RECENT AMENDMENT TO THE PORTUGUESE LAW ON VOLUNTARY ARBITRATION

The Portuguese Law on Voluntary Arbitration (hereafter referred to as "LVA") was enacted by Law no. 31/86, of 29 August 1986 and entered into force on 29 November 1986. Its adoption took place not only as an answer to the need felt, in this country, by the doctrine and the practitioners of this field of law but also in the wake of legislative reforms enacted in the field of commercial arbitration, in the last three decades, in many countries in Europe and other continents. It should be added that the fact that the UNCITRAL Model Law had been adopted in 1985 had a noticeable influence in the preparation of LVA and in the contents of some of its provisions.

The LVA provided Portugal with a Statute on commercial arbitration, which for most of its contents, was in tune with the trend set by the pieces of legislation that have been adopted in many countries dealing with commercial arbitration, both at the domestic and at the international level. The great majority of scholars, commentators and practitioners in this field of law acknowledged that the LVA was able to meet the requirements of the commercial operators for a means of dispute resolution which might be a serious alternative to the use of State courts, which are nearly paralysed by the overwork that has been affecting them to a rapidly growing extent.

Under the provisions of LVA, a party (the Plaintiff) wishing to submit the dispute to an arbitral tribunal, must notify the opposing party of that intent, by registered letter with acknowledgment of receipt. In its notification, the Plaintiff should indicate the relevant arbitration agreement and define the subject matter of the dispute, unless the same was already determined in the arbitration agreement (this could only occur if the arbitration

agreement was a *compromisso arbitral*, i.e., an agreement to submit an already existing dispute to arbitration, rather than a *cláusula compromissória*, i.e., an agreement to refer future disputes to arbitration). In the aforesaid notification, the name of the arbitrator or arbitrators appointed by the Plaintiff should also be indicated, as well as an invitation to the opposing party to appoint the arbitrator or arbitrators, which the latter would be entitled to appoint under the arbitration agreement [1].

When answering this notification, the Respondent could either (1) accept the definition of the subject matter of the dispute proposed by the Plaintiff; or (2) object to that definition, for instance, by arguing that it exceeded the boundaries set by the arbitration agreement or by invoking the non-arbitrability of the dispute under the Law; or (3) enlarge the notified definition of the subject matter of the dispute, without prejudice to the limits of the jurisdiction of arbitrators as set forth in the arbitration agreement itself.

Up to this point, nothing was provided in the LVA that differed significantly from what is provided in other Laws or regulations (foreign or international) dealing with voluntary (or commercial) arbitration.

The odd element existing up to now in the Portuguese Law on Voluntary Arbitration appeared in paragraph 4 of article 12.º which read as follows: "If within the time period (of 1 month counted from the appointment of the arbitrator(s) by the Defendant) the parties have not agreed upon the definition of the subject matter of the dispute to be submitted to arbitration, then the civil court of first instance should decide that issue (through a special procedure regulated by the Civil Procedure Code) and from its sentence an appeal was possible to the Court of Appeal".

[1] According to the provisions of the LVA, the appointment of the Chairman of the Arbitral Tribunal, would then be made either through the designation of a third entity (appointing authority) selected for this purpose in the arbitration agreement or, if nothing had been therein provided dealing with that issue and the Parties did not agree otherwise, such appointment would be made by mutual agreement of the arbitrators appointed respectively by the Plaintiff and the Defendant. Should all these methods of appointing the chairman of the Arbitral Tribunal prove to be ineffective, then such appointment would be made by decision of the President of the Court of Appeal.

This provision was unanimously criticized by the Portuguese scholars, commentators and specialized practitioners of commercial arbitration who have written on this issue, practically since the date when the LVA was enacted [2].

The grounds for such criticism were manifold. Most authors pointed out that opening the door for the parties (or, more precisely, for the party who might wish to postpone to the maximum the starting of the arbitration and thus to delay as much as possible the rendering of a final award that it feared might be detrimental to it) to fight before the State courts about the precise definition of the subject matter of the arbitral dispute, would mean creating a serious drawback to arbitration as an alternative means of resolution of commercial disputes (as opposed to litigation before State courts).

This argument continued to be used even after the amendments to the Civil Procedure Code enacted in 1995, which created and regulated a special and faster procedure for the judicial determination of the subject matter of the arbitration (though contemplating the possibility of one appeal to the Court of Appeal, to be processed as "urgent", as provided in that Code).

As a matter of fact, the critics of this possible State courts' intervention at the outset of an arbitral procedure kept on pointing out that, in addition to the unnecessary delays that it implied, the submission of such issue to the State courts was not in tune with the attribution to the arbitrators of the power to decide upon their own competence (in accordance with the well-known principle of *competenz-competenz,* which is accepted in article 21.º, nr. 1, of the LVA), such power being subject to State courts' scrutiny only

[2] see, for instance, Raúl Ventura – Convenção de Arbitragem – *Revista da Ordem dos Advogados* – 1986 – T. II – pp. 289-413. specially pp. 355 *et seq.* ; Francisco Cortez – A Arbitragem Voluntária em Portugal – *O Direito* – 1992 – T. III – p. 365-404, and T. IV- pp. 541-587, specially pp. 567-571.

after the rendering of the arbitral award on the merits of the case (see article 21.º, nr. 4, of the LVA) [3].

The only logical solution, whenever the parties did not agree about the determination of the subject matter of the dispute at the outset of the arbitration proceedings, would be to assign that task or mission to the Arbitral Tribunal itself, which would then decide, based on the proposal made to that effect by the Plaintiff and on the counter-proposal or objections made to the same effect by the Respondent, being obviously understood that, when settling such preliminary issue, the Arbitral Tribunal is bound, as it always is throughout the arbitration proceedings, by the limits or boundaries set by the arbitration agreement.

This solution was finally inserted into the LVA through a Government decree-law (Decree-law no.38/2003, of 8 March 2003, which made also a few other insignificant amendments to the same Law). This legislative amendment to the LVA has the meaning and the value of putting its contents fully in line with all the laws and regulations on voluntary (commercial) arbitration that in the last decades have been enacted in a growing number of countries. The Portuguese specialists and practitioners in the field of commercial arbitration can only rejoice over the new amendment.

[3] see José Lebre de Freitas – Algumas Implicações da Natureza da Convenção de Arbitragem -*in* Estudos em Homenagem à Professora Isabel Magalhães Collaço - Coimbra - 2002, pp. 625-691, specially pp. 631-633.