

New York International Chapter News

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Message from the Chair

As I sit in New York in early March writing this message, the news is filled with reports of violence and turmoil in Libya and protests in Bahrain following the fall of governments in both Tunisia and Egypt. One result of the uncertainty associated with this turmoil is the rapid increase in oil prices, which threatens the fragile economic recovery.



Andre R. Jaglom

The recent earthquake in New Zealand has caused billions of dollars in damages less than six months after NYSBA International held our successful Sydney Seasonal Meeting in the region.

And today's *New York Times* reports on the lessons U.S. cities are learning from the implementation of bus

rapid transit in places like Bogota, Mexico City, Jakarta, Sao Paulo and Beijing to reduce commuting time, costs and pollution while providing businesses with access to a broader labor pool.

All of these stories highlight the interconnectedness of our world and demonstrate the importance of the connections formed through NYSBA International to shrink the planet further and enable us, as lawyers, to help our clients navigate international regulatory and cultural shoals so that they can thrive in the global economy.

It will be my honor to assume the position of Chair of the International Section on June 1 and attempt to follow in the footsteps of the leaders who have brought the Section to its current position of success since its founding nearly 25 years ago. I am particularly grateful to our current Chair, Carl-Olof Bouveng, who graciously agreed to take office unexpectedly, months earlier than planned.

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PORTUGAL

Statutory Developments

A. Finality of Awards

According to Article V(e) of the New York Convention, a court may refuse to recognize or enforce an award that has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made. The Portuguese Law on Voluntary Arbitration (“LAV”)¹ distinguishes between appeal and challenge of an arbitral award.

Under Portuguese Procedure Law,² the recognition and enforcement of a foreign arbitral award may be refused if the award is not final and binding (*res judicata*), under the law of the country where the award was rendered (this provision includes awards that are subject to appeal). However, the fact that annulment proceedings are pending in the country where the award was rendered is not grounds for refusal of recognition and enforcement. This means that, under Portuguese law, while an appeal inhibits the *res judicata* effect of the appealed decision, annulment proceedings do not.

LAV applies only to arbitrations that take place in Portugal.³ Thus, if arbitral proceedings take place in a foreign country and apply Portuguese law, Portuguese courts may not decide on the annulment procedures.

B. Arbitrability /International Public Policy Rules

According to article V(2) of the New York Convention, recognition and enforcement of an arbitral award may be refused if, according to the law of the country where such recognition and enforcement are requested, the object of the dispute is not arbitrable or if the recognition and enforcement of the award violates the international public policy of the country where the award is to be recognized or enforced.

1. Arbitrability

In Portugal, LAV⁴ limits disputes which can be arbitrated to those relating to disposable rights (that is, rights that are not inalienable). This rule is consistent with the provisions of the Portuguese Civil Code and the Portuguese Civil Procedure Code regarding admission and settlement, which cannot take place in relation to inalienable rights (*as per* articles 353 and 1249 of the Portuguese Civil Code and article 299 of the Portuguese Civil Procedure Code).

Examples of inalienable rights include personal family rights, personality rights and rights to alimony (Decision of the *Tribunal da Relação de Lisboa* of 10-12-2009).⁵ Disposable rights are not limited to economic rights. On the one hand, not all economic rights are disposable, and on the other, not all disposable rights have an economic nature.

2. Public Policy

Under Portuguese law, the reference to “public policy” in the New York Convention refers to the international public policy of the country where a party chooses to have the foreign arbitral award recognized and enforced. Article 1096.º/f) of the Portuguese Civil Procedure Code expressly states that the only ground for refusing to review and confirm foreign awards is that the recognition of the award would lead to a result clearly incompatible with the principles of international public policy of the Portuguese State. The offense to public policy may relate to the arbitration agreement (for instance, if it is null and void), to the arbitration (e.g. partiality of the arbitrators, violation of the rights of defense), to the award, or even to the enforcement itself. Under Portuguese law, recognition of an award violates public policy where “its application creates a great injury, unbearable to the deepest ethical-legal sense of the Portuguese system (...).”⁶ For evaluating the condition set out in Article 1096.º/f) of the Portuguese Civil Procedure Code, the court should only look at the award itself and not to the ground on which it lays.⁷

Case Law Developments

A. Enforceability of a Foreign Arbitral Award in Portugal

The Portuguese Supreme Court held in March 2009 that a foreign arbitral award under the New York Convention can be enforced automatically in Portugal without revision or confirmation. The Court noted that under article 48, 2 of the Procedure Code “decisions rendered by an arbitral tribunal are enforceable under the same terms as judicial court decisions.” The Court then recognized that Article III of the New York Convention applied and that there could not be substantially more onerous conditions or higher charges to recognize and enforce foreign awards than those applied to the recognition and enforcement of national arbitral awards. (Decision of the Supreme Court of March 19, 2009.)

