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Arbitration - Portugal

Can Shareholders' Resolutions Be Annulled by Arbitral Tribunals?

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The Lisbon Court of Appeal has confirmed an arbitral award in which the tribunal annulled resolutions adopted by a shareholders' meeting.(1) This is believed to be the first time that an arbitral award annulling a shareholders' resolution has been brought before a Portuguese appeal court.

Facts

The dispute arose from a shareholders' meeting that took place in 2005. Following the meeting, a shareholder commenced arbitral proceedings against the company, seeking the annulment of the resolutions adopted at the meeting. The shareholder argued that:

- it had been unlawfully prevented from participating in the meeting;
- the meeting had not been quorate; and
- the minutes of the meeting had not been drafted by a public notary, as the shareholder had requested.

The company opposed the claim and asked that the proceedings be dismissed.

After some procedural issues had been resolved and a full hearing had been held, an award was rendered in the claimant's favour, annulling the resolutions adopted at the meeting.

The parties had not waived their right to appeal the award and the company therefore appealed to the Lisbon Court of Appeal.

Decision

The court upheld the tribunal's decision. No objections regarding the tribunal's competence or the arbitrability of the dispute were raised.

Comment

The Companies Code provides that resolutions adopted by a shareholders' meeting can be challenged in legal proceedings, which must be brought by a shareholder against the company.

Article 1(1) of the Arbitration Law states that a dispute may be submitted to arbitration if it does not concern rights that cannot be waived by the will of the parties. Although this criterion is wide enough to allow most disputes to be arbitrated, it presents difficulties and gives rise to certain grey areas. This is a particular problem where the outcome affects third parties, as in the case of disputes over the validity of corporate decisions at shareholders' meetings. As in the present case, the annulment of a resolution affects all of the company's shareholders, regardless of whether they were aware of the proceedings, since original deliberation (in principle) can no longer be invoked for any purposes. Portuguese experts have long considered the issue, but have not established a definite position.

A normal reading of the law imposes no barriers to the arbitration of disputes between companies and their shareholders.

In the case in question, it appears that the parties and the tribunal had no doubt as to the validity of the arbitration clause or the tribunal's competence; nor did the court comment on either point. However, as the question was not expressly raised and answered, it remains unclear whether the decision indicates that the court considered

the arbitration clause to be fully valid. Although most experts agree that nothing in the law prevents such disputes from being resolved by arbitration, some specific aspects require closer analysis.

In such cases the other shareholders may well have a legitimate interest in participating in the proceedings, particularly if they wish to preserve the effects of the disputed resolution. However, like many other national arbitration laws, the Portuguese legislation contains no provisions regulating third-party intervention. How can other shareholders participate?

The lack of legislative guidance should not be a problem, as in order for an arbitration to proceed, the company's articles of association must include an appropriate provision. Therefore, another shareholder may make use of this provision and apply to participate in the proceedings. However, is the tribunal bound to accept this?

The law is silent on whether the tribunal must accept such an application, but it is strongly arguable that - at least in principle - it is bound to do so. The third party cannot commence parallel proceedings in order to reverse the effect of the tribunal's decision; even if it could, the award in such proceedings would probably not be rendered in time to counteract the award in the first arbitration. Therefore, by barring the intervention, the tribunal would be endangering the third party's legitimate rights.

What is the position if the third party was unaware of the proceedings? Actions filed in state courts are not confidential and it is relatively easy to check whether a claim has been filed. In the case of claims involving a challenge to a corporate resolution, this is even easier, as the claim must be filed within a given period (normally 30 days) of the adoption of the resolution. Conversely, arbitration proceedings tend to remain confidential and a third party may be unaware of them until a decision is rendered. As a result, the tribunal must consider the possibility that the dispute is unknown to the other shareholders, particularly as such claims may be brought in an attempt to target the interests of a specific shareholder or group of shareholders.

The tribunal should ensure that the arbitral claim is registered at the company's official registry as soon as possible. In state courts, claims in such disputes cannot go beyond initial pleadings unless evidence is presented that the claim has been registered in this way. The same requirement should be applied to arbitral proceedings. However, there are no other general solutions to the problem; rather, it is the tribunal's responsibility to consider whether specific precautions are required. In particular, tribunals should seek to ensure that they are not being used by a shareholder to achieve unlawful aims that prejudice the rights of other shareholders and, ultimately, the company. Special attention should be paid to cases in which:

- the tribunal has reason to believe that a disagreement or difference of interests between shareholders has already become a full-blown dispute;
- the decision sought will clearly affect other shareholders; and
- the arbitration is being initiated as a result of an arbitration agreement between the company and certain shareholders and to the exclusion of others, rather than under an arbitration provision in the articles of association.

Arbitration practitioners will welcome the fact that the court appears not to have questioned the arbitrability of disputes between a company and its shareholders. However, recognition of the possibility of submitting such matters to arbitration should go hand in hand with an acknowledgement of the greater duties that such cases impose on arbitrators.

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Endnotes

(1) Case 7431/2007-1.