not a distinct system but solely a different designation for an accelerated arbitration procedure. Fouchard, Gaillard and Goldman – in 1999² – referred to fast track arbitration as the arbitral proceedings with shorter deadlines.

In 2006, the American Arbitration Association (“AAA”) statistics revealed that arbitration procedures valued between \$ 75.000,00 and \$ 500.000,00 took approximately 10 months to resolve and cases in excess of \$ 1.000.000,00 averaged 19 months to conclude³. These and other similar conclusions were the stepping stone for various changes in arbitration rules around the globe so as to include faster arbitration procedures.

The issue is not new, so why the recent buzz? Maybe arbitration outgrew its own boundaries.

The UNCITRAL Rules were revised in 2010, triggered by a thorough report prepared by Jan Paulsson and Georgios Petrochilos in 2006 which included a list of recommendation for the revising of the 1976 rules to reflect the advances in arbitration and included some suggestions to expedite the arbitration process⁴.

Indeed, Paulsson and Petrochilos’ report included some of the features we so commonly use in international arbitration, such as the requirement of detailed statements of claim and defense, including attachment of all the evidence relied upon and citations to evidence, and the empowerment of the arbitral tribunal to avoid unnecessary delays and expenses while ensuring a fair and efficient procedure.

However, we are all very much aware that international

arbitration today is usually a synonym for a *paper tsunami*⁵ of thousands, even millions, of pages, encompassing extensive submissions, voluminous attachments and documents, complex and time-consuming document production stages, comprehensive written witness statements and, more often than we like to admit, subject to guerrilla tactics by the parties.

Institutionalised arbitration rules were further developed and densified over the years to cope with the increased complexity of intricate international disputes, sometimes involving multiple parties, arising from more than one arbitration agreement or commercial and legal relationship. Arbitration practitioners grew in recognition by their specialisation, comprehensive industry knowledge and sharp case management skills. Whether to distinguish themselves from ADR or litigation practitioners or to prevent newcomers from settling in, the fact is that it may be said that the arbitration community pushed arbitration proceedings closer to the formalism and excessive regulation of judicial litigation.

Today there is the general recognition that arbitration is not always faster, rarely cheaper, and seldom tailored to the underlying dispute. The complexity involving modern international arbitration led to a growing dissatisfaction with the increased formality, length and costs of the ordinary arbitral procedure, which, in turn, led most institutions to amend their rules and allow a cleaner cut arbitration procedure, or at least, a shorter one.

There have been some different and meritorious approaches towards regulating fast track arbitration. The ICC is responsible for a rather minimalistic and successful solution; article 38 of its Arbitration Rules simply states “[t]he parties may agree to shorten the various time limits set out in the Rules”. This core provision is then completed by the need to obtain the arbitral tribunal’s approval if this agreement is reached after the constitution of the arbitral tribunal and with the possibility of the Court extending any of the time limits if it so deems fit to fulfil the Court’s or the arbitral tribunal’s responsibilities under the Arbitration Rules.

Others institutions chose a different path, notably the AAA’s International Expedited Procedure, the WIPO Fast-Track Procedure and the SCC’s Expedited arbitration; these examples provide for a more extensive regulation of the fast track model and, despite their differences, they converge in opting for a sole arbitrator, limited submissions and evidence, and conduction of oral hearings only when requested and deemed necessary by the arbitral tribunal.

The Portuguese arbitral community is not immune to the international trends and sophistication of arbitration. Indeed, especially in the last few years the Portuguese Commercial Arbitration Centre (“CAC”)⁶ has made an effort to adapt its regulations and *modu operandi* to international best practises; Not only did it revise its rules in 2014⁷ as, in 2015, it enacted several other sets of rules bringing it in line with other international institutions. The Centre enacted a set of rules aimed at regulating its role as appointing authority⁸, when requested, as well as new mediation rules⁹ and also made

public the criteria followed by the President when appointing arbitrators¹⁰. Last, but not necessarily least, the centre also decided to step up its offer of arbitration services and recently approved an autonomous set of rules for fast track arbitration¹¹.

Although a commendable effort of modernization, were these new rules really necessary?

The CAC arbitration rules were updated 2013¹² and included some new features for Portuguese standards, in line with the most relevant international rules of arbitration, such as provisions for emergency arbitrator, multiple parties, consolidation and third party joinder.

However, for the Portuguese arbitration community the modern commercial arbitration system, with its time and cost consuming complexity, is not always the most suitable solution to resolve an existing dispute; the CAC considered that it should offer a shorter, cheaper and less complex arbitration process, a back to basics alternative which could, on the one the hand, expand the potential disputes where arbitration could be seen as an actual alternative in terms of cost-efficiency and, on the other, reconcile with its users claiming for a simpler and faster procedure.

The CAC Fast Track Arbitration Rules will be in force in March 1 2016 and will be applicable either by agreement of the parties or at the initiative of the CAC President. The President will determine the application of the Rules whenever the value of the dispute is lower than € 200.000,00, although this decision may be overturned if both parties oppose it. The President may also decide to apply these rules to disputes valued above € 200.000,00 if deemed more appropriate, provided neither party opposes.¹³

The CAC rules set forth a sole arbitrator rule¹⁴, shorter time-limits for every procedural act¹⁵ as well as for the written submissions,¹⁶ a 35-page limit for the written submissions,¹⁷ and obligation on the parties to present all evidence with their respective submissions,¹⁸ option between written witness statements or the oral testimonies more familiar for Portuguese practitioners¹⁹, the possibility of additional written submissions although filed simultaneously and a 20-hour limit for the evidentiary hearing.²⁰

The envisaged time limit for rendering an award is 30 days from the final hearing and 6 months from the constitution of the arbitral tribunal²¹, although these limits may be extended by the President of the CAC at the request of the Arbitral Tribunal.²²

Although the costs for this fast track procedure have not yet been made publicly available by the CAC, reason for which it has not been possible to include an analysis on the cost aspect in this article, according to the information made available upon the public discussion of this new set of rules, the costs will be considerably lower than the costs provided for in the main Arbitration Rules of the CAC.²³

The CAC favours fast track arbitration for lower value

disputes, as this is the one prerequisite actually identified in the rules. This connection, similar to the one established by the AAA, may be seen as a strategic option to accommodate certain types of disputes and to allow institutional commercial arbitration in Portugal to be more accessible to a category of potential users.

