ADR Methods in Portugal: General Overview and Recent Trends

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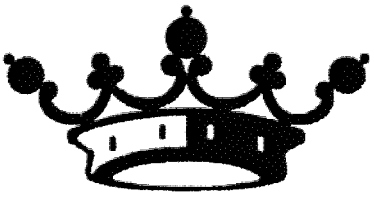

ASPATORE

General Overview

Despite recent transformations in our traditional concept of justice—i.e., expansion to more diversified, effective, informal, and simplified methods for resolving disputes—and apart from some specific and limited experiences, the development of alternative dispute resolution (ADR) methods in general is still quite embryonic in Portugal, especially if compared with other European countries and with countries of the common law system.

In the last twenty years, there has been an exponential rise in the number of disputes in Portugal which, together with the problems associated with our traditional judicial dispute resolution system—based on its lack of timely response, due to frequent lengthy delays, consequent costs, unwanted publicity, and ill will—has opened the door to ADR methods, and is leading to a progressive use and development of these methods. Therefore, signs of the increasing importance and popularity of ADR in recent years are evident and numerous.

In this context, the government approved a general resolution to recommend and promote ADR methods (Resolution no. 175/2001 of the Council of Ministers) as a solution to the rupture or excessive demands on the state court system.

However, there is still a commonly held ignorance and suspicion toward ADR, which obstructs the full growth, progress, and definite consolidation of these methods. Lawyers and other legal practitioners are still quite reluctant to advise their clients regarding ADR methods (especially other than arbitration). Only upon a significant evolution in such attitude can these methods be improved according to our social and cultural special needs and, thus, achieve a different position in our legal practice.

The relevant ADR methods in Portugal are generally classified into four major types/techniques: negotiation, mediation, conciliation, and arbitration. Standing between some of these methods and state court justice there is also an original and significant mixed experienced called *Julgados de Paz (Peace Courts)*. Apart from this, there are some minor or experimental expressions of other types of ADR methods or combined solutions, such as med-arb and binding or arbitral expertise.

Probably due to its closer similarity to the judicial method and to its historical background and increasing worldwide importance, arbitration definitely occupies a prominent position, both in our legal system and experience, and will, hence, be herein granted special focus.

Nevertheless, before taking a deeper look into arbitration—namely its current legal status, trends, and expected changes and development—it is important to situate each of the above-referred ADR methods.

Negotiation

In negotiation, the parties undertake to voluntarily discuss the dispute and all possible consensual solutions that may serve their interests, but there is no third party who facilitates the process or imposes a solution. All possible solutions must be discussed and agreed between the parties.

Ultimately, it could be said that negotiation is present in almost all ADR methods that are not settled by means of a jurisdictional decision. For this reason, it often is not qualified as a real autonomous ADR mechanism, but rather as a component of any and all ADR methods.

If compared with its commonly known features, there is no specific distinctiveness in this ADR method within the Portuguese jurisdiction.

Nevertheless, insofar as it is desired as a necessary step in dealing with a possible dispute, the use of negotiation should be clearly set in a contractual clause agreed to by both parties, so that they are compelled to proceed this way before turning to any other alternative or traditional dispute resolution methods.

It is also advised that the terms and steps of the procedure, such as a maximum duration, be accurately established in order to avoid a situation where any of the parties becomes a prisoner of this method, and to prevent any negative consequences that it may bring to the following contentious stage, especially if it is arbitration.

Finally, insofar as it is applicable to the matter at stake, the terms of the settlement reached at the end of the negotiation should be written and

signed by both parties or even notarized so as to comply with article 46 (1) b) or c) of the Portuguese Civil Procedure Code and enable its direct enforcement before judicial courts.

Mediation and Conciliation

Unlike negotiation, both mediation and conciliation methods rely on the intervention or assistance of an impartial third party to facilitate the resolution process.

Due to its notorious similarities, at first glance it could even seem that these methods are ultimately the same, since both of them involve the participation of an external intermediary and neither of them results in the imposition of a certain solution to the parties.

In common terms the distinction between the methods lies in the degree or intensity of the intervention of the party acting as intermediary (mediator or conciliator), but the borderline between both methods is in fact very thin, and some commentators opine that there are no substantial differences.

Usually, whereas in mediation, the third party simply guides the negotiation between the parties so as to optimize their needs and to enable them to find a proper solution on their own, in conciliation the third party actually leads the process by lowering tensions, providing technical assistance, seeking concessions, exploring potential solutions, and bringing about a negotiated settlement.

Conciliation is usually based on the existence of more acute communication difficulties between the parties in dispute. In this case, the parties accept the possibility of an agreement but do not have the will to initiate and pursue direct negotiations.

In order to overcome this unwillingness to negotiate or even establish a dialogue between the parties, the conciliator is commonly forced to conduct the proceeding through separate meetings with each party, rather than by means of general discussion meetings. These separate meetings are intended to encourage the parties to start an open dialogue and unblock this initial barrier, to search for eventual points of confluence between their individual

positions and interests, and even to recommend a certain neutral and rational solution, based on what seems to be the best equilibrium between both parties' interests and a balanced solution for the case.

As a consequence, in conciliation the parties seldom face each other across the table in the presence of the conciliator. Conversely, mediation is typically conducted by joint meetings between both parties and the mediator. The mediator starts by questioning each party's interests and motives, and will then seek for any points of confluence upon which an agreement can be built.

