PORTUGUESE COURT OF ARBITRATION FOR SPORTS: CONSTITUTIONAL AWARD NO. 781/2013 OF NOVEMBER 20, 2013

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1. Introduction

In recent years, the Portuguese Government has consistently promoted arbitration as an alternative and credible method of dispute resolution. In fact, this pro-arbitration attitude resulted directly from the financial crisis and, particularly, European Union-led recovery efforts in Portugal. As part of these efforts, the Troika[1] imposed requirements on Portugal to reduce the considerable backlog of cases before its domestic courts, which it diagnosed as one of the barriers to Portugal's economic development.[2] According to the Troika's May 2011 memorandum to the Portuguese Government, the latter committed to develop alternative dispute resolution methods, with a special emphasis on arbitration, in order to reduce the cost and length of dispute resolution proceedings.

These requirements have seen a number of pieces of Portuguese legislation intended to develop arbitration, the most relevant of which December 2011 UNCITRAL model law inspired Portuguese Arbitration Law, but also a piece of legislation involving the creation of a Portuguese Court of Arbitration for Sports ("PCAS"), inspired by the Court of Arbitration for Sports in Lausanne, Switzerland. The purpose of the PCAS, according to the law project's written motivation,[3] was to provide sport with a fast and specialized alternative dispute resolution mechanism.

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[1] The term Troika, from the Russian meaning 'group of three', has been consistently used during the Eurozone crisis to describe the European Commission, International Monetary Fund and European Central Bank, who formed a group of international lenders that laid down stringent austerity measures when providing financial bailouts, or promises of bailouts for indebted peripheral European states—the Portugal bailout program amounts to EUR78 billion.

[2] According to the World Bank's "Doing business 2014 Report" (www.doingbusiness.org), enforcing a contract in Portuguese courts takes an average of 547 days, less 30 days than in 2009, although still 100 days above European countries' average length.

[3] Law project – Decree no. 128/XII.

The PCAS is an Arbitration Institution created by Law 74/2013 with, amongst others, exclusive jurisdiction as an appeal body,[4] for every dispute arising from sport federations, professional leagues and other sporting entities' decisions, actions and omissions within the exercise of their disciplinary, regulatory, organizational and direction powers.

The original draft law[5], Decree no. 128/XII and its respective annex, prepared by the executive for parliamentary approval, envisaged the creation of a binding and non-appealable mandatory arbitration mechanism, with exclusive jurisdiction over disputes within the sporting legal system or related with sports' practice – falling outside the state's jurisdictional system and control. As shown below, however, the executive was perhaps rather too eager to imposing a legislatively mandatory arbitration solution without first ensuring adequate compliance with Portuguese's constitutional provisions.

2. Struggle in the (Law) Making

Before discussing the difficulties faced in establishing the PCAS, a brief background on the Portuguese legislative process is useful. The legislative process in Portugal arises from parliamentary or executive initiative; in either event, the legislative proposal is discussed and approved by the Parliament and sent to the President for ratification, rejection (political veto) or constitutional examination (constitutional veto).

Ultimately, the first draft PCAS law was constitutionally vetoed by the President because the latter had doubts on the dichotomy of a regime that included, essentially, "mandatory arbitration + not appealable decisions". This led to the draft PCAS law being put before the Portuguese Constitutional Court, which rendered the draft law unconstitutional by the Constitutional Court's decision no. 230/2013 of April 24 2013, published in the official gazette on May 9 2013, for the reasons better described below.

The scope of Constitutional examination is determined by the President's request for constitutional scrutiny, which in this case was limited to Article 8(1). This provision established that the decisions rendered by the PCAS were not subject to appeal. That article, together with articles 4 and 5, determined the exclusive jurisdiction of the PCAS for sport related disputes, including those arising from actions and omissions of the sporting federations, professional leagues and other sporting entities, as well as for the appeals of the decisions rendered by the disciplinary bodies of the

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[4] Parties may also revert the matter to the PCAS when the competent sporting entity fails to render a decision on the dispute within 30 days—article 4, par. 4 of the Law 74/2013 of September 6.

[5] Draft law prepared by the Executive for Parliamentary discussion and approval.

federations and the Portuguese Anti-Doping Authority. In other words, the President was concerned that the option for mandatory arbitration over disputes together with the lack of appeal for the PCAS' decisions was a disproportionate imposition on the potential arbitral parties, and in potential breach of the Portuguese Constitution.

