Portugal

António Sampaio Caramelo and Filipe Vaz Pinto
Morais Leitão, Galvão Teles, Soares da Silva & Associados RL

The importance of arbitration as an alternative mechanism of dispute resolution in Portugal has increased considerably in the past few years and this tendency can be expected to be maintained and even increase. This can be explained by a growing awareness of the traditional and well-known reasons justifying recourse to arbitration – it is less lengthy and more flexible, the parties being able to choose the forum, the institutional rules, the panel of arbitrators, the language in which the proceedings are held, and whether the proceedings will be confidential – but especially by the increasing failure recently of the state courts to provide adequate final decisions for business disputes within a reasonable time. This failure was even recognised by the government, which in 2001 approved a resolution promoting and recommending alternative dispute resolution mechanisms, even in disputes between the state and private entities, as one of the solutions to the problems created by the explosion of demand for access to the state judicial system.[1] Currently, the signs of this growing importance of arbitration abound.

An increasing number of scholars now specialise in arbitration – with the consequent rise in the quality and quantity of literature dedicated to the subject – and specific programmes and courses on arbitration are being offered by law schools. Many practitioners are active in arbitral matters and conferences and seminars on the subject are now frequent. Case law regarding arbitration has also increased and the growth in the number of institutional organisations administering arbitral proceedings has been remarkable, with about 30 organisations now authorised by the Ministry of Justice to conduct institutional arbitrations.[2] In 2006, the Portuguese Arbitration Association, composed of many respected scholars and practitioners, was created, aiming to fostering the use of arbitration in Portugal, among other things. Likewise, in 2006 the Portuguese section of the Spanish Arbitration Club was founded, also seeking to promote knowledge and recognition of arbitration as an efficient dispute resolution procedure.

Basic legal sources

The legal framework governing arbitration in Portugal is essentially composed of the relevant international conventions to which Portugal is a party and internal legislation, notably Law No. 31/86 of 29 August 1986, as amended by Decree-Law No. 38/2003 of 8 March 2003 (the Arbitration Act);[3] the Code of Civil Procedure, particularly regarding the enforcement of foreign arbitral awards; and the Code of Procedure in Administrative Courts. It is worth noting that, unlike in 'dualist' legal systems, international conventions duly ratified by Portugal are directly and automatically applicable by Portuguese courts without the need for any specific internal act of implementation or transposition. Further international conventions prevail over domestic law (except constitutional law). In the context of international arbitration, Portugal is a party to the Geneva Protocol on Arbitration Clauses of 1923, to the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927,[4] to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965, and to the Panama Inter-American Convention on International Commercial Arbitration of 1975.[5]

The Arbitration Act is the central Portuguese legislative document governing most matters related to arbitration. It follows a territorial approach in that it is applicable to all arbitrations taking place in Portugal, either domestic or international. Regarding arbitrability of disputes, the basic principle contained in the Arbitration Act is that any dispute that does not concern inalienable or indisposable rights may be submitted to arbitration, by means of a written arbitration agreement, provided that such matter is not exclusively reserved to the courts by law (article 1(1)). This criterion of arbitrability of disputes, centred in the alienability or disposability of the substantive rights under dispute, gives rise to some doubts and difficulties when applied in practice and has been subject to criticism. It is important to stress that the Arbitration Act adopts a very broad concept of dispute, allowing the parties to submit to arbitral tribunals, in addition to stricto sensu disputes, any other differences, notably those related to the need to clarify, complete, update or even review the contracts or legal relationships to which the arbitration agreement refers (article 1(3)).

Although drawing some inspiration from the 1985 UNCITRAL Model Law on International Commercial Arbitration, the Arbitration Act cannot be considered as a statute based on the mentioned Model Law, since several differences may be found in the scope, structure and content of these two instruments. In order to shed some light on the specificities of the Arbitration Act, the following major differences to the UNCITRAL Model Law can be highlighted:

- The Arbitration Act governs both domestic and international arbitration.
- Under the Act, the jurisdiction of the arbitral tribunal can be challenged before the state courts only together with the challenging of the final award of the tribunal (article 21).
- The Act does not contain any specific provision dealing with interim measures.[6]
- Unlike the Model Law, which contains default rules concerning the development of arbitration proceedings (articles 23, 24 and 25), the Act only sets forth the fundamental principles that must be complied with in any arbitration, namely the absolute equality of treatment of the parties, the obligation for the defendant to be summoned to the arbitral proceedings and the right of the parties to be heard in an adversarial manner throughout the arbitration proceedings. The Act leaves to the parties or to the arbitrators the issuing of any other procedural rules deemed necessary (articles 15 and 16).
- While the Model Law adopts a conflictual method regarding the law applicable to the merits of the dispute in the event of a failure of the parties to indicate the applicable law (article 28(2)), the Arbitration Act, regarding international arbitrations, preferring a direct method to that effect, providing that the arbitral tribunal shall apply the substantive law most appropriate to the dispute (article 33(2)).

- Under the Act, awards, as a condition of their own validity, must always be reasoned and address all the issues, and only those issues, raised by the parties (article 23).
- The Act sets a default time limit of six months, within which the arbitral tribunal must render the award, calculated from the appointment of the last selected arbitrator. An extension of this period is only possible by agreement of both parties and only up to twice the period initially set by the parties[7] (article 19).
- As well as the annulment procedure, the Act contemplates the possibility of an appeal to the state courts on the merits of the award.[8] In domestic arbitrations, the right to appeal on the merits is excluded only when the parties have waived such right (article 29). In international arbitrations, the rule is the opposite: an appeal on the merits is allowed only if provided for, and its terms regulated by, the parties (article 34).

A few more observations can be made. First, the Arbitration Act expressly accepts the *Kompetenz–Kompetenz* principle to the fullest extent. According to article 21 of the Act, the arbitral tribunal has the power to rule on its own jurisdiction even if it may have to assess the existence, the validity or the effectiveness of the arbitration agreement or of the contract in which the same is included. The decision of the arbitral tribunal declaring its jurisdiction to decide the dispute may only be reviewed by Portuguese courts after a final award has been made, in the context of an appeal on the merits of the award (when such appeal is admissible), as a ground for annulment of the award or, defensively, when opposing its enforcement. Second, as to the constitution of the arbitral tribunal, the Act requires an odd number of arbitrators and provides for a default procedure with the intervention of the president of the territorially competent Court of Appeals to appoint the arbitrators when the parties fail to make such an appointment (articles 6 and 12). Third, as to the criterion according to which the dispute will be settled, the Act allows the arbitrators to decide ex aequo et bono when the parties have expressly conferred such power upon them (articles 22 and 33). Finally, according to article 27 of the Act, an arbitral award may be annulled by a court, following an application by one of the parties, only if:

- the subject matter of the dispute is not capable of settlement by arbitration;
- the arbitral tribunal did not have competence or the constitution of the arbitral tribunal was irregular (ie, not in accordance with the agreement of the parties or with the applicable law);
- there was a breach of the above-mentioned fundamental principles that must govern arbitration proceedings;
- the award did not include the arbitrators' signatures or did not contain a number of signatures at least equal to the majority of the arbitrators or did not include the dissenting opinions, if any, duly identified;
- reasons were not given for the award; or
- the arbitral tribunal decided issues that the parties had not submitted to it or failed to address all the issues submitted by the parties.

The specific relevance of the Code of Civil Procedure to arbitration is felt in two major areas. First, it provides that the party against whom court proceedings are initiated in breach of an arbitration agreement has the right to raise an objection to that effect – this power is construed as an exception and cannot be assessed ex officio by the court (article 494). The court will simply verify the existence and validity of the alleged arbitration agreement and, if it is prima facie satisfied that such agreement exists and is valid, will dismiss the proceedings and refer the case to arbitration. Second, the Code sets forth the rules regulating enforcement of arbitral awards. Domestic arbitral awards do not need to be recognised or confirmed. They have the same binding nature and enforceability as a court sentence and may be immediately enforced or executed in the state court of first instance (article 48). Foreign arbitral awards must be recognised by Portuguese courts (competent Court of Appeals) before they can be enforced in Portugal (articles 49 and 1094). If the award was made in a state that is party to the New York Convention, this treaty will apply, namely as to the strict grounds admissible for non-enforcement, supplemented by the non-conflicting provisions of the Code of Civil Procedure.[9] If the award was made in a state that is not a party to the New York Convention, the award can still be recognised and enforced in Portugal provided that the requisites laid down in article 1096 of the Code (similar to, but not identical to, those provided for in article V of the New York Convention) are met.