However, the practice in Portugal is that these routines or characteristics correspond more to different techniques used by the intermediary within a common ADR mechanism than to different and autonomous ADR methods to be implemented by persons or organizations with different qualifications.

Moreover, in certain cases where reference is expressly made to conciliation, Portuguese law seems to differ from the common pattern, notably by conferring a more limited role to the conciliator. This is what occurs in conciliation stages considered mandatory by law in a dispute presented before the state courts where the judge acts as conciliator and has no other power than to stimulate dialogue between the parties.

Apart from this, when negotiations come to a deadlock, the mediator/conciliator has the power to creatively suggest new methods of dialogue between the parties, using techniques that seem adequate according to the case at issue and to the parties' subjective features and emotions. For this reason, a good mediator/conciliator is characterized by the experience and ability to cope with impasse situations

As soon as the parties reach an agreement with their guidance, the mediator/conciliator must synthesize the conclusions obtained and draft a final agreement, to be signed jointly with the parties, which will bind the parties in that extent. It is very important that the agreement should be written in such terms that enable its direct enforcement before judicial courts, notably under article 46 (1) c of Portuguese Civil Procedure. In case no agreement is reached, the parties' inability to agree should also be put in writing and signed by all participants.

Mediators and conciliators cannot impose a certain solution, but the parties may exceptionally agree to grant the power to actually settle the case to the conciliator, who from that moment on would be vested as an arbitrator, based on a written arbitration agreement to be executed between the parties.

This possibility, however, raises significant practical and legal issues, and therefore, it should generally be avoided and used only in very exceptional cases under a particular justification.

New Developments Regarding Mediation in Portugal

In conclusion, the effectiveness of any of the aforementioned solutions will depend not only on the ability of the conciliator/mediator to analyze the parties' intents, refrain their emotions, search for any points of confluence, and create the conditions for a possible agreement, but also on the parties' ability to expose their concerns and purposes in an objective and rational way.

Even though, as referred above, Portugal is still taking the first steps in mediation/conciliation, this ADR method has been experiencing an increasing development throughout the last decade, and is already proving to be very useful in certain specific types of conflicts (such as family, neighborhood, and consumer matters), as it is more expeditious and cost-saving, and encourages the parties to maintain and restore their original relationship.

In light of this recent positive experience and results deriving therefrom, our government recently created three institutional mediation systems:

- Labour Mediation System, created by Protocol executed on May 5, 2006 between the Ministry of Justice, the Portuguese Industry Confederation, the Portuguese Commerce and Services Confederation, the Portuguese Tourism Confederation, the Portuguese Farmers Confederation, the Portuguese Workers General Confederation, and the General Union of Workers—available in all national continental territories for labor issues, with a fixed cost and an average length of twenty-eight days
- Family Mediation System, created by Decree no. 18 778/2008, of July 13—available in all national territories for family-related issues, with a fixed cost and an average length of two months

- Criminal Mediation System, created by Law no. 21/2007, of June 12—available in some of our major districts for certain minor crimes, free of costs with a maximum length of three months.

In addition, the European Parliament and Council Directive no. 2008/58/CE on civil and commercial mediation approved on March 21, 2008 (see Appendix A), was enacted into the Portuguese legal system by means of Law no. 29/2009, of June 29, 2009, which extended the Directive's provisions to proceedings concerning both domestic and transnational civil and commercial relationships. This statute introduced four innovative articles regarding mediation in our Civil Procedure Code—i.e., articles 249-A, 249-B, 249-C, and 279-A, in force as of June 30, 2009 (see Appendix B).

It is definitely a peculiar solution that the mediation procedure as an ADR method was integrated in the Civil Procedure Code. The opportunity should have been used to create an independent statute for civil and commercial mediation in order to ensure the necessary dignity and autonomy of this method. Notwithstanding, the enactment of the above referred new set of rules on civil and commercial mediation must be considered a substantial improvement of ADR in Portugal.

The first three of the referred articles rule pre-judicial mediation, by allowing the parties to refer to mediation systems before submitting a certain dispute to judicial courts, thereby suspending all prescriptive or limitation periods while the mediation proceeding is pending (article 249-A), by determining that any arising agreements must be confirmed by a judicial court with jurisdiction over the issue—otherwise, the parties are obliged to submit an alternative agreement within a ten-day period (article 249-B)—and by imposing full confidentiality of all proceedings, so that, only in exceptional circumstances, notably when someone's physical or psychological integrity is at risk, may the content of mediation sessions be valued as evidence (article 249-C).

On the other hand, article 279-A rules on interim mediation by determining that civil procedures may at any stage be referred to mediation, either upon the parties' agreement, for a maximum period of four years (irrespective of judicial confirmation), or by judicial decision. The ongoing judicial

proceedings will be suspended until the mediation stage is concluded and an agreement is reached or found impossible. If an agreement is reached, the file will be forwarded to the judicial court, and the proceeding will be concluded by a transaction with the homologation of the court. On the contrary, if no agreement is possible, as soon as the mediator informs the court of that impossibility, the judicial proceedings will automatically continue, and its suspension will cease.