It is an option that makes perfect sense. Recent developments in arbitration have increased the number of disputes referred to arbitration and established Portugal as an eligible seat for international arbitration. Nevertheless, despite the recent arbitration law based on the UNCITRAL Model Law, the pro-arbitration judiciary, modern soft laws, such as the code of ethics for arbitrators in commercial disputes prepared by the Portuguese Arbitration Association²⁴ incorporating the IBA Guidelines on Conflicts of Interest in International Arbitration, there are certain type of disputes for which arbitration is not seen as the most adequate dispute resolution method. The CAC's fast track arbitration rules are aiming for a piece of this pie.

The CAC's new fast track arbitration rules will certainly allow commercial arbitration to become accessible to a category of users and a viable alternative for a number of disputes which are (were) *condemned* to the judicial courts by the discrepancies between current arbitration costs and judicial costs. This said, resorting to a fast track arbitration procedure may encompass a considerable amount of risk, especially for unexperienced arbitration users. Parties may later consider that some issues

were not dealt with – or seen to be dealt with – by the arbitral Tribunal with the necessary attention. In addition, lawyers may come to recognise that they had insufficient time to prepare or present their cases at the risk of missing deadlines.

Moreover, favouring lower valued disputes implies lower arbitration costs and arbitrator's fees, which may potentially keep the more qualified and renowned arbitrators and practitioners away from these fast track proceedings. This circumstance may cause the CAC's fast track arbitration rules to be mostly used by either unsophisticated practitioners, with little experience in arbitration, or by young practitioners, with already relevant arbitration experience as counsel, eager to obtain experience as arbitrators and less concern with the earnings involved.

There is no right or wrong solution. The CAC made a strategic option and although only time will tell how the Portuguese arbitration community will react; we believe these new and autonomous rules are a great opportunity to increase arbitration permeability on the dispute resolution industry.

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- 1 Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* 6–43 (2004).
 - 2 Fouchard, Gaillard, *Goldman on International Commercial Arbitration* 680 (Gaillard & Savage eds., 1999).
 - 3 Jennifer Fletcher, “Expedited Arbitration Rules”, in *JAMS Global Construction Solutions* newsletter, Fall 2012
 - 4 The report is available at http://www.uncitral.org/pdf/english/news/arbrules_report.pdf
 - 5 MICHAEL E. SCHNEIDER, “The paper tsunami in International Arbitration – problems, risks for the arbitrators’ decision making and possible solutions”, in T. GIOVANNINI AND A. MOURRE, *Written Evidence and Discovery in International Arbitration*, Dossiers of the ICC Institute of World Business Law 6 (2009).
 - 6 The Arbitration Centre of the Portuguese Chamber of Commerce and Industry, also known as the Commercial Arbitration Centre is the most important and most frequently used Commercial Arbitration Centre in Portugal.
 - 7 English version may be accessed on http://www.centrodearbitragem.pt/index.php?option=com_content&view=article&id=9&Itemid=110&lang=pt.
 - 8 The Portuguese version is available at http://www.centrodearbitragem.pt/images/pdfs/Legislacao_e_Regulamentos/Regulamento%20entidade%20nomeao%20e%20recusa%20orbito.pdf.
 - 9 The Portuguese version available at http://www.centrodearbitragem.pt/index.php?option=com_content&view=article&id=192&Itemid=195&lang=pt.
 - 10 The Portuguese version available at http://www.centrodearbitragem.pt/index.php?option=com_content&view=article&id=173&Itemid=192&lang=pt
 - 11 The Portuguese version of the fast track arbitration rules (“*Regulamento de arbitragem rápida*”) is available at http://www.centrodearbitragem.pt/images/pdfs/Legislacao_e_Regulamentos/Regulamento%20Arbitragem%20Rápida.pdf
 - 12 In force since 1 March 2014.
 - 13 Article 3 of the CAC Fast Track Arbitration Rules.
 - 14 Article 6 of the CAC Fast Track Arbitration Rules.
 - 15 Article 5 of the CAC Fast Track Arbitration Rules.
 - 16 Article 9 of the CAC Fast Track Arbitration Rules.
 - 17 Articles 8 and 9 of the CAC Fast Track Arbitration Rules.
 - 18 The Respondent is granted an additional 20 days following its Reply for the submission of written witness statements and expert reports. See Articles 8 and 9 of the CAC Fast Track Arbitration Rules.
 - 19 Article 11 of the CAC Fast Track Arbitration Rules.
 - 20 Article 11 of the CAC Fast Track Arbitration Rules.
 - 21 Although such information is not publicly available, the average duration of an arbitration administered by the CAC is of around 14 months.
 - 22 Article 17 of the CAC Fast Track Arbitration Rules.
 - 23 The simple fact of having a sole arbitrator (if compared to the local culture of 3 arbitrators, irrespectively of the value at stake) reduces the arbitration costs to 50% of the usual solution.
 - 24 Approved on 11 April 2014.