LAW ON VOLUNTARY ARBITRATION

(Statement of the Reasons of the Legislative Proposal or, alternatively, Preamble of Decree-Law published on the basis of a legislative delegation law)

1. The law on voluntary arbitration (Law no. 31/86 of 29 August) was published some 23 years ago, and at the time it constituted an enormous progress in the Portuguese legal system, which thus got a modern and, from the legal and technical point of view, well formulated flexible regulatory framework. This enabled voluntary arbitration to overcome, in our country, its until then almost irrelevant state.

Notwithstanding their recognition of the law's great quality and value, and as soon as it was published, several eminent commentators could not help pointing out some defects or omissions. These became even more apparent not only as a result of the accumulated experience acquired with the practical application of the law, but also from its comparison with the vast reflection and analysis *acquis* emerging from the impressive number of different works or studies on commercial arbitration carried out in countries where, particularly during the last three decades, this set up achieved a wide propagation and a wide technical and legal sophistication, and, more recently, on investment arbitration. It is only fair to mention that the Portuguese legal doctrine was attentive to this increased interest on the study of voluntary arbitration.

However, in order to justify the need to modernize our voluntary arbitration regulatory framework we must stress the fact that over the last twenty some years, specially due to the publication in 1985 of the UNCITRAL Model Law (*United Nations Commission on International Trade Law*, also known as *CNUDCI* or *CNUDMI,* the corresponding acronyms of its other official names in the French and Spanish languages), on International Commercial Arbitration, several States – among which one may not only find the majority of the European countries but also the American and the Far Eastern countries, including the major world economic powers – have adopted new voluntary arbitration regulatory laws (and this

occurred even in countries that had approved laws on this issue in the early eighties).

At the origin of this was the understanding by those countries' governmental officers and representatives of the entrepreneurial representatives that the creation of favourable conditions for the development of voluntary arbitration does not only constitute an extremely important factor for the development of their economies, both at domestic and international level, in as far as it facilitates and contributes to a more efficient settlement of disputes constantly arising in the context of economic activities, but also that it may constitute by itself a source of very significant direct benefits for the respective countries, should one succeed to induce international commerce operators to locate in their territory the arbitrations provided in their respective agreements as the method to settle disputes arising therefrom.

2. For the abovementioned reasons, the "Portuguese arbitration community", mainly composed by university teachers and lawyers who, more or less frequently, intervene as representatives of the parties or as arbitrators in domestic or international arbitrations, has since long been claiming the publication of a new law that provides our country with a modern voluntary arbitration legal framework. There is a clear preference for the adoption of an entirely new law, instead of the approval of mere supplements or amendments to the law currently in force.

Therefore, and not surprisingly, the Portuguese legislator's unequivocal option was to prepare a new coherent text. In fact, there are several reasons that justify that choice.

In the first place, the objective of systematic coherence was decisive. It is a given fact that subsequent amendments to laws that had an undeniable internal coherence the moment they were prepared, are frequently the source of interpretation problems. Secondly, it was soon concluded that the necessary or convenient amendments would be so numerous that it would not make much sense to opt for a possible mere modernization or complementation of the current law. As we will refer below, there was the intention of bringing the new law closer

to the regime of the UNCITRAL Model Law on International Commercial Arbitration. Finally, preparation of a new law was thought to be a precious element to raise the awareness of companies and professionals in several areas who often resort to arbitration in other countries (particularly in those with which our country has a more intense economic relationship) to the advantages and the potential of electing Portugal as the seat of international arbitrations, specially concerning disputes involving companies or other economic operators from Portuguese speaking countries, or where the applicable law is the one of these countries, like for instance Brazil. In fact, Brazil is nowadays one of the countries where settlement of disputes by means of arbitration has registered an enormous growth that placed this country on the absolute frontline in this field.

The second option that the Portuguese legislator was confronted with concerned the decision on whether he should prepare a text that aimed to be original at the level of compared law, or if, on the contrary, he should seek to follow the UNCITRAL Model Law, by adapting and completing it whenever necessary according to the Portuguese reality. For a number of reasons it was easy to realize the advantages of this second solution.

