



Litigation Practice Area

ARBITRATION AND MEDIATION WORKGROUP

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## EDITORIAL

We are pleased to present the Second Edition of the Arbitration & Mediation Aware.

This time the members of the Department of Arbitration and Mediation (GAM) have dedicated their time to the analysis of (i) a recent Supreme Court ruling - in a case where Abreu Advogados represents one of the parties - that elaborates on the party's sui generis renounce to the right to appeal the award; (ii) the potential change of perspective that may soon take place in Portugal regarding the arbitrability of tax disputes and (iii) the enforceability of mediated settlement agreements in Portugal.

Finally, we shall include a highlight with some of the most recent and relevant jurisprudence in domestic arbitration.

We hope you enjoy this Aware and...Merry Christmas!

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## THE WAIVER OF APPEAL IN THE ARBITRATION AGREEMENT

The Supreme Court of Justice (STJ) has recently rendered a decision on a case in which we were involved, about an issue we believe to be particularly interesting in what regards the scope of arbitration clauses and the possibility for the parties to subject the arbitral decision to appeal.

As we know, the Law on Voluntary Arbitration (LAV), after having established the principle of non-waiver of the right to annul an arbitration award<sup>2</sup>, expressly admits that the parties can renounce, in *absolutum*, to recourse against the award, and states, secondarily, that final decisions issued by the Arbitral Tribunal can be appealable, in the same cases where an appeal would be admissible before a Court of Appeals for a decision that was rendered by a district Court<sup>3</sup>.

Concerning the case that was examined by the STJ, the parties had contracted to submit any future dispute to an Arbitral Tribunal under the terms of the Procedural Rules of the Centro de Arbitragem Comercial da Câmara de Comércio e Indústria Portuguesa, which state that arbitral awards are not appealable. However, the parties had provided the possibility of appeal against the award in the arbitration clause, establishing the possibility of an “appeal before the Court of Appeals of Lisbon, under the terms set in the Civil Procedure Code for the appeal on the merits”. Subsequently, not accepting the decision rendered by the arbitrators, the Defendant appealed, and the case was decided favourably by the Court of Appeals of Lisbon. In light of this appellate decision, the Claimants, in turn, appealed for review before the STJ, and after having been initially admitted by the Court of Appeals, the appeal proceeded to be deemed inadmissible by the STJ, first by the report of the Supreme Court Rapporteur, then, by a collective decision of the Supreme Court.

The reasoning of the STJ is quite assertive when considering, as argued by the Defendant, that they were not faced with an exception, decided according to the will of the parties, to imperative norms related to appellate procedures, which

would result in the violation of the principle of legality with regards to appeals, access to justice, and effective judicial protection, as defended the Claimants, but rather with an issue of good interpretation of the will of the parties, under the terms of articles 236<sup>o</sup> and 238<sup>o</sup> of the Civil Code, in accordance to which it results that, *in casu*, these Parties had provided only one exception to the regime of non-waiver stated in the afore-mentioned procedural rules. In other words, as regards the waiver of appeals that necessarily results from the submission of the dispute to the Centro de Arbitragem Comercial, the parties intended and declared to exclude the possibility of appeal before the Court of Appeals of Lisbon, admitting the challenge of an appellate decision against the award.

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1. Law n.º 31/86, of August 29<sup>th</sup>


2. Article 28<sup>o</sup>, n.º1: The right to request the annulment of the arbitral award cannot be waived.

3. Article 29<sup>o</sup>, n.º1: If the parties have not renounced to the right to appeal, the same recourses are available for an arbitral award to be appealed before a Court of Appeals than those available for a district court decision.

## THE WAIVER OF APPEAL IN THE ARBITRATION AGREEMENT (CONTINUATION)

*The parties have not declared the setting aside of the norm contained in the Procedural Rules which provided for the renunciation of appeals with the selection and application of the Arbitral Tribunal, nor does this appear in any element of the "Contract" or of the case file. Therefore, it was decided that the wording of the arbitration clause is unequivocally, which, according to the express will of the parties, should be interpreted in the sense that the arbitral award shall only have one degree of appeal, which is before the Court of Appeals of Lisbon, with the inherent inadmissibility of an appeal for review before the Supreme Court.*

What we should retain from this decision is the understanding, already behind the Latin phrase *cui licet quod est plus, licet utique quod est minus*, that if it is admissible for the parties to renounce, in *absolutum*, to any right of appeal against an arbitral award, it is also permitted for them to limit, through the arbitration clause, the degree of appeal they intend to subject the arbitration award to.

