HOW THE COURTS VIEW ARBITRATION

Posted on 01/11/2005

Category: Opinions
Tags: clarification, harmonisation, international, internationally, jurisdictions, modernization, opportunities, practitioners, sophistication, technicalities

José Miguel Júdice outlines the challenges facing Portugal's arbitration community.

The growing sophistication of modernday disputes has resulted in a search for practical solutions, decision-making mechanisms and resources which are not usually available in the courts. Alongside the current crisis in the justice system, with judgements often taking four to six years to conclude, there is an increasing belief in arbitration as the dispute resolution mechanism par excellence.

From a purely legal standpoint, Portugal is a country where arbitration can be practised without disturbance. We are signatories to the New York Convention, guaranteeing the international recognition of arbitration awards, and the Arbitration Act of 1986 considers UNCITRAL as well as other internationally recognised standards.

However, in reality, all is not as bright as it appears. Portugal has regulations that are modern (designed to eventually bringing our country in line with the most advanced jurisdictions), but a

judicial system and a legal community that acts as if the regulations are not exactly what they seem.

The judiciary still has a strong bias against conflict resolution outside the state courts. If allowed, many Portuguese Judges would decide against arbitration, as they consider it a breach of the monopoly that, as a profession, they would rather preserve. That non-judges are able to make awards, usually on very sophisticated and/or valuable cases, and quite often without appeal to the state courts, is considered as a kind of infectious risk. If the legal community can see the advantages of arbitrators over judges on commercial and other matters, public opinion and the authorities may see a tendency in favour of destroying or limiting the judges' monopoly.

Another problem is that the Portuguese Procedural Code (PPC) is an aged text (dating from 1939) unsuited to modern needs. It has a strong ideology, providing almost no scope for adapting the regulations to the specific needs of certain conflicts. Many parties try to avoid arbitration if they feel they may lose. The lack of clarification on harmonisation between the Arbitration Act and the PPC creates opportunities for technicalities to set aside awards on grounds that, although not allowed by the Arbitration Act, could be considered if the PPC applies to the arbitration proceedings.

That said, in the last twenty years the movement towards arbitration has improved enormously. Our firm is currently involved in more than 30 arbitrations, as members of the panel or counsel. In recent years, the courts have been increasingly required to analyse arbitration matters, and some precedents are being published that help practitioners. But while precedents suggest a move towards accepting arbitration, at least as a fait accompli, we think it important that the national and international arbitration community does not think that Portugal has already attained a level equal to the most arbitration-friendly legal environments. Work still needs to be done and open debate will be a priority.

There have been court decisions unfriendly to arbitration, although I believe that step by step (and with some main and important exceptions) things are improving. Our big problem is that, unlike common law countries, we do not have rule by precedent. Too often courts, including the Supreme Court, gives rulings that are inconsistent with earlier decisions.

Even with all these problems and difficulties, we are very optimistic about the future . The positive economic and political evolution of former Portuguese colonies is helping transform Lisbon into a regional arbitration centre.

However the modernization of Portuguese arbitration laws regarding international conflicts is a precondition for that goal. If Portugal wants to be a significant player in the arbitration world, we must insulate arbitrations located in Portugal from the local courts as other countries have done in recent years.