To begin with, over the last 24 years, the prevailing tendency in the world has been clearly to use the said Model Law as a basis or, at least, as the source of inspiration. This is not a decisive factor, but it is certainly one to be taken into consideration. Secondly, it was weighed that this option would create the conditions to enable the major Portuguese cities to be more often elected as the seat of international arbitrations, in particular those relating to disputes in Portuguese speaking countries. Thus, if the applicable laws in this country become familiar – given that they are embedded in a regulatory matrix whose solutions have been tested by the courts of other countries and where the problems that are more often raised have already been profoundly analyzed and settled by the foreign and international jurisprudence – the international arbitration community will, thus, much more likely consider Portugal as the seat of international arbitrations. Thirdly – and this may probably be deemed to be the main reason –, the fact that in the course of the years, based on the accumulated international experience, UNCITRAL was capable of making its Model Law evolve, had a significant weight in the choice. Therefore, it is now possible to state that the current version of this Model Law corresponds

most likely even better than any domestic law, to what reality demonstrated to be appropriate for the development of arbitration as the normal way to settle disputes in the field of international economy.

Obviously, the motivation now assumed does not mean that the now approved and published new law is a mere translation of the UNCITRAL Model Law. Actually, this would not be possible. It is a known reality that the referred regulatory instrument is not an exhaustive one, given that originally it was designed to regulate international arbitrations, but also because it left a few relevant issues open, namely to be regulated in accordance with the cultural or institutional particularities of several national legal systems (such as the identification of the courts with jurisdiction to provide the various indispensable forms of support to the regular development of arbitral proceedings). Furthermore, inclusion in the Portuguese legal system of a law based in the Model Law could not ignore the need to respect the unity and the internal coherence of this system.

That is why it was sought, whenever deemed useful, to value tested solutions in the application of Law no. 31/86. Guidance or insight was also sought in several national laws regulating arbitration which were approved over the last fifteen years in countries where legal science studies on arbitration and the accumulated experience resulting from its practical use studies have reached a depth and a refinement that does not yet exist in the Portuguese panorama, namely when compared with countries with whom we have more affinity in terms of culture and legal institutions.

3. Moreover, some of the fundamental traits that characterize the new voluntary arbitration regulation should be briefly mentioned.

Following the example of the German law on arbitration approved in 1998 and immediately integrated in the Civil Procedure Code of the country, this law changes the disputes' arbitrability criterion by making the arbitrability not dependent on the availability of the right to be submitted to arbitration, but rather, in the first place, on its pecuniary nature. Similarly to the German law, this one also combines that main criterion with the secondary criterion of the compounding

character of the claim in dispute, in order to allow the submission to arbitration even of disputes not involving pecuniary interests, but regarding which settlement is allowed.

Concerning the requirements of formal validity of the arbitration agreement, the provisions of this law aim to grant more flexibility to compliance with the written form requirement, also in accordance with what is defended by UNCITRAL, not only by means of the reformulation made in 2006 of article 7 of its Model Law on International Commercial Arbitration, but also by means of the recommendation made on the same date and in strict compliance with the amendment of that provision to the Contracting States in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, relating to the interpretation of articles II (2) and VII (1) of the said convention.

In line with UNCITRAL Model Law, this law clearly states the principle of the arbitral process' autonomy, implicitly embodied in Law no. 31/86, and, on the other hand, it also reaffirms the so called negative effect of the principle of "Kompetenz-Kompetenz" of the arbitral tribunal, also embodied in the previous law, from which we now can draw all the appropriate conclusions concerning how to articulate the competences of arbitral tribunals and of the courts called upon to ultimately control the rightness of the tribunal's decision on that issue.

In regulating the way the arbitral tribunal is to be constituted, the new law is more precise than the previous one. It provides that independence and impartiality are indispensable requirements not only of an appointed arbitrator, but also that he should be able to remain a member of the arbitral tribunal. This is, in fact, commanded by the constitutional principles in relation to any court. Furthermore, it regulates the process leading to the removal of arbitrators who do not comply with those requirements or who do not reveal the required diligence or capacity to satisfactorily comply with the functions assigned to them. This compensates for a serious gap in the previous law which, in a manifestly inappropriate manner, simply referred to the judges' impediment and dispensation regime.