This understanding supports the objective pursued by the parties to an arbitration clause: the balance between a faster process leading to a final decision, thus opting to submit the dispute to the Arbitral Tribunal, and justice by a reviewed decision based on the merits, allowing that another jurisdiction pronounces itself on these same merits. 

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## THE ENFORCEABILITY OF MEDIATED SETTLEMENT AGREEMENTS IN PORTUGAL

One of the main elements that differentiates mediation from litigation or arbitration is the enforceability of the outcome. Indeed, both court decisions and arbitral awards enjoy a level of enforceability which comforts parties who oftentimes want closure almost as much as a favourable outcome. This is due to the fact that for both these adjudication procedures, the law grants the necessary legal effectiveness to have such outcomes executed.

Mediated settlement agreements unfortunately merely consist in private agreements signed between the parties to a dispute, and therefore lack the legal effect that would allow them to be directly executed. This loophole may sometime be problematic, as in most cases, the parties to the dispute have significant trust issues, which are frequently, in the conflict situation at hand, due to the breach by one party of its contractual obligations. Those in disfavour of mediation would thus find an easy argument in the question: "How can one party be sure that the other will respect the settlement agreement when a breach of contract is what brought them to mediation in the first place?"

In face of this pertinent question, three points must be analysed to explain the enforceability of mediated settlement agreements under Portuguese law.



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## THE ENFORCEABILITY OF MEDIATED SETTLEMENT AGREEMENTS IN PORTUGAL (CONTINUATION)

Firstly, there is a way to give a mediated settlement agreement a greater level of enforceability than that of a private contract, by having it respect the legal requirements of article 46º of the Civil Procedure Code (CPC), which would automatically confer it the status of "enforceable title".

The relevant requirements to be met for the agreement to be granted the status of an "enforceable title" are found in nº 2 and 3 of the afore-mentioned article, which respectively state that can serve as such titles *"the specific documents, signed by the debtor, which contain the constitution or the recognition of pecuniary obligation, the amount of which must be determined or determinable by simple arithmetic calculation as established in its provisions, or an obligation to deliver a thing or to perform an act"*, or *"the documents which, by a special provision, are attributed enforceable force"*.

According to the wording of the law, it does not seem difficult to have a settlement agreement meet the requirement stated above, since such agreements usually contain the constitution or recognition of a pecuniary obligation, but may also include an obligation to deliver or to perform obligations which are aimed at permitting the final resolution of the dispute. Moreover, for the sake of reinforcing the qualification of the settlement agreement as an enforceable title, the parties can additionally include a clause within the agreement stating that the parties attribute enforceable force to the document, as per nº 3 of article 46º of the CPC.

The result of having been conferred the status of enforceable title will permit the parties to have the obligations contained therein enforced before a court under a specific procedure called "executive action", which is a much faster, less costly and simple procedure with limited grounds for opposition, thus ensuring an additional protection for the enforceability of the settlement agreement.

The second way to give a mediated settlement agreement in Portugal is to have it confirmed by a judge, in accordance with article 249-Bº of the CPC. Indeed, this provision states that *"If the mediation results in an agreement, the parties may demand its confirmation by a judge."*

Number 3 of the same article adds that *"the judicial confirmation of the agreement obtained in pre-trial mediation aims at verifying its conformity with the current legislation"*.

The confirmation therefore entails two major aspects, the first being that the parties are free to choose whether or not to have the settlement agreement confirmed, and the second being that through this confirmation, the court might refuse to give it the power of a court decision if it deems it to be contrary to the current legislation in force. Concerning this second point, which is the most interesting one, it is important to mention that if the parties decide to have the settlement agreement confirmed by a judge, it will have the same legal effectiveness as a court decision of first instance, provided of course it is validated by the said judge. The parties will be left with an agreement which they have drafted, which is tailored to their needs and interests, which they overall believe to be an acceptable manner to resolve the dispute, and which will have the same force as a judicial ruling.