General Advantages and Problems of Negotiation/Mediation/Conciliation in Portugal

In general, any and all of these ADR procedures are characterized by the following main features that strongly differentiate them from traditional judicial litigation:

- Flexibility: The parties may extend or limit the initially submitted case, and thus the case settlement, throughout the proceedings, regardless of the *thema decidendum* to which judicial courts and arbitrators are traditionally bound; possible combination of ADR methods according to the evolution of negotiation; major focus on the parties' interests and not on their rights; fewer procedural limitations enabling a wider and almost unlimited discussion of the case;
- Celerity in the achievement of a solution, especially when compared to traditional civil proceedings where the average length for resolution in first instance is estimated to be around four years
- Expected higher level of specialization of the third party intermediating the conflict
- Cost reduction: Considering the low complexity and higher celerity of the proceedings
- Efficiency: Genuine interest in a consensual solution and confidence in the efficiency, neutrality, seriousness, and enforceability of the adopted ADR method for the dispute by the parties
- High rate of success: Based on the parties' willingness to amicably resolve the dispute and their inherent responsibility to respect all agreements obtained in it; results known showing success rates of 80 or 90 percent

- Preservation of the parties' commercial relationship: Dispute resolution involving close dialogue and deeper understanding of the counterpart's position usually makes the proceeding more friendly and rational
- Confidentiality of all issues discussed and agreements reached

The parties are not obliged to be advised or escorted by lawyers or paralegals, but it is advisable to do so, so as to be better prepared to understand the exact legal implications of any and all discussed proposed or possible solutions regarding pending or envisaged cases.

Despite these numerous benefits, Portugal is still far removed from other European countries in what concerns the use and relevance of the above-referred ADR methods, and more so if we consider the important field of commercial and high value disputes.

Commentators point out the need for proper and closer regulation, such as: (i) the definition of rules for the creation and functioning of mediation and conciliation centers, their social scope and guarantees of exemption, (ii) explicit terms of enforcement of mediation and conciliation agreements by judicial courts, (iii) mediation and conciliation ability exclusively attributed to authorized centers, preventing usual problems related to ad hoc mediation, (iv) general specification of the obligations and duties of mediators and conciliators that can hold them liable for damages caused due to their breach, and (v) prohibition of legal advice by mediators, conciliators, and respective chambers, clarifying the legal restriction of such activity to lawyers and paralegal officers.

However, even though regulation is much needed and appreciated in these matters, legislators are not the only ones to blame for our, so far, incipient practice in mediation/conciliation methods in Portugal. On the contrary, lawyers and other legal practitioners also play an important role in this situation, since they are still very reluctant to address their clients to these methods, and thereby, block their development and actual growth.

Therefore, when advising their client on ADR methods, Portuguese lawyers and practitioners should also be strongly committed to enabling a profitable dialogue between the parties and to searching for a mid-way solution,

according to the client's interests and instructions. In Portugal, lawyers are always imposed with professional secrecy over all information exchanged during negotiations when an agreement is not reached, and should not encourage their client to adopt warlike and delaying attitudes.

Julgados de Paz (Judges of Peace)

In addition to these most common and worldwide ADR mechanisms, in 2001, based on a French experience, the Portuguese Parliament approved another institutional dispute resolution method, located halfway between the judicial and alternative systems—*Julgados de Paz* (Courts or Judges of peace).

Julgados de Paz are legally and constitutionally recognized non-judicial courts, created by Law no. 78/2001, of July 13 and implemented by governmental decree aiming at achieving a faster, cheaper, easier, and closer dispute resolution method. This alternative method is intended to encourage the parties' civic participation and to stimulate a fair and agreed-upon dispute resolution, based on general principles of simplicity, adequacy, informality, oral discussion, and absolute judicial economy.

These alternative courts hold limited jurisdiction over civil quarrels that do not exceed € 5.000—namely, delivery of movable assets, condominium issues, possession, acquisitive prescription and accession, urban rental (except eviction), contractual liability and torts, and civil claims resulting from certain criminal acts. Family, labor, succession, and criminal matters are utterly excluded from this simplified procedure.

According to data included in recent statistics published by the Ministry of Justice in 2009, most cases submitted to the above-mentioned courts related to condominium issues (46.5 percent), contractual breach (14.6 percent), contractual liability, and torts (14.3 percent).

It was initially discussed whether the jurisdiction of these courts should be exclusive or alternative, but it is now almost unanimously agreed that—at least, *de iure condito*—*Julgados de Paz* are mere alternative courts, whose competence depends on the submission of the case by one of the parties.

The procedure begins by the presentation, before the court's secretariat, of a simple initial statement based on a standard form available to the public. This initial statement may also be orally communicated to a court officer, who will put it in writing. The respondent will immediately be summoned to prepare and file a response.

If none of the parties refuses the possibility to settle the case by mediation, a mediation stage will follow, beginning with a pre-mediation session intended to explain the aims of this stage and to assess the parties' willingness to discuss a possible solution through this method. Should the parties accept to undergo this stage, they may appoint a mediator among the court's list of mediators, and immediately initiate mediation sessions.

It must also be mentioned that a dispute can be submitted to this mediation process even if the matter falls outside the scope of jurisdiction of the *Julgados de Paz*, although it may not be subject to the following stage.

