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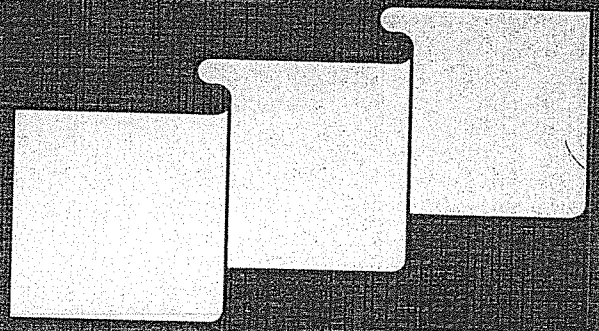
COMPARATIVE LAW YEARBOOK OF INTERNATIONAL BUSINESS



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General Editor

Dennis Campbell
Director, Center for International Legal Studies
Salzburg, Austria

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guidelines to transactional lawyers, the arbitration community, and the business world in general. This is because it situates its holding in the reality of the business dealings. The award creditor may have decided not to have the non-signatory as a party to the arbitration agreement because it chose to assume a higher commercial or political risk and priced its transaction accordingly. When the contract soured, it should not be allowed to invoke non-signatory jurisprudence to cure the business effects of its own decisions.

In some cases, as in *Altain Khuder*, the decision to contract with a BVI company without making the liquid associate company jointly or severally liable may be the result of a lack of experience in complex international ventures. However much one may sympathize with the Mongolian award creditor in the circumstances, this is no ground for allowing the arbitral tribunal to exceed its remit.

In addition to being theoretically correct, the decision of the Victorian Supreme Court produces efficient litigation outcomes. Reviewing or enforcing courts are not burdened with the task of selecting the most plausible interpretation of negotiations, some of which may contain commercially sensitive information. In addition, the abusive joinder of non-signatories in expensive arbitration proceedings and any resulting judicial proceedings is avoided. Third-party creditors of non-signatories also are protected against unidentified contingent liabilities, and potential award creditors are required to make decisions about the level of risk they are willing to accept if the non-signatory remains outside the contract.

In *Dallah*, Lord Mance used a tennis metaphor to make the point that the party seeking to enforce a foreign arbitral award against a non-signatory has only the advantage of service. A more apt variation should be that if the award creditor, when presenting the award for enforcement, cannot prove to the enforcing court that the non-signatory was a party to the arbitration agreement, he commits a double fault and loses game, set, and match to the non-signatory.

Tax Arbitration in Portugal: A New Tax Dispute Resolution Model

Rogério M. Fernandes Ferreira,
José Calejo Guerra, and José Mègre Pires
RFF & Associados Law Firm
Lisbon, Portugal

Introduction

In January 2011, the tax arbitration regime (*Regime Jurídico da Arbitragem* — RJAT) was introduced in the Portuguese legal system by way of Decree-Law Number 10/2011 of 20 January. This new regime was designed as an alternative dispute resolution method for disputes between taxpayers and the tax administration, with the specific goals of reducing the number of tax cases pending in the Portuguese courts and promoting faster resolution of tax disputes.

Considering that most tax disputes in Portugal last for several years, thus reducing the effectiveness of the tax system as a whole and hindering investment opportunities in Portugal, this new regime, if correctly applied, represents a tremendous development in this field, benefiting all operators involved.

In order to guarantee the actual application of this regime, other laws were passed to regulate the binding force of arbitration decisions, the arbitration fees, and the appointment of tax arbitrators. Accordingly, Ordinance Number 112-A/2011 of 22 March, issued by the Minister of Finance and Public Administration and the Minister of Justice, regulates the effectiveness of arbitration decisions *vis-à-vis* the tax administration.

Moreover, the Portuguese tax administration is subject to and bound by the decisions issued by qualified arbitration tribunals as regards disputes with a value equal to or less than EUR 10,000,000. In practice, this means that only disputes within this threshold can be subject to arbitration, with all others being mandatorily subject to the traditional jurisdictions.

The RJAT also imposes special requirements depending on the value of the tax disputes. Disputes with a value of more than EUR 500,000 will be decided by a tribunal headed by a former tax judge or by a person with a masters degree in tax law, while disputes with a value of more than EUR 1,000,000 will be decided by a tribunal headed by a former tax judge or by a person with a PhD in tax law.

In any case, the requirements on the designation of the arbitrators always need to be interpreted in conjunction with the Regulation on the Selection of Arbitrators in Tax Matters, under which only individuals with a minimum of ten years' experience in tax matters can be appointed as tax arbitrators.

The RJAT was complemented by the Regulation on the Fees due for Tax Arbitration Procedures, which regulates the costs for resolving tax disputes through arbitration, the way such fees are paid by the taxpayers who decide to resort to tax arbitration, and the way the arbitrators are remunerated for their work.

