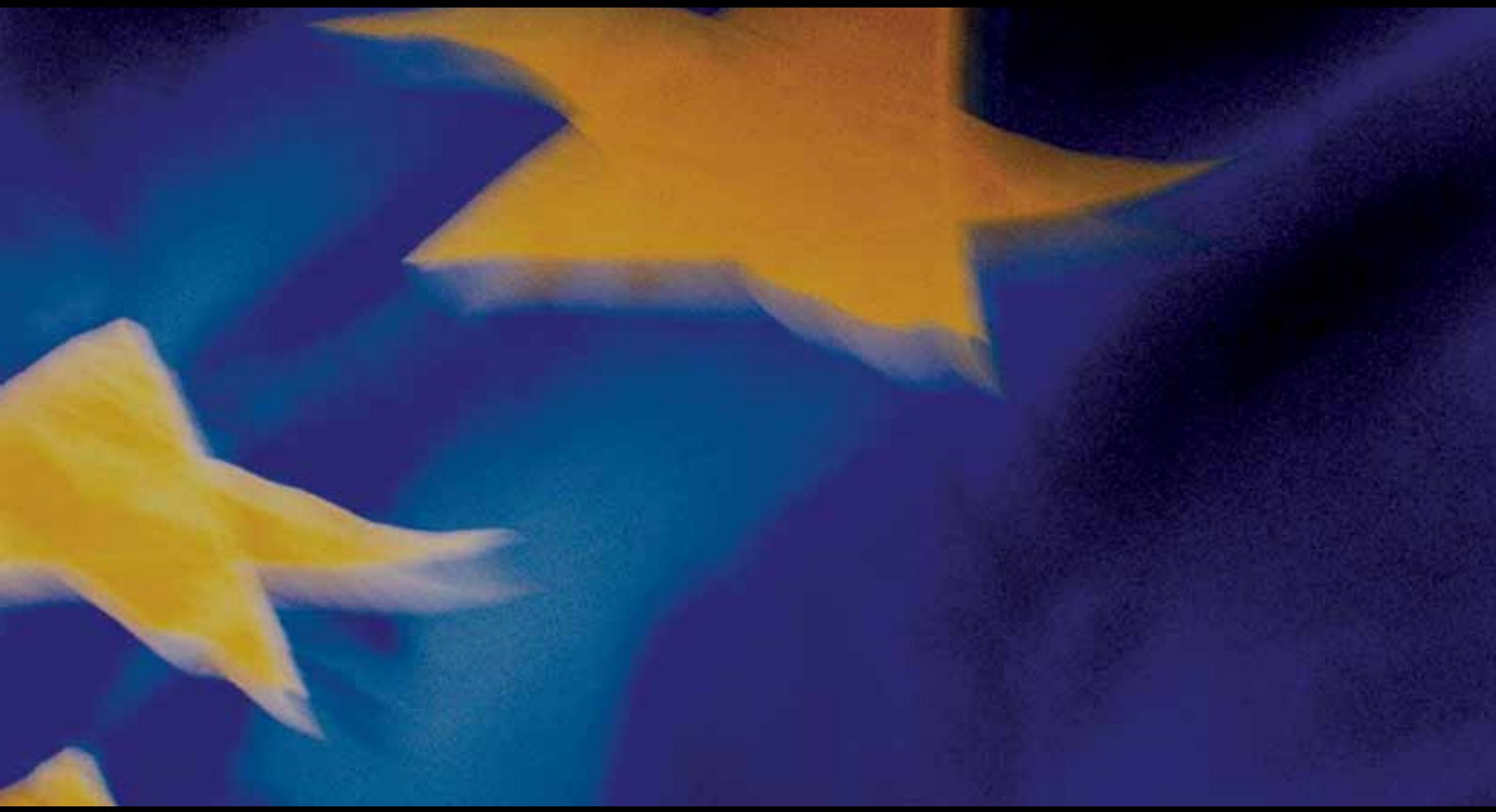
THE EUROPEAN, MIDDLE EASTERN AND AFRICAN ARBITRATION REVIEW 2014



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The international journal of commercial and treaty arbitration
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A Law for All Seasons