If an agreement is reached during the mediation stage, it is written, signed, and sent to the competent *Juiz de paz* (judge of peace) for immediate ratification, having the value of any judicial award. If the parties fail to reach an agreement during the mediation stage, the case will be referred to that same judge *Juiz de paz* (judge of peace) to schedule a trial hearing.

The trial is very informal, usually conducted in a conference room around an oval or round table, where parties will sit by the side of the judge, facing each other. With no particular order or fixed procedure, the judge will hear each party and their witnesses, and analyze any documents or other evidence presented.

If no agreement is reached during this stage, the judge will render a final decision, equivalent to any first instance judicial decision, which will immediately be orally communicated to the parties before the end of the trial and written down for appeal and enforcement purposes. Despite the referred equivalence, these decisions are appealable only to our first instance judicial courts and not to High or Supreme Courts.

The major advantages of this method are its informality, its customary celerity (an average two months' length), its low cost (with a maximum fee of € 70 per party, if no agreement is reached), and its enforceability.

Conversely, the major problems with these procedures, which were recently debated during the Commemoration of the eighth year of the *Julgado de Paz* of Lisbon are, among others: (i) their similarity to judicial courts, leading to unbalanced comparisons; (ii) their unawareness and undervaluation, mostly by litigation lawyers; (iii) their alternative jurisdiction; (iv) the lack of assimilation between these judges and judicial judges and the lack of recognized exclusive jurisdiction; (iv) the low number of judges, increasing the current number of pending cases; (v) the need for further regulation on the Monitoring Board, giving seat to a judge of peace and a mediator; and (vi) the need for further analysis of comparative law.

Arbitration

Arbitration, rather than a direct/indirect negotiation method facilitated by a third party and settled by means of an agreement, implies the assessment of the case by independent individuals or individual (arbitrators or sole arbitrator) empowered by the parties to rule on the case (*ex aequo et bono* or according to strict rule of law) and render an enforceable award.

Arbitration is clearly the most entrenched, developed, and highly rated ADR method in Portugal, which has increasingly proved its importance and efficiency, especially in certain commercial areas. For this reason, we will henceforth focus our analysis on this particular method, regardless of some punctual references to the others, when adequate and necessary.

Arbitration procedures can be compulsory, if imposed by law, or voluntary, if submitted by the parties by means of an arbitration agreement. Compulsory arbitration is, nowadays, quite rare, especially in Private and Administrative Law, but it is still set forth, namely in our 1999 Expropriation Code and in our Labour Code, for collective labor disputes and in articles 1525 to 1528 of the Portuguese Civil Procedure, containing a few subsidiary rules.

Voluntary arbitration also used to be ruled within the successive Portuguese Civil Procedure Codes, where it was provided as an ancillary institution highly subordinated to judicial courts.

However, the legal source governing this ADR method is presently Law no. 31/86, of August 29 (*Lei da Arbitragem Voluntária*), as amended by decree-

Law no. 38/2003 of March 8 (hereinafter, "Arbitration Act") (see Appendix C). The 2003 amendment provided for some minor but important details, mostly as to the determination of the matter in dispute and to the ability to submit administrative disputes to institutional or ad hoc arbitration.

Since the approval of the Arbitration Act, arbitration has achieved a whole new status and level of appreciation in Portugal. This Arbitration Act rules on both domestic and international proceedings that take place in Portugal.

Besides the approval of this domestic law, in 1994, Portugal ratified the New York Convention, albeit limiting its application to the recognition and enforcement of awards rendered in other ratifying states, as well as the Inter-American Convention on International Commercial Arbitration, signed in Panama City in 1975 (although this last convention is not yet in force in Portugal because the respective adhesion instrument has not been deposited as required), and numerous bilateral conventions dealing with the recognition and enforcement of arbitral awards.

In addition, in 1984 Portugal ratified the 1965 Washington Convention on the Settlement of Investment Disputes between the states and nationals of other states; in 1988 it became a party to the Convention Establishing the Multilateral Investment Guarantee Agency; in 1996 it ratified the Energy Charter Treaty; and it entered into a great number of bilateral investment treaties (BITs) which allow recourse to arbitration under the auspices of the International Center for the Settlement of Investment Disputes (ICSID) as well as other international rules of arbitration (ICC or UNCITRAL).

Finally, in 2002, the Code of Procedure in Administrative Courts was approved establishing a commitment concerning the arbitration of disputes with public entities in matters related to administrative contracts, extra-contractual liability of the state, and some unilateral administrative acts.

Voluntary arbitration can be held before ad hoc or institutional tribunals. In ad hoc arbitrations, the parties themselves commit to organize the tribunal and all procedures and measures necessary to rule on the case, whereas in institutional arbitrations, the parties submit the case and its organization to a specialized institution that abides by its own regulations and possesses an administrative infrastructure prepared to organize the course of the arbitral procedure.

The Arbitration Act was complemented by Decree-Law no. 425/86, of December 27, ruling on the creation and approval of arbitration institutions. In addition, in order to plan and execute policies and services for alternative dispute resolution, a public administration office was created within the Ministry of Justice—the Office for Alternative Dispute Resolution (*Gabinete para a Resolução Alternativa de Litígios (GRAL)*).

Presently, there are approximately thirty arbitral institutions in Portugal authorized to deal with disputes in various matters, with limited jurisdiction over certain territories and/or types of cases—notably consumer-related disputes, intellectual property, car insurance, and commercial disputes.