This set of regulations enables the introduction of a unique and innovative regime in the Portuguese jurisdictional framework, one that is unmatched in the world. This new regime allows for swift resolution of tax disputes, promoting the efficiency and reliability of the Portuguese tax system and providing robust protection mechanisms for domestic and foreign current and future investors.

Alleged (Un)Constitutionality of Tax Arbitration

Traditionally, some questions have been raised concerning the compatibility of tax arbitration with national legislation, particularly with the principle of unavailability of tax credits stated in Article 30(2) of the General Tax Law. According to this principle, which also is a corollary of the constitutional principles of equality and legality, it is not possible to dispose of tax credits. In practical terms, this means that the parties to the tax relationship — the taxpayer and the tax administration — cannot decide to reduce or waive any taxes, except when such possibilities are provided for in the law and only if all existing legal requirements are met.

The discussion focused on whether or not the settlement of a tax dispute outside the traditional tax courts would mean free availability of tax credits, in the sense that the taxpayer and the tax administration could merely adjust the taxes due, with no regard for tax legality. Considering the way in which the RJAT has been designed and construed in Portugal, most of the Portuguese legal doctrine considers

Portuguese tax arbitration to be compatible with the principle stated in the General Tax Law and the constitutional principles of equality and legality. This is because tax arbitration is mandatory and binding for the parties involved, and all decisions are based solely on the existing law, as interpreted by the legal doctrine and case law.

This debate is even more in favor of the compatibility of the new tax regime with existing legal principles when one considers that these principles seem to refer only to tax credits which are already consolidated in the legal order, in the sense that they are not subject to administrative or judicial approval. Even if that were not the case, these principles could not be construed as incompatible with the current framework of tax arbitration, as they do not oppose the taxpayer making use of administrative or judicial proceedings to dispute any tax assessments.

Tax Arbitration Tribunals

Nature of Tribunals

According to the RJAT, tax arbitration disputes are settled by tax arbitration tribunals which are created for each particular case under the auspices of the Center for Administrative Arbitration (CAAD). A particular arbitration tribunal is constituted for each dispute and dissolved when that dispute ends.

Arbitration tribunals are sovereign entities,[1] the creation of which is expressly provided for by the Constitution.[2]

In addition to constitutional support, there is no doubt that tax arbitration tribunals are, like any other tax court, able to exercise judicial functions in an independent manner, without being subject to the administrative or political powers of the state.

Jurisdiction and Competence

Only arbitration tribunals that are created under the aegis of the CAAD may settle tax disputes. This is because the CAAD is the only arbitration center that is permitted by law to operate for resolution of tax disputes. It has a close relationship with the Supreme Council of

1 Constitution of the Portuguese Republic, Article 110(1).
2 Constitution of the Portuguese Republic, Article 209(2).

Administrative and Tax Courts, with which it has a protocol to ensure that there is strict cooperation between the two entities in the best interest of the administration of tax justice.

A relevant issue in this context concerns the powers of tax arbitration tribunals, which has great significance in the effectiveness of decisions issued by the tribunals. In particular, the question is whether a tribunal is restricted to the declaration of illegality of a disputed tax assessment act or whether it also is empowered to effectively annul the disputed act and to impose on the tax administration the obligation to take specific measures to comply with the arbitration decision.

If the arbitration tribunals were limited to "declarative" powers, the effectiveness of the decisions issued — and consequently the attractiveness of the RJAT — would be severely hindered. The apparent interpretation of the wording of Article 2 of the RJAT on the scope of a tax arbitration tribunal's competence is that its competence is limited to disputes where the taxpayer requests the "declaration of illegality of acts".

However, several authors have understood, based on Article 24 of the RJAT, that the determination of the effects of the tax arbitration decision falls within the competence of tax arbitration tribunals, and that such competence covers the possibility of annulling acts whose declaration of illegality is requested and of ordering the tax authorities to pay compensatory interest and imposing other sanctions. This opinion also has been supported by the case law issued by several arbitration tribunals and is currently widely accepted.

An analysis of the available arbitration case law leads to the conclusion that tax arbitration tribunals have not only rendered declarative decisions, but also annulment and condemnation decisions. This means that judgments in the context of arbitration proceedings, even if limited in scope, will have the same validity and legal effect of judgments rendered by administrative and tax courts, being as far-reaching in their legal effects.

Accordingly, in the event of non-compliance with decisions rendered by tax arbitration tribunals, the interested parties may make use of the enforcement mechanism for judicial decisions as provided for in the Code of Tax Procedure and Process.[3]

However, arbitration tribunals are limited in their scope of competence when compared with the typical tax courts. The jurisdiction of tax arbitration tribunals is limited to claims related to tax assessments,

3 Decree-Law Number 433/99.

including withholding taxes and payments on account, and on claims related to acts for the determination of the taxable amount, of the taxable base, and of patrimonial values. Disputes regarding collection of tax debts or tax misdemeanor proceedings are outside the jurisdiction of tax arbitration tribunals.