The way to constitute an arbitral tribunal was defined for cases of arbitrations with multiple applicants or respondents and the solution adopted was the one that has

been adopted in more recent foreign laws and in some regulations often used in international arbitrations (like the CCI regulation).

Whenever the parties fail to fix the amount and the payment terms of the arbitrators' fees and costs in the arbitration agreement, the arbitral tribunal is granted the power to decide on this matter. This decision, however, shall remain subject to a possible review and correction by the court. This also makes up for a serious gap in the previous law which could, should one of the parties fail to agree with the arbitrators' fees and costs, give rise to a practical impossibility to start the arbitration, notwithstanding the fact that the parties elected this settlement method of the dispute.

There is a series of questions with great practical relevance that may be raised in the arbitral process and regarding which the previous law was completely silent, namely the granting of interim measures in subordinated arbitral processes.

It is certain that some of those questions had already been corrected by the Portuguese courts' case law, such as the possibility to apply for interim measures to the courts in subordinated arbitration processes yet to be started or already ongoing. However, several other questions clearly remained unresolved. Among them, was the question of knowing whether or not the arbitral tribunal, particularly in the case — which happens most of the times — where the parties have failed to agree thereon, could order interim measures and, should that be possible, to what procedural regime such an order would become subject to.

This law aims to answer such questions and follows very closely the series of provisions approved by UNCITRAL in 2006 to be embedded in its Model Law. The contents of this series of provisions then attached to the Model Law are based on the distinction between "preliminary orders" — which are by nature short termed and not liable to be coercively enforced and to which one basically resorts to preserve the existing situation, as long as the arbitral tribunal is not in condition to order an interim measure, and which may, if its '*raison d'être*' so requires, be issued without hearing the respondent — and true 'interim measures', which are only ordered after hearing the respondent. Coercive enforcement of such interim measures implies cooperation of the courts. Although the source of this element of this law was the UNCITRAL Model Law, in the definition of the requirements to

order interim measures it was sought to use the terminology adopted in this field by the Civil Procedure Code, given that Portuguese jurist are more familiar with them. This is certainly a matter where the spirit of good cooperation between arbitral tribunals and the courts, whether judicial or administrative courts, shall be put to the test, having in view a successful application of the new regime.

In the regulation of the essential aspects of the arbitral process — and this law could only be concerned with these aspects, given that the detail of that process' regulation must fall to the parties or to each arbitral tribunal constituted to settle a dispute — the provisions of the UNCITRAL Model Law and of the foreign laws that followed it most faithfully were taken into account, as well as the teachings of the most reputed and modern foreign doctrine that studied and commented on this particular area of the commercial arbitration issue.

The definition of the arbitral process' regulatory rules must not be subject to the procedural rules applicable to the courts, without prejudice of the parties agreeing or the arbitrators deciding – in the exercise of their competence to regulate the arbitral process – that the first or the latter may refer to those rules.

Besides, this law embodies solutions that were peacefully accepted in the doctrine and in the compared law of arbitration, namely the fact that the respondent's lack of intervention in the process or the respondent's failure to submit a statement of defence cannot produce any evidentiary effects relating to facts claimed by the applicant.

In the course of the arbitral process, the possible intervention of third parties is also contemplated. However, the possibility of spontaneous or induced intervention of such third parties against the will of one of the parties in the arbitral process or without the arbitral tribunal's approval, as a supplementary legal solution, is not provided. In fact, it is vastly recognized in the doctrine that without significant restrictions or adaptations the intervention regime of third parties from the procedural law applicable to courts cannot be transposed into the voluntary arbitration. However, possible acceptance by the parties of more liberal third party intervention regimes, whether spontaneous or induced, is admitted, as long as they appropriately regulate such matter in the arbitration agreement or refer therein to institutionalized arbitration agreements. In fact, these admit, in principle, with

several limits and subject to the discretionary appraisal of the administrating institution and of the arbitral tribunal itself, some forms of intervention of third parties in ongoing arbitration processes.