The Constitutional Court confirmed the President's concerns. It stated in Award 230/2013 that the intended exclusive jurisdiction arising from binding mandatory arbitration breached the parties' constitutional right of access to the courts and the right of effective jurisdictional review, respectively foreseen on articles 20(1) and 268(4) of the Portuguese Constitution.

The Constitutional Court based its decision on several considerations.

Most importantly the Court considered that the draft law involved a delegation of judiciary powers from the administrative courts to the PCAS. The Court considered that when delegating powers to the PCAS to resolve sports related disputes, the State should have maintained some degree of control or supervision over PCAS decisions. This State control was the more relevant because the PCAS would decide disputes arising from the exercise by sporting entities and federations of their *ius publicum* delegated powers, including sanctioning authority.

The Constitutional Court considered the fact that the PCAS imposed binding mandatory arbitration without a right of appeal to be an improper delegation of the State's judicial powers. More specifically, the Court stated that the PCAS effectively meant that the State had relinquished its duty to review the execution of its judicial powers. The main concern, as pointed out by the Court, was that the PCAS would ultimately be judicially unaccountable.

This lack of accountability was aggravated in the eyes of the Constitutional Court by the fact that it did not consider that the PCAS could guarantee its own impartiality and independence. Specifically, the Court stated that the manner in which the pre-determined list of PCAS arbitrators was established did not guarantee their independence and impartiality. To the contrary, since the PCAS arbitrators were to be appointed by the same sporting federations, professional leagues and other sporting entities who, in all likelihood, would become parties to the proceedings under the exclusive jurisdiction of the PCAS, the Court considered there to be a real threat of bias. The award also stated that an appearance of bias arose from the powers attributed to the President of the PCAS on matters of appointment or substitution of arbitrators.[6]

[6] It should be stressed that the provisions relating with the arbitrator appointment process were not subject to Constitutional review—since the same were not included on the Presidency's request for constitutional scrutiny, therefore, the same should have fallen

In the wake of the Constitutional Court's unfavourable decision, the Parliament had a choice: it could either modify the draft law in accordance with the Constitutional Court's decision or obtain a favourable qualified majority of two thirds to overturn the Constitutional Award. It decided to adjust the draft law and resend it for Presidential ratification.

3. Approval of the PCAS Law

The Parliament modified the original draft and approved the PCAS law which was later published on September 6th 2013 as Law no. 74/2013. The newly enacted law dropped the provision mandating that the PCAS' decisions were not subject to appeal. In its place, the Parliament inserted a provision whereby the decisions of the PCAS appeal chamber were subject to a judicial appeal to the Supreme Administrative Court provided that (i) the issue under dispute is of fundamental importance from a legal or social standpoint or when (i) the appeal is blatantly necessary for a better application of the law.

The original draft law also underwent a few—although significant—modifications regarding the appointment of arbitrators. The original draft law was criticized by the Constitutional Court[7] because it granted almost absolute power to the President of the PCAS, who was elected by the same people responsible for the PCAS list of arbitrators. The original draft law provided PCAS President with the powers for the appointment of arbitrators whenever the parties failed to reach an agreement, being also responsible for the substitution of arbitrators and for the decision on interim measures, these powers were transferred from the President of the PCAS to the President of the Central Administrative Court or the President of the Lisbon Court of Appeals, depending on the administrative or civil nature of the dispute. This minor modification to the draft law led to the major consequence of the PCAS no longer being seen as being judge in its own cause.

4. The President Strikes Again

Despite these modifications to the draft law, the Portuguese President still considered that the PCAS legislation raised concerns about its Constitutional adequacy. Most notably, the President was concerned as to whether the limited possibility of appeal and the changes to the arbitral appointment procedure were sufficient to meet Constitutional scrutiny.

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outside the scope of the Constitutional assessment, even so, the Court included the matter on its reasoning although not having formally declared the unconstitutionality of the provisions regulating the appointment process.

[7] This specific issue was not included on the constitutional mandate, because it was not addressed by the Presidential request for constitutional examination, nevertheless, this did not prevent the Court from openly criticizing this legislative option in its Award 230/2013.

