

GENERAL COUNSEL QUESTIONING COMPLEXITY OF PORTUGUESE ARBITRATION

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In-house lawyers questioning who leads the arbitration process, the General Counsel, external law firm or arbitrators?

Portuguese in-house lawyers discussed the challenges of managing the arbitration process, at a recent meeting hosted by Iberian Lawyer's In-House Club in Lisbon.

The event, one of many across Spain and Portugal for lawyers working within businesses, was sponsored by the law firms PLMJ and Barrocas Advogados.

Faced with the perceived complexities of arbitration and different procedural and award processes when compared to traditional litigation, General Counsel are often unsure of the steps they should follow, participants heard. Above all, is it they who should be driving the process, or passing control over to their external lawyers?

Introducing the debate, Rui Mayer, General Legal Counsel and Company Secretary of GALP, suggested that arbitration is increasingly regarded as a satisfactory, timely and cost effective way of resolving both complex domestic and international disputes.

But while much of the writing on arbitration focuses on the relevant legal framework, or the role of the arbitrators in the process, there remains a shortage of information regarding the role of the General Counsel; who, at the end of the day, has the ultimate responsibility for the outcome of the process.

"Arbitration is of course very demanding" Jose Miguel Judice, Head of the Arbitration practice at PLMJ, told participants.

"External lawyers need to work as a team with the in-house lawyers. This means knowing the documents well, analysing the facts and preparing all the aspects of the case in detail, such as speaking to the witnesses and making sure they are prepared for cross examination."

This was a view mirrored by Mireille Bouzols-Breton, currently a judge in the International Chamber of the Commercial Court in Paris and until recently the Group Senior Vice President Legal at Technip, where she led a legal team of over 50 lawyers.

"It is always good to ensure that senior

management are actively involved in the case," she said. "My advice on major arbitrations is that you should organise an internal team from across the business including, say, a project engineer, who may in fact be initially reluctant, to get involved in the case."

Businesses need also to have special internal procedures, especially regarding any financial provisions for potential awards or losses, she suggested.

"And, of course, you have to consider if and where parties have assets in case you have to seize them."

In Portugal the interaction between arbitration and civil process is a particular challenge, participants heard.

"Portugal's Civil Procedure Code can create confusion and added complexity which does not help the arbitration procedure", explained Manuel P Barrocas of Barrocas Advogados. "A party can appeal an award on the merits of the case but when drafting arbitration clauses parties need to be aware of this risk, taking the appropriate steps to avoid it."

Such grounds of appeal are not however possible in the case of international arbitrations where arbitrators enjoyed more autonomy from the courts, Barrocas nonetheless cautioned. "There is also emerging now in certain legal circles some discussion regarding the potential for reforming the current domestic approach, and to bring it into line with international practice."