The parties are therefore no longer bound only by a mere contractual agreement, which they would have been free to breach, but are faced with obligations that have the recognition and authority of a court decision, which plays a significant role both in the personal and practical approach to how the agreement will be fulfilled by the parties, and adding a powerful incentive to respect it.




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## THE ENFORCEABILITY OF MEDIATED SETTLEMENT AGREEMENTS IN PORTUGAL (CONTINUATION) TAX ARBITRATION

It must be noted however that by submitting the mediated settlement agreement to a judge for confirmation, the parties relinquish their right to having the agreement remain confidential, as it will take on the same public status as a court decision. The parties therefore will have to make a choice, either to keep the agreement confidential and risk that the obligations included therein being breached, or to give up the confidentiality of the content to the benefit of granting a higher degree of legal force to the settlement agreement.

The final point that needs to be discussed concerning the enforceability efficiency of mediated settlement agreements is that most often, the fact that the parties have concluded the agreement themselves is sufficient enough incentive for them to comply with their obligations contained within. Indeed, by empowering the parties in deciding on the outcome or their dispute, and giving them the possibility, from the start of the process, to refuse or accept certain provisions or certain others, it truly makes them feel that they are involved more personally with the result, which is, in effect, their own solution to their problem, based on their information and on what they are supposedly willing to do to achieve that resolution. A mediated settlement agreement represents, beyond the fact that it is a mere contract, a solution to a concrete problem that the parties have mutually negotiated and agreed to, which will benefit them both, and which they both consider to be acceptable. As such, the chances that one of the parties breaches this settlement agreement, despite that it does not have a legally binding effect as a court decision does, are very low.

Overall, mediated settlement agreements in general are usually respected by the parties, due to their intrinsic characteristics, but if the parties wish to give these agreements additional binding power, they may choose to do so under the provisions of the Civil Procedure Code, either by granting the agreement the status of an "enforceable title", or by confirming it before a judge. 

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After months of expectation, the Council of Ministers has approved, last November 11th, the statute that will create and regulate tax arbitration as an alternative means to judicial litigation. We are now waiting, with even greater expectation, the approval of the statute by the Assembly of the Republic and its subsequent publication.

Arbitration, as an alternative mean to judicial litigation on tax matters, was defined after the legislator granted the Government, through Law 3-B /2010, of April 28, which approved the State's Budget for 2010, powers to draft a law on Tax Arbitration, thus accepting the proposals in the Report of the Group for the Study of Tax Policy Competitiveness Efficiency, and Justice of the Tax System<sup>1</sup>.



Idealistically and according to the general lines drawn in the said legislative delegation, the arbitration procedure for tax litigation shall have two main purposes: i) more celerity in discussing and deciding litigation between taxpayers and the Tax Administration and ii) the relief of judicial Courts.

In fact, the arbitration award shall be rendered within a maximum of six months, which may be extended for similar period whenever justified. This one point presents itself as a huge progress for judicial procedure, where so many times one awaits a decision that, most of the times, comes late, therefore implying significant costs to taxpayers.

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<sup>1</sup>. Report of the Group for the Study of Tax Policy Competitiveness Efficiency and Justice of the Tax System, under the general coordination of António Carlos dos Santos and António M. Ferreira Martins and coordination of the subgroups by João Amaral Tomaz, Rui Morais, Sidónio Pardal, António Nunes dos Reis and Rogério M. Fernandes Ferreira, page 654 and

## TAX ARBITRATION (CONTINUATION)

Of the very little we know from the legislative delegation granted to the Government, the arbitration procedure will only apply to matters that may be the object of a judicial claim and of a claim for recognition of a legitimate tax right or interest, thus excluding matters like opposition to tax enforcement procedure. However, this choice from the legislator seem odd, as an opposition to tax enforcement procedure is, in fact, one of the tax procedures where the celerity of rendering an award becomes more important.