The major Portuguese commercial arbitration institution is the Arbitration Center of the Lisbon Commercial Association within the Portuguese Chamber of Commerce and Industry (commonly referred to as *Centro de Arbitragem Comercial (CAC)*).

This Arbitration Center has a standard suggested arbitration clause (see Appendix D), and arbitration proceedings are governed by a new set of rules in force since 2008, along the lines of the current tendencies of commercial arbitration (see Appendix E).

According to these rules, arbitrators are selected from an existing list, and the costs involved in an arbitral proceeding include the fees and personal expenses of the arbitrators, administrative fees, and the expenses incurred in the presentation of evidence. The value of the proceedings, corresponding to the immediate economic utility of the claim, is set by the chairman of the Center. Following a general rule in Portugal, arbitrators' fees are determined depending on the value of the proceedings and according to a predetermined scale (see Appendix F).

Due to their social importance, the above-referred GRAL technically and financially supports the following arbitration centers, where the average length for the resolution of a certain dispute is currently estimated at three months:

- Centro de Arbitragem de Conflitos de Consumo do Distrito de Coimbra (CACCDC)

- Centro de Arbitragem de Conflitos de Consumo de Lisboa (CACCL)
- Centro de Arbitragem de Conflitos de Consumo do Vale do Ave (CACCVA)
- Centro de Informação de Consumo e Arbitragem do Porto (CICAP)
- Centro de Informação, Mediação e Arbitragem da Região de Consumo do Algarve (CIMAAL)
- Centro de Informação, Mediação e Arbitragem de Consumo (CIAB – Arbitral Tribunal)
- Centro Nacional de Informação e Arbitragem de Conflitos de Consumo (CNIACC)
- Centro de Informação, Mediação, Arbitragem de Seguros Automóveis (CIMASA)
- Centro de Arbitragem do Sector Automóvel (CASA)
- Centro de Arbitragem Administrativa (CAAD)
- Centro de Arbitragem para a Propriedade Intelectual, Nomes de Domínio, Firmas e Denominações (ARBITRARE).

Although there is no reliable data on the total number of arbitrations conducted every year in Portugal, it seems that the rate of institutional arbitrations in commercial matters is still found to be lower than the rate of ad hoc arbitrations. Institutional arbitrations are preferred in international disputes were clients and practitioners consider it to be more important. In this instance, mention should be made to the International Chamber of Commerce (ICC), as the more commonly used international institution.

According to our current Arbitration Act, all disputes that do not concern inalienable rights (rights or claims that cannot be waived or freely disposed of by the respective beneficiary) may be submitted to voluntary arbitration provided such a matter is not reserved by a specific law to judicial courts or to mandatory arbitral tribunals. This arbitrability criterion has however been criticized, as it gives rise to many practical doubts and difficulties especially deriving from the difficulties in establishing the definition frontier of the concepts of inalienable and waivable rights.

In what concerns the arbitral proceeding, the Arbitration Act merely provides general guidelines, leaving a wide freedom to the parties and arbitrators as to the definition of the applicable rules.

Voluntary arbitrations are based on an arbitration agreement, which, in order to be valid and effective, must be made in writing, and that agreement should be as wide and complete as possible, especially in ad hoc arbitration, where there is no preexistent set of rules, and in international arbitration, so as to prevent the usual problems notably in what concerns the lack of determination of certain crucial aspects.

Specifically, among other possible aspects, the arbitration agreement should (directly or indirectly) (i) describe the submitted disputes; (ii) determine the arbitrator's fees and the way of providing for other costs of the arbitration; (iii) determine the place of arbitration and the procedural language (particularly in international arbitration); (iv) determine whether to admit or exclude judicial appeals; (v) set a time limit for the rendering of a final award longer than the unreasonable short default period provided in the Portuguese arbitration act; and (vi) empower the arbitral tribunal to order interim or conservatory measures, to avoid any and all doubts. In order to ensure the validity and completeness of arbitration agreements, the parties should always seek legal advice before signing any proposal.

Although it cannot be said that there is a uniform familiarization and approach within the Portuguese court system in regard to arbitration, our courts are usually quite favorable to this ADR method, as they do not hesitate to decline jurisdiction and refer the parties to arbitration whenever the existence of a written arbitration agreement regarding arbitrable matters is raised by one of the parties.

According to data included in recent statistics published by our Ministry of Justice in 2009, most cases submitted to the above-mentioned supported arbitration centers related to insurance issues (42 percent), transport, storage, and communication issues (11.6 percent), commercial automotive issues (9.3 percent), and building issues (5.2 percent).

Arbitration entails administration and administrative costs. The first refer to remuneration of all work related to the organization of the arbitration—namely, the reception of the request for arbitration, notices to the parties, file preparation, etc. The latter refer to proceeding costs, such as travel and stay expenses incurred by the arbitrators, travel costs incurred by experts, expertise costs, etc. Apart from these, institutional arbitrations also entail

the payment of listed and published costs related to the functioning of the arbitration center. Finally, arbitration will also entail additional costs related to the arbitrators' fees, which are usually agreed upon between the parties and the arbitrators, without any official listing or limitation, and may thus reach significant amounts and increase the proceedings' global cost. In ad hoc arbitrations, where the proceeding is usually organized by the arbitrators, administration costs are usually included in the arbitrators' fees.