B. Service of Process

Pursuant to Article V (1)(b) of the New York Convention, the burden of proof falls on the party against which the arbitral award is issued when claiming that it was not properly informed of the selection of the arbitrator or of the arbitration process itself. For the party to be deemed to have been duly informed of the selection of the arbitrator and of the arbitration process itself, it is not necessary

for service of the arbitration process to have been made by registered mail with acknowledgment of receipt, and a vernacular translation. Rather, service of process upon the Respondent, as required by al. e) of art. 1096º of the Civil Procedure Code (“CPC”), must be made in accordance with the law of the court of origin. Therefore, it is according to arbitral procedural law, and not according to the Portuguese procedural law, that the question of the validity of the service of the process must be viewed so there is no requirement for registered mail with acknowledgment of receipt as required in litigations under articles 233º, no.2, al. a), 236º and 247º of the CPC. No specific method of service is specified in the New York Convention, hence it must be ascertained if the party against which the award is issued was, or was not, effectively placed in the situation where it could, if it wished to, present its points of views/arguments before the arbitrators.

Under Article V(2)(b) of the New York Convention, the recognition or enforcement of an award can also be rejected if such recognition and enforcement is against public policy, which is called in Portugal the International Public Policy of the State of Portugal, as defined at al. f) of art. 1096º of the CPC. No principle of this public policy requires service by registered mail with acknowledgment of receipt, nor that the demand should be in the native language of the served party. (Decision of the Supreme Court of May 18, 2005.)

C. Court of First Instance as the Competent Court

According to Article III of the New York Convention and according to articles 24, no. 2, 26, no. 2 and 30, no. 2 of Law no. 31/86 of August 29, the court of first instance (whether such court is of general jurisdiction or of specific jurisdiction) and not the “Relação” (which is the court of appeal that is one level above the court of first instance) has jurisdiction over recognition of an international award. (Decision of the *Tribunal da Relação de Coimbra* of January 19, 2010; see also Decision of the *Tribunal da Relação de Lisboa* of October 2, 2001; Decision of the *Tribunal da Relação do Porto* of October 26, 2004.)

D. Conflict of Laws

The rules of conventional international law in which the Portuguese State takes part, not only are immediately enforceable in Portugal, but also take a superior role in the hierarchy of norms issued by national statutory bodies, so that, should any conflicts arise between national law and conventional international law in enforcing a foreign arbitration award, the latter will prevail.

E. The Arbitral Tribunal

Under articles 289 and 389, no. 1, al. d) of the CPC, the arbitration process is considered initiated when a party sends a request to the counterparty for the constitution of the tribunal pursuant to art. 11 of Law no 31/86, of 29/08. A certificate of this notification is not required be-

fore the arbitration process is deemed initiated. (Decision of the *Tribunal da Relação do Évora* of 05-06-2008.)

Conclusion

The New York Convention has now been in force in Portugal for 16 years. Jurisprudence shows that the New York Convention is an instrument widely accepted in Portugal with respect to recognition and enforcement of foreign arbitral awards related to several types of commercial disputes, notably those arising in the context of maritime, franchise and distribution agreements as well as contracts for the purchase and sale of merchandise. It also shows that many of the issues dealt with by Portuguese Courts relate to matters of public policy rules, conflict of rules and arbitrability.

Portuguese domestic law is also highly favorable to foreign arbitration and therefore has substantial relevance to recognition or enforcement of a foreign arbitral award in Portugal under the New York Convention.

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Endnotes

1. Arbitration in Portugal is regulated by Law no.31/86, of 29 August 1986, as amended by Decree-Law no.38/2003, of 8 March 2003, also known as the Portuguese Law on Voluntary Arbitration (LAV). Please note that a new arbitration law on voluntary arbitration is currently being debated in Portugal and may come into force soon.
2. Article 1096, b).
3. Article 37, LAV.
4. Article 1.1, LAV.
5. <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/7d0e8e0e55346827802576af00501395?OpenDocument&Highlight=0,arbitra>.
6. Decision of *Tribunal da Relação do Porto* of 11-10-2004, proc. 0454490, available at www.dgsi.pt.
7. See Decision of *Supremo Tribunal de Justiça*, 03.07.2008, proc. 08B1733, available at www.dgsi.pt.