Still, there are two issues that may lead to discussion on this matter, particularly regarding the administrative costs and fees to be paid and the appointment of the arbitrators by the parties.

So far, we know nothing on the amounts to be paid for tax arbitration, in terms of fees or administrative costs. The experience of commercial arbitration gives us an idea that these costs may not be bearable by each and every taxpayer, particularly concerning natural persons. Under the terms of the legislative delegation, the determination of the fees shall depend on the amount in discussion, on the procedure, as well as its complexity.




Concerning the constitution of the arbitration Court and as a general rule, it will be tripartite, *i.e.*, composed by three arbitrators, two appointed respectively by each party and a third arbitrator, who will be the arbitrator-president, who shall be appointed by said two.

Regarding the eligibility of arbitrators, in principle, they must be legally qualified with at least 10 years of known experience in tax matters. The arbitrators must be qualified as such by the Administrative Arbitration Center (CAAD), with the supervision of its Ethics Council. In what concerns the award that may be rendered, we already know that these arbitrators may only apply the existing Law, without any margin to render an award based on equity.

As to the effects of the arbitration award, the fundamental rule will be that of the unavailability of an appeal, except when appealing to the Constitutional Court. Nevertheless, even an appeal to the Constitutional Court may only be accepted when and where the arbitration tribunal refuses to apply a rule based on its unconstitutionality or applies a rule, the unconstitutionality of which had been risen. Except when there is an appeal or an annulment of the award, it shall be as enforceable as any final judicial decision.

Finally, still regarding the introduction of this new alternative means to tax litigation, we must point out the implementation of a transitory regime that foresees the possibility for taxpayers to submit to arbitration the tax acts that for which the decisions are pending since over two years, without having to pay the respective costs.

Since this statute still has not been published, we cannot go much further than the analysis of legislative delegation to make an adequate analysis. Nevertheless, we recognise the merit of this legislative initiative but still wonder if it is the right path to settle tax litigation, as there is still so much to do. 

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## JURISPRUDENCE

### **I - Non violation of the principle of *res judicata* for an award issued by a mandatory arbitral tribunal**

Being the award rendered by a mandatory arbitral tribunal a real ruling and not an interim measure for determining damages (*arbitramento*), then in case the award is subject to an appeal, there is no *res judicata* effect over the legal issues which were the object of such award, *in casu*, over the expropriation, whether as to the final decision or as to the grounds on which it relied on.

This way, the grounds stated in the arbitral award have not, in themselves, *res judicata* effect. Thus, the conditions for the appeal to be upheld are therefore not met, regardless of the amount in dispute, when the intention to revoke the ruling rendered by the Court of Appeal has been refused.

Ruling from *Supremo Tribunal de Justiça* (Supreme Court of Justice), October 12<sup>th</sup> of 2010, case no..4925/07.4TBGMR.G1.S1.

### **II - Arbitration clause and competence of the arbitral tribunal**

The arbitral tribunal has a conventional nature regarding its competence, being directly dependant on the will of the parties, particularly through the inclusion of an arbitration clause in the respective contract, which occurred *in casu*.

As such, the Parties decided to give the arbitral tribunal the competence to rule on the matter. Therefore should a claim be filed before a judicial court, and provided the dilatory exception is invoked, it would represent a violation of the arbitration clause.

Ruling from *Tribunal da Relação de Lisboa* (Lisbon Appeal Court), June 30<sup>th</sup> of 2010, case no. 2865/08.9TVLSB.L1-8).

### **III - Non automatic recognition of an enforcement title based on arbitral award**

Albeit foreign arbitral awards are directly enforceable under the terms of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, national legislation must be taken into account at all times. When a debt collection procedure is petitioned, based on a foreign arbitral award, there is no direct enforcement, for the revision and confirmation are distinct realities, being the confirmation subject to Portuguese Law in the matter.

Ruling from the *Tribunal da Relação de Lisboa* (Lisbon Appeal Court), June 8<sup>th</sup> 2010, case no. 243/10.9YRLSB-7.