As in other jurisdictions, the pros of arbitration in Portugal and the advantages over the state courts are mainly specialization, flexibility, celerity, and confidentiality (although there is no general legal rule providing for express confidentiality, this is a widely accepted characteristic of arbitration. Besides, the parties may include a confidentiality provision in the arbitration rules and should do so if this aspect is considered important).

On the other hand, the disadvantages of this ADR method are predominantly: cost (it tends to be more expensive than proceedings in state courts), absence of *ius imperii* (powers of coercion) of the arbitral tribunal (particularly to enforce interim measures or certain rulings regarding the taking of evidence) together with the lack of jurisdiction concerning third parties, and the excessive dependency of the state courts and of the parties' behavior or attitude.

Therefore in opposition to the Portuguese state court system, and despite the referred disadvantages, arbitration tends to be a more efficient dispute resolution method, based on the arbitrator's awareness of the dynamics of economic and corporate life and internal or international commerce, and their minor dependence on the traditional judicial procedures and rules. It entails a deeper participation by the parties in the definition of the arbitral procedural rules and in the choice of the arbitrators, an expected specialization of the arbitrators appointed on the matters at issue, and the expectation of a fair and adequate decision. Moreover, it is usually a faster procedure and decision-making process, avoiding state justice delays and inherent costs.

Current Status and Recent Trends in Voluntary Arbitration in Portugal

Voluntary arbitration arose in private law matters, especially commercial law. In the past few decades, its success has been mostly associated with

international commercial transactions and resulting disputes. In addition, we have recently observed an increase of arbitration procedures involving the state or some other public entities, namely regarding the protection of foreign investments.

Despite the undeniable merits of our 1986 Arbitration Act, more than twenty-four years after its enactment, Portugal is clearly in need of a new and refreshed Arbitration Act, in light of the pros and cons of our experience and in line with the modern concepts and trends prevailing in the field of commercial arbitration.

In fact, at the time it was enacted, the existing Arbitration Act represented an enormous example of progress in the Portuguese legal system and enabled voluntary arbitration to achieve its current and rising status in Portugal. However, it is now inevitably outdated in many aspects. Moreover, all its defects and omissions have become increasingly visible, not only as a result of the experience acquired by its practical application all through these past years, but also from its comparison with other international experiences and legal systems.

In this context, the Portuguese Arbitration Association (*Associação Portuguesa de Arbitragem* - APA) presented in April 2009 a proposal for a new legislative bill. Unfortunately, the parliamentary term interrupted the ongoing legislative process, but a renewed legislative bill is expected to be soon presented in Parliament.

The Proposal is based on the UNCITRAL Model Law. It intends to overcome the major inaccuracies and inefficiencies of the existing Arbitration Act, and aims at placing Portugal in a competitive position among other arbitration seats by harmonizing its laws with international arbitration rules, such as those found in most European, American, and Far Eastern countries.

This being said, and since the mentioned legislative bills were prepared by some of the most experienced university professors and lawyers in Portugal, the analysis of the proposals therein contained constitutes the best form to illustrate, on the one hand, the problems of the existing Arbitration Act and, on the other hand, the upcoming development in our legislation and in the general panorama of arbitration in Portugal.

For this purpose, among other innovative measures, we would point out the following as some of the most important proposals introduced by the new 2010 legislative proposal:

i. Modification of the arbitrability criterion (following the solution of German Law), no longer limited to the alienability of the concerned rights but based, firstly, on the pecuniary nature of the concerned rights and, secondly, on the ability to freely dispose of such rights and achieve a voluntary compromise over the subject matter of the dispute.

ii. More flexibility for compliance with the requirements imposed by law for the formal validity of the arbitration agreement, namely its written form, as suggested by UNCITRAL. Moreover, as set forth in Swiss and Spanish laws, the substantial validity of the arbitration agreement should be analyzed according to the various legal systems involved, so as to ensure its validity under all eventually applicable legal systems.

iii. Clear definition of how to combine the competences of arbitral tribunals and other judicial courts called to ultimately rule over a certain arbitral decision, in view of the so-called negative effect of the "kompetenz-kompetenz" principle (i.e., the arbitral tribunal's power to rule on its own jurisdiction, even if it implies an assessment of the existence, validity, and effectiveness of the arbitration agreement). Among these new rules, the 2010 legislative bill proposes that the arbitral competence-competence decision may be challenged before judicial courts, within thirty days after its summoning, although it will not suspend the effectiveness of such decision, and that judicial courts should acquit the respondent from the proceedings if the latter alleges that the arbitration agreement was breached (unless such agreement proves to be clearly void, ineffective, or unfeasible).

iv. More accurate definition of the terms of the constitution of the arbitral tribunal, and of the grounds to challenge arbitrators, namely by including express reference independence and impartiality as fundamental requisites for the arbitrators' appointment and exercise, in line with the constitutional principles applicable to all courts.

v. In order to prevent the usual obstacles to the beginning of the arbitral proceedings related to the definition of fees and expenses

to be paid to the arbitrators, when the parties have not ruled so, such amounts should be fixed by the arbitral tribunal, albeit this decision may be revised and amended by the judicial courts.