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Introduction

Arbitration in Portugal

Although the regulation of arbitration in Portugal dates back centuries, modern commercial arbitration started with the enactment of Law 31/86 of 29 August 1986. That law was not specifically based on any other law, but it was inspired by French Law. It contained solutions that were not substantially different from the ones adopted in other countries, despite some particularities of the law that were a consequence of our civil procedural tradition. In fact, the main evidence of the success of that law was that it remained in force for 25 years, with only a minor amendment, and arbitration effectively started as a new area of practice.

Although the success of arbitration in recent years is in part a consequence of the lesser effectiveness of state courts, the fact remains that arbitration has been growing and that it is seen today as the best way to solve some types of disputes, notably complex procedures where a reasonable degree of specialisation is required.

In view of this new trend, local practitioners started to discuss the possibility of changing the law or, more audaciously, replacing it with a new one. The process was long, with the first project seeing the light in early 2009, and the final version, Law 63/11 of 14 December (the Law), enacted in December 2011. The main characteristic of this law is that it was not prepared by any governmental body, but drafted by local practitioners[1] and subject to wide public discussion before its final approval.

The law has been in force since March 2012 and, although it is still early to make evaluations, it appears that it is being applied without any major problems.

The model of the Law

When discussing the revision of Law 31/86 of 29 August 1986, there were many opinions on the path to follow; notably, simply amending the law or approving a completely new document. Eventually, the latter option prevailed and the decision was taken that the new text should be based in the UNCITRAL Model Law.

One of the purposes of changing the law was to make Portugal a more interesting seat for international arbitration and that would be more easily achieved with a law following an internationally accepted standard. Considering that the UNCITRAL Model Law was the source of inspiration for many new European texts (as had happened recently with Germany, Austria and Spain), it was clear at a very early stage that it should also be the model for the new Portuguese law.

Nonetheless, the Law is not a mere copy of the UNCITRAL Model Law text and many changes were introduced, either because they were more in line with the Portuguese legal tradition or because the UNCITRAL Model Law solutions were not considered adequate or were too vague

A monist Law

The UNCITRAL Model Law was conceived as a model text for international arbitration. However, when discussing the new Law, it was decided that it should be applicable to both domestic and international arbitration, even if some minor additional provisions would be required to regulate the latter.

That was already the option in 1986, where the vast majority of the provisions of the Law applied indistinctly to domestic and international arbitration.

As a consequence, the Law regulates domestic and international arbitration, and has an additional chapter that addresses specific aspects of international arbitration (see below).

Law 63/11 of 14 December (the Law)[2]

Arbitrability

According to the Law, any dispute regarding economic interests may be submitted to arbitration (article 1). In addition to that, disputes not involving economic interests may also be referred to arbitration, provided that they concern matters where the parties are able to settle. Finally, arbitral tribunals may be also requested to interpret, complete, adapt or supplement existing contracts.

The state and state entities may enter into arbitration agreements provided that the disputes concern private law (as opposed to public law). In addition, the Law states that state and state entities may be a party to arbitration agreements if authorised by law. Portuguese public law can be considered very generous in this regard, meaning that arbitration clauses are possible in almost all contracts. This makes the Portuguese system one of the most advanced internationally in relation to public law.

As a matter of fact, the Portuguese legislator extended arbitration to other fields of law, such as tax disputes and, in limited cases, labour disputes.

Arbitral clause and negative effect of the arbitration agreement

The Law reproduces the doctrine arising out of the New York Convention and the UNCITRAL Model Law, demanding a written agreement but giving the term 'written' the widest meaning possible (article 2).

As to the negative effect of the arbitration agreement, the principle of *Kompetenz-Kompetenz* is firmly reaffirmed in articles 5, 18 and 19, except in cases where the state court concludes that the arbitration agreement is clearly null and void, became inoperative or is incapable of being performed. Special emphasis is given to the fact that, regardless of any state proceedings, arbitration may commence or continue and that the parties cannot file a claim in the state courts with the sole purpose of discussing the validity of an arbitration agreement.