### **IV - Lapse of the arbitration clause**

Regarding the rendering of the arbitral award, the Law on Voluntary Arbitration (LAV) provides a default period of six months, except if otherwise agreed by the parties. If the parties did not establish any term, one may not exclude that such a period will not be considered by the Rules and Statutes of the Arbitration Centre of the Portuguese Chamber of Commerce and Industry.

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## JURISPRUDENCE (CONTINUATION)

According to this Regulation, the arbitral tribunal will only be constituted when all of the arbitrators have accepted the functions they have been designated for, and not at the date on which the last arbitrator was designated – as defined by the LAV -, thus determining the starting moment of the period before which the arbitral tribunal has to issue an award, as well as for the purpose of the lapse of the arbitration clause under the terms of the LAV.

Ruling from *Supremo Tribunal de Justiça* (Supreme Court of Justice), March 4<sup>th</sup> of 2010, case no. 1205/07.9TVPRT.P1.S1.

### V - Revision and recognition of arbitral awards

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards prescribes that each ratifying State is to recognize the authority of arbitral awards and enforce them under the same procedural terms as national awards. In Portugal, Courts of First Instance are competent for said recognition and not the Courts of Appeal - nor are the Specialty Courts - under the terms of both the Convention and the Portuguese Law on Voluntary Arbitration ("*Lei da Arbitragem Voluntária*"). Such is so due to the fact that the recognition request is based on the exequatur, the mere control and revision, as it is not a means to apply the Law or even revise factual aspects, just as it is the case for the national Portuguese awards.

Ruling from the *Tribunal da Relação de Coimbra* (Coimbra Appeal Court), January 19<sup>th</sup> de 2010, case no. 70/09.6TBCBR.C1.

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## JURISPRUDENCE (CONTINUATION)

### VI - Validly of an arbitration clause by reference and non-contentious nature of the origin of the arbitration agreement.

The court has decided that in the situation where one party, which is subject to an arbitration clause through a written agreement, transfers its rights and obligations to another, the agreement to arbitrate is treated as existing by reference, as it is covered by the transferred rights and obligations originally present in the written agreement.

The transferee is therefore bound to the arbitration clause, even though it did not sign the clause or the document in which it is included. In addition, the court stated that the amendment to a pension calculation could give rise to an arbitration procedure despite its non-contentious nature, as the Law on Voluntary Arbitration states that "the parties may agree to consider as included in the concept of a dispute any other matters, such as matters related to the need to make precise, to complete, to update or even to review the contracts or legal relationships which are at the origin of the arbitration agreement".


Ruling from *Tribunal da Relação de Lisboa* (Lisbon Appeal Court), January 13<sup>th</sup> of 2010, case no. 373/09.0TTLSB.L1-4).

### VII - Enforcement of foreign arbitral award

Being an arbitral award a true decision, it will be considered as an enforcement title for the terms and purposes of paragraph a) of article 46 of the Civil Procedure Code, and not, as was suggested, as a document that will be given executive force by a special provision – cf. as provided in the paragraph of the same article.

In what concerns foreign arbitral awards, whether they are rendered by an arbitral court or by an arbitrator, the general rule is that a review and confirmation of the award is necessary as grounds for enforcement – cf. no. 1 of article 49 of the CPC. However, the same provision excludes the cases for which another solution is provided for in treaties, conventions, European regulations and special laws, in a clear openness to the order and respect for international judicial cooperation.

Thus, since the State of Portugal has ratified the New York Convention of June 10<sup>th</sup> 1957, and taking into consideration the provisions of its article III, the authority of an arbitral award will necessarily have to be recognized and treated as such, under the same conditions as national rulings, being therefore an enforcement title.

Ruling from *Supremo Tribunal de Justiça* (Supreme Court of Justice), March 19<sup>th</sup> of 2009, case no. 299/09, available in Jurisprudence Compilation, Volume I/2009, pages 147 to 149. 

This *Aware* is not intended to be a comprehensive review of all developments in the law and practice, or to cover all aspects that are referred. Readers should take legal advice before applying the information contained in this publication to specific issues or transactions. For more information please contact us at [apc.gam@abreudadvogados.com](mailto:apc.gam@abreudadvogados.com) | Visit our website [www.abreudadvogados.com](http://www.abreudadvogados.com)

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