vi. Clarification of the ability of judicial state courts to award interim measures related to ongoing or future arbitration proceedings and close regulation of its terms and conditions, in view of the rules laid down in the UNCITRAL Model Law. These latter provisions are based on the distinction between "interim measures" *stricto sensu*, depending on the respondent's previous hearing and enforceable in cooperation with judicial courts, and "preliminary orders"—by nature, short termed and not coercively enforceable, if necessary ordered without hearing the respondent, and aimed at preserving an existing situation while the arbitral tribunal is not able to order an actual interim measure.

vii. Definition of the arbitral procedural rules regardless of civil procedure rules applicable to judicial courts, even though either the parties or the arbitrators—within their power to regulate the proceedings—may refer to those rules. So being, in the absence of any applicable provisions, the arbitral tribunal may conduct the arbitration in such a way as it considers appropriate, and issue the procedural rules that it deems adequate.

viii. Implementation of peacefully accepted solutions, both in our legal doctrine and comparative arbitration law, such as the absence of negative evidentiary effects, resulting merely from the respondent's failure to submit a statement of defense or its lack of intervention in the proceedings.

ix. Admissibility of spontaneous or induced third party intervention in the arbitral proceedings and definition of the default terms and conditions under which such intervention should be made in pending arbitrations.

x. Definition of a longer time limit for the arbitral tribunal to make and serve the parties with the final award on the substance of the case, in line with the UNCITRAL Model Law and, among others, the modern German and Spanish arbitration laws. As a matter of fact, in view of the unrealistically narrow six-month time limit established in the existing Arbitration Act, the 2010 bill proposes the introduction of an initial twelve-month time limit, extendable by the arbitral tribunal regardless of the parties' consent, for equal successive periods, upon adequate justification. To prevent the parties' interests

from being totally neglected, the mentioned legislative bill also establishes that, albeit the parties' consent is not required, these time extensions may be prevented by the parties' joint opposition or by one party's request for the arbitrators' dismissal, filed before the competent judicial court and based on the arbitrators' lack of due diligence.

xi. The arbitrators' ability to rule the case as "*amicable composeurs*," even in domestic arbitrations, if the parties agree to grant them such power.

xii. Reversal of the default rule regarding the appeal of final arbitral awards, so that, from now on, as occurs in the Model Law, unless the parties rule differently in the arbitration agreement, final arbitral awards are not appealable and may only be challenged by means of a legal action to obtain its annulment, to which neither party can waive in advance. As such, arbitral awards may only be appealed if the parties have expressly ruled that possibility in the arbitration agreement and the case was not decided *ex aequo et bono*. This measure will finally put an end to some of the fiercest critiques to the existing Arbitration Act, by limiting the uncertainty naturally occasioned by these challenge mechanisms and accelerating the achievement of an ultimate decision for the case.

xiii. Additional powers granted to the arbitrators after the final award notification, at either party's request—namely, to rectify or clarify the decision, as well as to render an additional award over certain pleadings or parts of a pleading omitted by the arbitrators.

xiv. Regulation of the legal action to obtain the annulment of an award as a procedure, to be filed before our Courts of Appeal or Central Administrative Court, according to the nature of the case, and conducted as an appeal ("*recurso de apelação*"), albeit it is not intended to review the substance of the case. Further appeals, to the Supreme Court of Justice or Supreme Administrative Court, will be limited to the exact terms and conditions defined in the applicable procedural law.

xv. New list of grounds for objection to the arbitral award construed upon those listed in the UNCITRAL Model Law and the most significant ones contained in the existing Arbitration Act.

xvi. Definition of a sixty-day period (shorter than the existing one and the one established in the UNCITRAL Model Law and the

German law), to file legal action to obtain the annulment of an arbitral award, in order to limit to a reasonable minimum the uncertainty of the arbitral award during this stage, in line with the Spanish law.

xvii. In line with the German law, no party may apply for stay of execution based on a certain cause of annulment of the award, if no legal action for the annulment of the arbitral award was filed, in due time, with that same ground. The opposite solution was permitted by the current Arbitration Act and fairly criticized by Portuguese specialized legal doctrine.

xviii. In international arbitrations, no state or public-controlled organization or company may use its domestic law to evade the obligations deriving from the arbitration agreement.

xix. In light of the most recent arbitration laws, namely the 1998 German law and the 2003 Spanish law, the parties may choose a non-governmental legal system based on generally recognized principles and rules of law to rule the case. On the contrary, when the parties do not rule on the applicable law, the case should be decided according to the laws of the most closely connected state.

xx. Transposition of recognition and enforcement rules contained in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, granting the Courts of Appeal (2nd instance) jurisdiction over the recognition and the admission of enforcement of these awards. This is an important rule to overcome recent case law, contrary to the almost unanimous opinion of our legal doctrine.

xxi. Clarification of the competent state courts empowered to support and assist arbitral proceedings, as well as to define the procedural rules applicable to each of those assistance mechanisms.

xxii. Jurisdiction to render most decisions related to the proceedings' correct functioning and their conformity, as well as to the validity of all rendered awards granted to our Courts of Appeal or Central Administrative Court, according to the nature of the case, so as to concentrate this competence in these higher courts, not only due to their recognized level of experience but also due to their lower workload.