It should be stated that although the President could have requested a new pre-emptive constitutional examination, i.e. prior to the ratification of the law, the requested a successive constitutional examination instead, i.e. following its approval and publication on the official gazette. This appears to have been a political decision and it was very surprising indeed. If the President still had doubts regarding the Constitutional adequacy, it would normally be the case that those doubts would be sufficient to withhold the enactment of what was a non-urgent law. Instead, the President allowed the law to be enacted before requiring the Constitutional Court to consider it.

The successive constitutional examination does not affect the enforcement of the law *per se*, in effect, the PCAS provisions which are successively declared in breach of the constitution shall only be amended so to conform with the constitution following three constitutional judgements declaring its unconstitutionality. In other words, only after the third aligned successive constitutional examination will the targeted legal provision be modified or removed from the legal document.

In any event, the newly enacted law 74/2013 of September 6th 2013, which created the PCAS, was soon after declared unconstitutional by the Portuguese Constitutional Court's Award no 781/2013.

5. Constitutional Award No 781/2013

The Award no 781/2013 of November 20, 2013 published in the official gazette on December 16th 2013, declared as unconstitutional article 8, pars 1 and 2, together with articles 4 and 5, of the newly enacted PCAS law.

The Court repackaged its previous analysis as contained in the first Constitutional Award no. 230/2013 and considered that the new law was still in breach of the parties' constitutional right of access to the courts and the right of effective jurisdictional review, respectively foreseen on articles 20(1) and 268(4) of the Portuguese Constitution.

The Award stated that the modification which granted the possibility of appealing to the Supreme Administrative Court was too narrow and insufficient to guarantee the necessary jurisdictional review. The Award recognized the law provided the parties with three forms of accessing judicial discussion over a PCAS decision: (i) the appeal to the Constitutional Court, (ii) the possibility of setting aside the decision under the Portuguese Arbitration Act and—the latest modification—(iii) the appeal to the Supreme Administrative Court.

However, the Constitutional Court also acknowledged that in any of the three situations the facts of the dispute were left outside the scope of judicial review. This was for several reasons.

Firstly, the appeal to the Constitutional Court and the setting aside of the arbitral decision could not be seen as an actual jurisdictional review, to the extent that the former only addresses constitutional related matters and the latter is limited to formal and procedural aspects of the decision (in line with the to the grounds set forth on Article V of the New York Convention).

Further, the Constitutional Court also stated the newly created possibility of appeal to the Supreme Administrative Court was still insufficient to secure the parties' constitutional rights, since it is only admitted over specific decisions of the PCAS, under exceptional circumstances—which aim to protect the community interests and not the parties' legitimate interests and rights—and limited to the legal aspects of the dispute—since factual matters are outside the scope and powers of the Supreme Administrative Court analysis.

In view of the above, the Constitutional Court determined that the PCAS Law with its requirement of binding mandatory arbitration, together with the limited form of jurisdictional review still did not provide the parties' constitutional right of access to justice and the right of effective jurisdictional review, respectively foreseen in articles 20(1) and 268(4) of the Portuguese Constitution.

The Constitutional Award considered the PCAS law to be excessive and unreasonable; to the extent that in the interest of celerity, uniformity and efficiency the PCAS law severely restricted the parties right to have appellate access to State courts concerning the jurisdictional control of the legality of administrative actions (*ius publicum*), including sanctioning acts. The Constitutional Court pointed out that the sport industry had its interests of celerity, stability and uniformity already addressed and resolved by the sport *res judicata* rule which prevents the subsequent invalidation of sport effects as a result of a succeeding appeal by a domestic court.

6. Commentary

The Constitutional Court was well intentioned and aimed to achieve a positive outcome (often mentioned on the award—including the first one), which was to prevent an exclusive, fully autonomous and unaccountable sporting justice system. However, in doing so it may have decided against the pro-arbitration constitutional amendments and a number of arbitration-friendly court decisions.

By way of background, the Portuguese Constitution was revised in 1982 and deliberate attempts were made (and, indeed, continue to be made) to make Portugal an arbitration-friendly jurisdiction. Specifically, Article 212 of the Constitution was modified so to include Arbitral Tribunals within the

constitutionally foreseen court categories. The Constitutional Court's position has been (ever since 1986)[8] that the arbitral tribunals also exercise the jurisdictional mission foreseen in Articles 202 and 209(2) of the Constitution, and may do so definitively, i.e. without being subject to a judicial appeal.