Concerning the time and the way the arbitral award must be made, there is significant innovation in several points in relation to the previous law, nearly always following the path adopted in the UNCITRAL Model Law and in some foreign laws that closely followed it, e.g. the German and the Spanish law.

In this area one must highlight a particular point, namely the time limit fixed for the court to make and serve the parties with the final award on the substance of the dispute. Starting from the understanding that the period of 6 months provided in the previous law was unrealistically short (whose extension – in a literal interpretation which gave origin to serious problems as it defended that the initial duration could only be doubled – was dependent on the parties' agreement), the option now was to establish an initial period of twelve months, which can be extended one or several times without requiring the approval of both parties. Thus, the option was to grant the arbitral tribunal the power to extend such period, once or additional times, for successive periods of twelve months, by means of an appropriate justification, as it was deemed that the practicality of an alternative solution granting such decision to the courts (as in the French law) seemed highly doubtful (given the difficulty to obtain a decision the courts in due time). Such extensions require the presentation by the arbitrators of appropriate justifications, but they may be opposed by the parties, by common agreement, or, failing to reach such an agreement, by the possible removal by the courts, upon request of the parties, of the arbitrators failing to act with due diligence. The idea was to avoid (as it constituted a greater evil) the waste of time and money spent in arbitrations that would end without a final award on the dispute, namely due to the termination of the function and the powers granted to arbitrators, as well as to the transpiring of a peremptory period combined with one party's will to terminate an arbitral process that it would deem disadvantageous. In fact, it is known that in most cases, exceeding the duration of the period initially fixed is not the fault of arbitrators.

Among the numerous points in the Chapter relating to ordering the final award in which this law innovates in relation to the previous law, there are three more that deserve to be highlighted.

On this issue, the first point to be mentioned concerns the extension of the arbitrators' power to decide as "*amicable compositeurs*" to national arbitrations, if the parties agree to award them such task when such a possibility is deemed useful.

The second innovation that deserves a special reference is the inversion of the supplementary rule relating to the appealability of the final award made in the arbitral process. According to this law, and contrary to the provision of the previous law, save if expressly provided by the parties in the arbitration agreement that the final award made in the arbitration could be appealed under the terms provided in the applicable procedural law, now such an award cannot be appealed, without prejudice of recourse to the court against such award by means of an application for setting it aside, according to the provisions of this law, which cannot be waived beforehand. This amends one of the most justly criticized aspects of the previous law.

The third innovation that is worth mentioning in this Chapter concerns the preview and the regulation of some acts that the arbitrators may perform after the service of the final award and upon request of the parties, namely the correction of material errors and the explanation of ambiguities or obscurities detected in the award, as well as the possibility of making an additional award on parts of requests or requests submitted in the process and omitted in the earlier award. Although such possibility is often embodied in the comparative law of commercial arbitration, when the previous law on voluntary arbitration was in force, there was good reason to doubt whether the arbitral tribunal could perform such acts after serving the award, bearing in mind the rule of termination of the arbitrators' jurisdictional power stated in article 25 of the said law.

The application for setting aside the award – which is only admissible if based on one of the grounds typified in this law – no longer constitutes an action under ordinary proceeding, and its award would remain subject to two degrees of appeal. In order to constitute recourse, which is not exactly an appeal (as it does not aim to reappraise the merits of the rejected decision), and depending on the nature of the dispute, it must be handled as an appeal and submitted either to the competent Court of Appeals or to the Administrative Central Court. It will be liable to be appealed to the Supreme Court of Justice or to the Supreme Administrative Court only within the limits admitted by the applicable procedural law. Obviously, this

profound change of the regime to recourse against the award aims to accelerate as much as possible taking the final decision on the recourse against the arbitral award and, consequently, reducing the duration of the uncertainty to which this decision (while the award is pending) is subject to. On this particular, the Portuguese regime of voluntary arbitration is also in line with the solution embodied in the majority of foreign laws. Besides the advantage it provides to any sort of arbitration, this constitutes another factor that may be determinant to elect our country as the seat of international arbitrations.