Some of the terms or solutions of the proposal are still under consideration by the government presently in office according to whom the new law on arbitration is to be issued by the end of this legislature ending in approximately three years.

Conclusion

The use of arbitration as an ADR method to decide disputes in Portugal has been growing since the approval of the Arbitration Act but the panorama has decisively evolved in the last decade. In fact, arbitration practice and culture is now much more dynamic than ten years ago.

The notion of an "arbitration community" seeking to promote the recognition of arbitration in Portugal has risen and matured.

A considerable number of scholars presently specialize in arbitration hence intensifying the quality and quantity of literature dedicated to the subject and consequently raising the level of expertise of the practitioners who, more and more frequently, intervene as representatives of the parties or as arbitrators in domestic and international arbitrations, as well as also being active in other arbitral matters.

Specific programs on arbitration and courses are offered by law schools and conferences and seminars occur regularly. Following this trend, in 2006, many respected scholars and practitioners founded the Portuguese Arbitration Association (APA), and in 2006, the Portuguese section of the Spanish Club of Arbitration (CEA) was created. The APA has also promoted the elaboration and approval of a code of ethics for arbitrators, which was previously nonexistent.

In addition, more and more contracts contain arbitration clauses and arbitration is prevailing as the favored method for the resolution of complex and high value commercial disputes involving interests in Portugal.

Arbitration is therefore highly recommended as a valuable ADR method in Portugal. However, significant steps still have to be taken to place Portugal in a competitive position among other arbitration seats side by side with the best international practices and with the reality of the most advanced legal

frameworks on arbitration transforming it into an advantageous seat for arbitration.

Portugal clearly needs a new law on arbitration based on the UNCITRAL Model Law, in line with the modern concepts and trends prevailing in the field of commercial arbitration, consequently overcoming the problems of the present Arbitration Act. The new law will modernize the arbitration regime as being a decisive element to raise the awareness of companies and professionals to the advantages of arbitration and the potential of electing Portugal as the seat of international arbitrations.

The intervention on the legal framework is therefore the most decisive move toward this objective. Others would be to reinforce reputable arbitral institutions and to establish mechanisms that stimulate courts to better familiarize themselves with the principles and characteristics of arbitration.

If these goals are attained together with the continuous development of arbitration, Portugal may consistently aim to reach a competitive position among other arbitration seats and a very significant role particularly in disputes involving Brazil and the Portuguese speaking African countries, or where the applicable law is the one of these countries.

Case Law - Brief Incursion

Case law on arbitration has increased proportionally as a direct consequence of the above described recent development of arbitration in Portugal.

With very few exceptions, arbitral awards are not usually published. Even though some cases may be given some publicity in specialized journals or in doctrinal or case law papers, due to their notorious interest, the confidentiality of arbitral procedures frequently prevents public access to such decisions.

Therefore most case law published on voluntary arbitration issues comes from our superior courts, especially in judicial appeals, annulment requests regarding arbitral awards, opposition to judicial executions based on a certain arbitral award or requests for review and enforcement of foreign arbitral awards, under the 1958 New York Convention, and interim or

conservatory measures in assistance to pending arbitrations as well as award appeals and annulment requests.

Although Portuguese courts still have scarce experience regarding ADR methods, more and more debated arbitration issues are currently being posed before the referred superior courts.

One of these issues refers to the conditions and terms of annulment of arbitration awards and, in particular, to the admissibility or inadmissibility of such annulment with grounds on a certain offense against public policy. The issue has been quite debated among our doctrine and case law, mostly favorable to the inadmissibility of any annulment reasons other than those listed in article 27 of our Arbitration Act (which does not include the offense against public policy).

A breakthrough analysis can be found in a recent decision rendered by our Supreme Court of Justice on July 10, 2008, according to which even though offense against public policy are not expressly provided for in article 27 of the Arbitration Act, this should be admitted as a justified reason for the annulment of an arbitral award.

Notwithstanding, most judicial decisions and legal commentators understand that article 27 contains an exhaustive list of annulment grounds that precludes the annulment of arbitration awards based on any reasons other than those therein listed.

In addition, according to some authors, the enlargement of this exhaustive list would enable the parties or their lawyers to control, by means of an annulment request, the merits of non-appealable awards (thereby, embezzling the appeal prohibition). As such, offenses against public policy could only justify the annulment of an arbitration award, either by inclusion in one of article 27's paragraphs (e.g., paragraph a) concerning the case's non-arbitrability; paragraph b) regarding the lack of jurisdiction of the arbitral tribunal or paragraph d) concerning the infringement of a fundamental procedural principle) or under the general principles of law.

Still to be determined is whether the relevant public policy should, in any case, be nationally or internationally circumscribed.

Finally, we note that the above described proposal for a new arbitration act does not contemplate the offense against public policy as a ground for annulment of the award, but this is precisely one of the aspects still under consideration and the government has publicly announced that it is favorable to a different solution defending the inclusion of such a provision in the new law to be approved.

Key Takeaways

- When advising their client on ADR methods, Portuguese lawyers and practitioners should be strongly committed to enabling a profitable dialogue between the parties and to searching for a midway solution, according to the client's interests and instructions. In Portugal, lawyers are always imposed with professional secrecy over all information exchanged during negotiations when an agreement is not reached, and should not encourage their client to adopt warlike and delaying attitudes.

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