The arbitral tribunal

The subject of the constitution of the arbitral tribunal (articles 8 to 16) has received special attention in the Law and there were many changes compared with the 1986 law, although one may say that such changes simply follow what has been the recent trend in international arbitration.

The tribunal will be composed of an uneven number of arbitrators or, if the parties are silent, three. These arbitrators must

be independent and impartial, and have the duty to reveal any circumstances that, in the eyes of the parties, may affect such independence and impartiality.

If the parties fail to nominate one or more arbitrators, then unless the parties have designated another entity for such purpose (such as an arbitration centre),[3] the state courts have the power to make such appointment, at the request of the most diligent party. When making nominations, the state court is obliged to take into account all relevant circumstances to ensure that an independent and impartial arbitrator is appointed. In the case of international arbitrators, the law establishes that the state court, if requested to appoint the chairman or a sole arbitrator, should consider the convenience of appointing arbitrators with a different nationality from that of the parties, applying the 'neutrality' rule.

In case of multiple parties (article 11) and failure of one of the sides to agree on the name of the arbitrator, the state court will make the appointment of the missing arbitrator, but in principle that will not compromise the appointment of the arbitrator appointed by the claimant. This is only not the case if the state court is convinced that the parties have conflicting interests and that justice will better served if all the arbitrators are appointed by the state court. Therefore, the Dutco doctrine is accepted in a moderate way.

If a party wants to challenge an arbitrator (and it is not the sole arbitrator), the challenge request is submitted to the arbitral tribunal (articles 13 and 14). If the challenged arbitrator does not step down, the tribunal, with the participation of the challenged arbitrator, will decide. In case of denial of the request, the challenging party may apply to the state court, but the arbitral proceedings may follow their normal course.

The law contains a specific provision on arbitrators' fees (article 17) demanding that this aspect be agreed in writing before the tribunal is fully constituted. If that agreement is not concluded but the proceedings continue, the arbitrators will establish their fees, but the parties are entitled to challenge them in the state courts.

Interim measures and provisional orders

This was a matter that generated some discussion, to the extent that there were doubts in face of the 1986 law as to whether arbitral tribunals could issue interim measures and, in the affirmative, which of those exist in the Civil Procedure Code.

One of the concerns, when drafting the new law, was to avoid any links with the civil procedure law (to the extent that for many practitioners there was a trend of applying those rules directly to arbitration, thus strangling the procedure). It was agreed that the interim measures should be regulated independently from the procedural law. Without wanting to innovate too much, it was decided that the best solution would be to apply the UNCITRAL Model Law text as it was, making this part of the Law (articles 20 to 29).

Ultimately it was an innovation, in as much as the solutions now established in the arbitration law are different and, in some cases, go beyond what is possible under procedural law.

Conduction of the proceedings

As mentioned above, one of the concerns of the drafters of the law was that a clear line is drawn between arbitration and civil procedure, thus ending a tendency to try to apply civil procedure provisions in arbitration proceedings.

Therefore, the whole of chapter V of the law (articles 30 to 38) was drafted to avoid such association. In themselves, most of the provisions do not deserve any special comment: the parties are free to agree on the rules of the procedure and, failing such agreement, the tribunal will conduct the proceedings as it best sees fit, in accordance with the principles of due process.

Taking a clear stand in a long worldwide dispute, the law expressly states that the arbitral proceedings are confidential (article 30.5), without prejudice of the possibility of publishing final awards and other decisions, provided that all elements identifying of the parties are removed.

Article 35 addresses the defaulting of one party and states that the failure of a party to contest a pleading or appear at a hearing will not be deemed an admission of facts, and so the arbitral tribunal should continue the proceedings on ex parte basis. Although this appears standard today, it is the opposite of what would have happened before in accordance with the rules of civil procedure, where defaulting has severe consequences.