Finally, the new Code of Procedure in Administrative Courts, enacted in 2002, is also of great importance to arbitration, particularly to disputes with public entities. In fact, in line with Resolution No. 175/2001 of the Council of Ministers, this new statute was intended to send a clear signal that arbitration should be viewed as a consistent and reliable mechanism of dispute resolution. This code clarifies that matters related to administrative contracts, to extra-contractual liability of public entities (tort) and even to some administrative unilateral acts can be adjudicated through arbitration. Most importantly, the code seems to contain a unilateral commitment from all public entities to agree to arbitration in respect of the above-mentioned matters, thereby giving a right to any interested party to require from the concerned public entity the conclusion of an arbitration agreement.[10]

Recent case law

Regarding case law, we must start by saying that, with few exceptions, arbitral awards are not regularly published in Portugal. They only become public in the context of judicial proceedings, which are public in nature, typically in annulment proceedings, which have grown in number in the past years. There are also many judicial decisions concerning the enforcement of the agreement to arbitrate, when a party tries to initiate judicial proceedings in breach of an arbitration clause.

One important issue that has been raised, in different ways, in several recent judicial cases is the extent to which disputes relating to distribution agreements can be adjudicated by arbitrators. Its practical relevance and recentness deserves a specific reference. According to Decree-Law No. 178/86 of 3 July 1986, as amended by Decree-Law No. 118/93 of 13 April 1993,[11] commercial agents are entitled, upon termination of the contract, to a special equitable compensation (*indemnização de clientela*), provided that they have brought the principal new customers or have significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers. Further, article 38 of the same statute states that, regarding termination and its consequences, Portuguese law has to be applied to contracts that are executed exclusively or predominantly in Portugal, unless foreign law is more favourable to the commercial agent. These rules are mandatory and have been consistently extended by Portuguese courts to all kinds of distribution agreements, namely commercial concessions and franchising agreements. In this light, three recent court cases will be considered.

In 2005, the Court of Appeals of Guimarães considered null and void an arbitration clause included in a commercial concession contract that established that the arbitrators should decide ex aequo et bono.[12] The distributor initiated judicial proceedings against the principal seeking damages for wrongful termination of the contract and an equitable compensation for the termination. The principal

asked for the dismissal of the proceedings grounded on the existence of an arbitration clause. Considering that the special compensation attributed by law is mandatory and was under discussion in the dispute, the court held that it cannot be adjudicated by arbitrators deciding ex aequo et bono, because the arbitral tribunal would be entitled to disregard the mandatory provisions of the law. So the court allowed judicial proceedings to continue. Also in 2005, the Supreme Court of Justice had the opportunity to address the question of the applicability of the above-mentioned article 38 to international arbitration proceedings.[13] This provision has been construed by some commentators as also implying the jurisdiction of Portuguese courts to decide disputes related to distribution contracts performed predominantly in Portugal. Despite the existence of an ICC standard arbitration clause in the contract, the plaintiff initiated judicial proceedings in Portugal against the principal, arguing that article 38 prevented arbitration. The Supreme Court correctly enforced the arbitration clause, pointing out that article 38 is first and foremost a provision regarding the applicable substantive law, which applies despite the existence of an arbitration clause. It also recalled that there was nothing in the records indicating that Portuguese law would not be applicable. Obviously, this line of reasoning seems to suggest that the decision of the court might have been different if there were a choice of law clause referring to a law other than Portuguese law (and if such law were worse for the agent than the Portuguese one). More recently, in 2007, the Court of Appeals of Porto returned to this question.[14] In a commercial concession contract between a Portuguese and a Spanish company (a subsidiary of a French company), the parties included a clause indicating French law as the substantive law of the contract and an FIS arbitration clause referring to the International Seed Trade Federation Rules. Here the court, although following very questionable reasoning, considered that the arbitration clause, coupled with the choice of a foreign law, amounted to a violation of article 38 and implied a serious inconvenience for the plaintiff and, as such, the arbitration clause could not be enforced. In this case, the court failed to consider if French law was indeed worse for the agent than Portuguese law, a very important question, especially taking into account that in this respect Portuguese law is an enactment of a European Directive that was also implemented in France. Hopefully, in the future the Supreme Court will have opportunity to clarify this issue, providing adequate guidance for lower courts.