If the first constitutional award concerning the PCAS (no. 230/2013) could be interpreted as favouring the judiciary over arbitration, since it implied that a certain degree of jurisdictional review should be performed by State courts, the latter constitutional award (no. 781/2013) seems to imply that said jurisdictional review can only be performed if it is addressed in full by State courts, ignoring that arbitration is also constitutionally considered a jurisdictional form of dispute resolution.

The dissenting vote on this 781/2013 award identified this particular issue and argued that

> [O]ur Constitution does not enable a monopoly of state courts or any exclusivity over public justice. The main constitutional guarantees that the principle of effective jurisdictional review embodies are the ones regarding the independence of the judge (article 203), due process (article 20(4)), reasoned decisions (article 205(1)), res judicata (article 282(3)) and even the availability of precautionary measures (article 268(4)); neither of these are exclusive of state courts.

Although the Constitutional reasoning was limited to very specific circumstances, the most relevant of which was that mandatory arbitration was under scrutiny and not voluntary arbitration, the fact is both Constitutional Court decisions, specially 781/2013, implied arbitration in general is a lesser form of justice when compared to state courts, in apparent contradiction with the Constitutional text which does not make such distinction.[9] This implied inferiority led to the decision that mandatory arbitration was not suited to pursue their constitutionally recognized jurisdictional mission.

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[8] Constitutional Award no 230/86, published on the official gazette in September 12, 1986 "even if the arbitral tribunals may not be included on the definition of Tribunal as a sovereign body (Portuguese Constitution, article 205), this does not mean they cannot be qualified as Tribunal for other constitutional effects, since they are constitutionally defined as such and established as an autonomous category of Tribunal"

[9] The referred Constitutional Award 230/86 stated that the Constitution considered arbitral tribunals as proper and autonomous tribunals and did not distinguished arbitral tribunals from judiciary tribunals when referring to the conferred jurisdictional powers. This decision further stated there was no reason to restrictively interpret the Constitutional provision regarding jurisdictional powers so to only include judiciary tribunals in detriment of arbitral tribunals.

7. Conclusion

The first immediate conclusion from the above is that according to the Portuguese Constitutional Court, mandatory arbitration will not be definitively binding in Portugal; the final decisions rendered by an arbitral court established under mandatory arbitration shall have to be subject to appeal.

Most Portuguese arbitration practitioners were less worried with the direct implications of the Award on mandatory arbitration and more concerned with the eventual adverse repercussions for Portuguese arbitration in general. Even acknowledging the differences and unique challenges of mandatory arbitration when compared to voluntary arbitration, there were several who raised eyebrows over the apparent inconsistency of Constitutional Award 781/2013 with both the Constitution and previous Constitutional case law.

Notwithstanding, the fact of the matter is that the concerns leading to 781/2013 Constitutional Award are not only very specific but actually exclusive of mandatory arbitration, therefore, with no apparent or expected repercussion over voluntary arbitration, even if conceptually the Constitutional Court considered arbitration as a lesser form of justice, the constitutional decision had a specific focus, so in practice the *victim* was mandatory arbitration and not voluntary arbitration.

In effect, the historical constitutional awards favouring arbitration, which placed arbitration on the same level with judicial dispute resolution, targeted voluntary arbitration and not State-mandated arbitration. Although not specifically, the 230/86 Award thoroughly addressed the characteristics of voluntary arbitration, the most important of which the fact that arises from a contractual agreement, a voluntary consensus between the parties—diametrically opposed to mandatory arbitration, which is determined by law and not by parties' choice.

Bearing the above in mind, although the 781/2013 Award may have demoted arbitration in general, the fact that it specifically targeted mandatory arbitration should be seen as a clear indicator that it shall have little to no implications for voluntary arbitration. It may imply some degree of conceptual reasoning in the future, to clearly distinguish mandatory from voluntary arbitration, but it does not compromise the understanding that voluntary arbitration tribunals are suited to definitively exercise the jurisdictional review foreseen on articles 202 and 209(2) of the Constitution.

Therefore, this decision shall not undermine Portuguese voluntary arbitration growing credibility and efficiency as an alternative dispute resolution mechanism.