Article 36 deals with third-party intervention, which is permitted, provided the third party is bound by the arbitration agreement. If the third party was not an original party to the arbitration agreement, their intervention will only be valid if accepted by the other parties to the arbitration and only for the purposes of those arbitration proceedings. The intervention may take place before or after the constitution of the tribunal, but in this latter case the intervening party will have to accept the tribunal as it is. In any event, the tribunal may always refuse the intervention if it considers that it may disturb the conduct of the proceedings.

Article 37 regulates tribunal appointed experts. Although this was an issue covered by the UNCITRAL Model Law, it is a substantial evolution in view of what would happen in accordance with civil procedural laws, where the parties would each appoint an expert and the tribunal a third expert, and the three would agree on the result of the joint work.

Finally, article 38 regulates the assistance by state courts, notably on the production of evidence. The parties may apply for such assistance, but only after obtaining the leave of the arbitral tribunal.

Award and closing of the proceedings

Unless the parties authorised the tribunal to decide ex aequo et bono, the award will be taken in accordance with the applicable law (article 39) and the decision can only be appealed if the parties expressly agree on that (under the 1986 regime the appeal was the norm). As we shall see below, in international arbitration, the solution has specific characteristics.

Article 43 deals with the time limit to render the award. Under the previous regime, the time limit was six months and could only be extended with the agreement with the parties. A very stringent consequence, if the time limit was exceeded without approval of both parties, was that the tribunal would cease to have power to settle the dispute, the arbitration agreement itself would be forfeited and the parties would be sent to the state courts. This very strict regime led to a much more open approach in the new Law establishing a time limit of 12 months and gives the arbitrators power to extend such time limit, unless both parties oppose. Finally, the arbitration agreement remains valid even if the time limit to render the award is exceeded.

Within the 30 days following the notification of the award, the parties may not only ask for the correction of the award (in respect of clerical and similar errors), but also for the interpretation of any part of the award that it considers obscure or ambiguous (article 45.1 and 45.2). More interesting is the possibility of the parties asking the tribunal to render an additional award regarding claims or parts of claims they consider not to have been addressed in the award (article 45.5).

Challenging the award

As mentioned above, under the 1986 regime, the norm was for awards to be subject to appeal. However, the regime was a dual regime, in as much as together with the appeal, it also made

provisions for the possibility of requesting the setting aside of an award and that was – and still is – a right that could not be waived. Conversely, it did not include international public policy in the grounds to set aside.

With the new Law (article 46), and except when the parties admitted explicitly the possibility of appeal, the award may only be set aside. The grounds for setting aside an award are in line with what is established in the New York Convention. The process is treated as an appeal and dealt at the appeal court.

After much debate, the Law includes – in this case, in disagreement with the drafters that proposed that the issue would not be mentioned – the right for the courts to set aside an award on public policy grounds (but limited to the international public policy of the country).

Article 46.8 grants the state court the power, at the request of one of the parties, to send the award back to the arbitral tribunal to have some aspect readdressed, avoiding the set aside of the award. This is a provision without precedent in the Portuguese system, but one that may be an effective solution in the benefit of the parties, avoiding the need to start a new arbitration after the setting aside of the award.

International arbitration

Chapter IX of the Law deals with international arbitration. As mentioned above, and despite the existence of a chapter devoted to international arbitration, the Portuguese system cannot be classified as dualist, to the extent that the regime applicable to domestic and international arbitration is substantially the same (as expressly determined by article 49.2). However, this chapter is good evidence of how committed the Portuguese legislator was in enacting an arbitration-friendly regime, and with the aim of attracting international disputes to our territory.

Following French law, international arbitration is defined as arbitration that puts at stake international trade interests (article 49.1).

Article 50 deals with the inadmissibility of pleas based on the domestic law of a party. It is a very arbitration-friendly provision which states that in international obligation, where a state or a state-controlled entity is a party, that party cannot invoke provisions of its internal law to challenge the arbitration agreement.