The listing of the reasons to recourse follows the UNCITRAL Model Law and some foreign laws that closely followed the said model law. However, some provisions of the previous Portuguese law were kept, as their practical application proved to be correct. The 60 day period currently fixed to submit the application for setting aside the award (which is the same as the one provided in the Spanish law) is shorter than the one set out in the Model Law and in the German law, and seeks to reduce the period of uncertainty to which the arbitral award shall be subject during that phase to a reasonable minimum.

In respect of the enforcement of the arbitral award, a provision stemming from the German law has been included, which prevents a party that might invoke a justification for setting aside the arbitral award by means of the recourse submitted within the respective period of time but failed to do so, from expecting a submission of an application for the enforcement of the arbitral award against herself and to then oppose it based on that reason. This solution, provided by the previous law, was justly criticized by the Portuguese doctrine.

The Chapter dedicated to international arbitration, a concept that is still defined as in the previous law, has a very useful provision embedded – originating from the Swiss law and later adopted by the Spanish law – which provides that a State or a State controlled organization or company cannot oppose pleas based on its domestic law to somehow escape from its obligations arising from that arbitration agreement.

In this same Chapter, also as provided in the Swiss and Spanish laws, the assessment of the substantive validity of the arbitration agreement is now based on the provisions of one of several legal systems that apply in alternative, in order to

protect as much as possible the validity of the agreement that complies with any of those laws.

On the other hand, in line with what has been adopted in recent laws on arbitration, namely the Spanish law of 2003, the parties are allowed to elect, but should they fail to do so, then the arbitral tribunal is allowed to determine that the rules of law applicable to the subject-matter of the dispute do not belong to a state's legal system but rather to an a-national or trans-national source, as is the case of the so called *lex mercatoria*.

In respect of recognition and enforcement of foreign arbitral awards, the regime of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards is embedded in this law and there is no discrepancy between them. At the same time, the competence to decide on the recognition and admission to enforce such awards is referred to the Courts of Appeals. Thus, the case law which was being consolidated in the opposite direction and against a practically unanimous understanding of the doctrine was overcome.

One of the most important Chapters of this law and its good application on which the correct operation of the new voluntary arbitration regime will largely depend, is certainly the one that concerns the identification of the courts that are competent to provide the various forms of support or assistance to arbitration, as well as the definition of the procedural regime to which any of those assistance modalities will be submitted.

Following the example of several foreign laws, in particular the German law, this law has chosen to concentrate in the Courts of Appeals, or in the Administrative Central Court – relating to disputes of administrative law – the competence to set as the aim of the majority of the decisions to ensure the correct operation of arbitral proceedings and to control its regularity, as well as the validity of the awards made therein. No State can waive control relating to arbitrations located in its territory.

These courts, due to the greater experience of their judges and to the fact that they are less overloaded with work than first instance courts, gather the indispensable conditions to acquire more in-depth knowledge on arbitration issues. This may

turn them into the best promoters of a solidly prepared case law, in favour of the development and perfecting of arbitration, as it is based on the appropriate understanding of the specificities of the problem and on the knowledge of the prevailing tendencies in the doctrine and the case law of the countries where this dispute settling method has been more steadily developed. Perhaps one way to achieve such a goal would be the possible creation – in a not very distant future – of sections specialized in arbitration in the Courts of Appeals that will be more frequently called to decide on problems related to domestic or international arbitrations, that is to say, the Courts of Appeals of Lisbon and of Porto. This is already happening in some countries and the advantages are recognized by everyone.

4. Finally, immediate application of this law moves away from disputes arising from or relating to labour contracts, notwithstanding the fact that they may be covered by the herein adopted criterion of arbitrability. The reason of such distancing lies in the circumstance that the possibility of submitting such disputes to voluntary arbitration – according to authors that studied these matters more profoundly, namely in countries where such submission has been interdicted for a long time – must be accompanied by the creation of mechanisms that protect the weakest party in the labour relation. In fact, under a legal and constitutional requirement, the definition of such mechanisms and, more generally, of the legal framework that will specifically govern the possible submission to voluntary arbitration of this type of disputes must be preceded by consultation and debate over these matters with the workers' organizations. In the present legislature this was not compatible with the approval of this law.