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Arbitration practice and culture in Portugal is now much more dynamic than a few years ago and appears to be seeking to meet the goals and aspirations of parties resorting to it. It is clearly a favoured means of dispute resolution and this certainly is to be welcomed. However, some things still need to be done to transform Portugal into a truly arbitration-friendly situs. Courts need to better familiarise themselves with the principles and characteristics of arbitration, a process in which scholars and practitioners must surely have a role. On the other hand, the Arbitration Act was a good law when it was enacted in 1986. Now more than 20 years have passed and, similarly to what has been done in Europe and throughout the world, Portugal clearly needs a new Arbitration Act, preferably based on the UNCITRAL Model Law, in line with the modern concepts and trends prevailing in the field of commercial arbitration.

Notes

1 Council of Ministers Resolution No. 175/2001.

2 The leading Portuguese institution administering arbitration is the Arbitration Centre of the Portuguese Chamber of Commerce and Industry. Its rules of arbitration are available at www.port-chambers.com/eng/arbit_arbit.htm.

3 An unofficial English translation, without the amendments made in 2003 to articles 11 and 12, can be found in the *International Handbook on Commercial Arbitration* Suppl 12, 1991, annex I. Another translation (updated) can be found at http://www.port-chambers.com/eng/arbit_arbit.htm.

4 The two Geneva conventions now have limited relevance and applicability in view of article VII(2) of the New York Convention.

5 Although Portugal is a party to this convention and ratified it in 2002, it has not yet deposited its instrument of adhesion, so it is not yet in force in Portugal.

6 Despite this omission, Portuguese courts have consistently (and rightly) decided that an arbitration clause does not impede a party from requesting from a court an interim measure, therefore reaching a result similar to the one provided for in article 9 of the Model Law. As to the different issue of the jurisdiction of the arbitral tribunal to grant interim measures, the distance between the Arbitration Act and the Model Law has increased, particularly in light of the new articles 17-A to 17-J of the Model Law, as amended in 2006. Because of the lack of legal provision addressing this issue, in Portugal the question is still debated among scholars, specially when the arbitration clause is silent regarding this possibility.

Morais Leitão, Galvão Teles, Soares da Silva & Associados RL

Rua Castilho, 165
1070-050 Lisbon
Portugal
Tel: +351 213817400
Fax: +351 213817494

www.mlgts.pt

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António Sampaio Caramelo • Tel: +351 213817400 • Fax: +351 213817494 • ascaramelo@mlgts.pt
Filipe Vaz Pinto • Tel: +351 213817482 • Fax: +351 213817494 • fvpinto@mlgts.pt

7 This legal regime has attracted a lot of criticism for being very rigid. If not correctly addressed by the parties beforehand, serious negative consequences may occur, including the collapse of the whole arbitration.

8 In any case, it should be noted that the rules of Portuguese institutions administering arbitrations almost always exclude such right of appeal to state courts.

9 In this regard, one important practical question has been discussed in Portuguese courts: which is the court with jurisdiction to recognise foreign arbitral awards made in states party to the New York Convention? While domestic awards are enforced and executed by the courts of first instance, foreign awards (and foreign court decisions) are recognised by the Court of Appeals. Based on a very questionable understanding of article III of the New York Convention, involving a so-called 'principle of comparison' (*equiparação*), some courts, including the Supreme Court of Justice, have decided that these foreign arbitral awards should follow the same regime of the domestic arbitral awards, ie, they can (and must be) immediately enforced by the courts of first instance without needing to be recognised by the Court of Appeals. This line of decisions has been criticised, with commentators arguing that the foreign arbitral awards should be recognised by the Court of Appeals and only thereafter be admitted to enforcement.

10 This matter is debated among Portuguese legal scholars, since some authors hold that the above-mentioned provisions need to be implemented by further legislation.

11 Implementing Council Directive No. 86/653/EEC of 18 December 1986, on the coordination of the laws of the member states relating to self-employed commercial agents.

12 Judgment of 16 February 2005, case 197/05-1.

13 Judgment of 11 October 2005, case 05A2507.

14 Judgment of 11 January 2007, case 0636141.