Likewise, article 51 deals in equally favourable terms with the substantial validity of the arbitration agreement. According to this article, provided that the arbitration agreement is valid under the law chosen by the parties to regulate the arbitration agreement, under the law applicable to the merits, or under Portuguese law, it should be accepted by a tribunal seated in Portugal or by the Portuguese court in case of challenging of an award.

The law applicable to the merits is regulated by article 52. The tribunal should apply the law chosen by the parties and, failing such choice, the law that has the closest connection with the dispute. The article also makes express reference to the contractual terms agreed by the parties and the relevant trade usages.

Regarding the possibility of appeal, the norm is once more that there is no appeal unless the parties expressly agree otherwise (article 53). However, even if such agreement exists, such appeal has to be directed to another arbitral tribunal and the rules and terms applicable have to be set in advance. This is an innovative provision that deliberately wants to limit the intervention of state courts in international arbitration.

Recognition and enforcement of foreign awards

All foreign awards have to be recognised (ie, an exequatur is obtained) before they become effective in Portugal. This matter is covered by the New York Convention, so the scope of application of article 55 is quite reduced. In any event, the provisions of articles 55 to 57 are very similar to the ones contained in articles IV, V and VI of the New York Convention.

State courts

Articles 59 and 60 of the Law deal with the jurisdiction of state courts in all matters where its intervention may be required in accordance with the Arbitration Law.

Contrary to the previous regime, the competence has been centred in the appeal courts (second instance courts) and the aim of the drafters of the project of the law was that, in a near future, the appeal courts would have specialised sections devoted to arbitration, as currently happens in France. The competence of the appeal courts covers the appointment and challenge of arbitrators; the challenge of the arbitrators' fees; the appeal (if admissible); or the request to set aside. Confirming the favor arbitratis, part of these procedures were classified as urgent.

For all other matters – from interim measures to assistance in the production of evidence – the competence remains with the first instance courts, as they are more suited for these type of processes.

Trends

The Law came into force on 14 March 2012 and only applied to new proceedings (even if based on old clauses). The reaction to the law was good and although little more than one year of experience is not enough to perform an evaluation, it appears that the law is not raising many problems.

No law is perfect and there is always room for improvement, but we are of the opinion that now is the time to consolidate the law and arbitration in Portugal.

Portugal now has an arbitration law that can be considered in accordance with international best practices and standards. As noted above, the law clearly favours arbitration, and the tradition of Portuguese courts has been of upholding the arbitral awards that are brought before them. Although no statistics exist, most of the decisions of the appeal courts are published, and the number of awards set aside or modified through appeal seems very low.

The country has a vast legal community and a number of lawyers actively involved in arbitration, both as counsels and arbitrators.

Though located in the western extreme of Europe, Portugal continues to have a very strong relation with its former African colonies (Angola, Cape Verde, Guinea-Bissau, Mozambique and São Tomé and Príncipe), and most of them still have their legal system based in the Portuguese matrix. Together with a common language, this law commonality places Portuguese practitioners in a privileged position to assist in the development of international arbitration involving those countries.

The trend is therefore to take advantage of all these aspects and continue to develop arbitration in Portugal.

Notes

1 The Board of Directors pf the Portuguese Arbitration Association, working pro bono. The authors of this text were part of the seven drafters

2 English, French and Spanish translations of the law are available at http://arbitragem.pt/legislacao/.

3 The LAV accepts, with almost absolute flexibility, the rules of national and international centres, and therefore many of the articles of the LAV have just a subsidiary application in the case of institutional arbitration.

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PLMJ is Portugal's largest law firm. It has one of the leading arbitration practices in the country and is the market leader as regards international arbitration.

The team is the largest in Portugal (at least14 lawyers have arbitration as the main focus of their activity) and PLMJ is the only Portuguese law firm that has litigation and arbitration as distinct units and is therefore much more specialised. Many members of the team have postgraduate studies in arbitration and one of them is preparing his PhD in arbitration, the first ever in Portuguese universities.

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