Furthermore, even in the context of acts concerning administrative and tax procedures, tax arbitration tribunals are restricted from deciding on the legality of administrative acts concerning the denial or revocation of tax exemptions and other benefits that come within the competence of the tax authorities. They also are restricted from deciding on administrative acts concerning matters that are not related to the legality of tax assessments.

Composition

By default, arbitration tribunals work with a single arbitrator. However, if the taxpayer chooses to appoint an arbitrator or if the amount involved in the dispute is more than EUR 60,000 (twice the value of the jurisdictional threshold of the Central Administrative Court), the arbitration tribunal will consist of a panel of three arbitrators.

As the option to appoint an arbitrator is left solely to the taxpayer, the tax administration will not be able to take the initiative of appointing an arbitrator. If the taxpayer decides to appoint an arbitrator, the arbitration tribunal will function with three arbitrators: one appointed by the taxpayer, another appointed by the tax administration, and the third (the president of the tribunal) appointed by the CAAD. If the taxpayer does not choose to appoint an arbitrator and the value of the dispute is less than the jurisdictional limit of EUR 60,000, the CAAD, through its Board of Ethics, will appoint the sole arbitrator.

Eligibility Criteria for Arbitrators

According to the RJAT, arbitrators must be chosen from "persons of proven technical ability, moral reputation, and sense of public interest". Eligible arbitrators should be individuals with at least ten years of professional experience in tax matters, either in the exercise of duties in the public sector or as judges or lawyers, among other qualifications.

Exceptionally, people with degrees in economics or management also may be appointed as arbitrators, provided that the arbitration involves issues which require specific expertise in these non-legal

areas. However, an individual with a non-legal background cannot be appointed as a single arbitrator or as the president of a three-member arbitration tribunal.

Special rules apply for the appointment of arbitrators. Under Ordinance Number 112-A/2011, special requirements apply to the appointment of the president of an arbitral panel in certain cases. In the case of disputes valued at more than EUR 500,000, the presiding arbitrator is required to have carried out public functions as a judge in the tax courts or must hold a masters degree in tax law; in disputes valued at more than EUR 1,000,000, the presiding arbitrator is required to have carried out public functions as judge in the tax courts or hold a PhD in tax law.

If, however, it is not possible to appoint an arbitrator who meets these eligibility requirements — which is a virtual impossibility, considering the current list of tax arbitrators elected by the CAAD — the Chairman of the CAAD Board of Ethics may appoint a presiding arbitrator without these eligibility qualifications.

Given that practicing lawyers also can act as arbitrators, the need for impartial and fair judgments is essential. To meet this purpose, a specific set of rules on impediments and conflicts of interest is in force, imposing special duties on the arbitrators. Under these rules, arbitrators are obliged to inform the CAAD, after their nomination, if there are any issues that may raise concerns about their impartiality.

In fact, one of the most intriguing features of the RJAT is that the same person may act as an arbitrator and as an attorney, although not in the same case. In extreme circumstances, the same individual may act as a judge on one case in the morning and as an attorney on another case the same afternoon. However, in order to avoid dubious situations which can give rise to issues regarding the partiality of the arbitrators and of the CAAD itself, the CAAD typically avoids appointing an arbitrator who is already acting as an attorney in any other pending case.

An eligible candidate can apply to serve as arbitrator through the proper procedure, specified by the CAAD from time to time. The names of eligible arbitrators who have been appointed are listed according to their levels of specialization; the same order will be used for the appointment of arbiters to a tax arbitration tribunal.[4]

4 The list of arbitrators is publicly available (in Portuguese) on the CAAD website at http://www.caad.org.pt/.

Arbitration Fees

Costs in arbitration procedures — generally referred to as arbitration fees — are charged in every arbitration procedure in order to cover the expenses of the arbitrators and the administrative expenses incurred by the CAAD in hosting the arbitration procedure.

The arbitration fees are calculated on the basis of two fundamental criteria. The first relevant criteria to determine the arbitration fees is the value of the dispute, as the fees vary according to the amounts being disputed. Notably, the increase in the fees is not proportional to the increase in the value of the dispute, considering that the ratio of the fees in relation to the amount in dispute decreases as the disputed amount increases. The second relevant criteria to determine the arbitration fees is whether or not the taxpayer has decided to appoint an arbitrator, in which case the arbitration fees will be higher.

A taxpayer's decision to appoint an arbitrator also has a temporary financial effect, as arbitration fees are payable in full at the time the request for arbitration is submitted. A taxpayer who does not opt to appoint an arbitrator is only required to pay half the arbitration fees initially, and pay the outstanding fees at a later stage.

Compared to typical judicial proceedings before the Portuguese courts, arbitration fees may seem higher, thus imposing on the taxpayer an extra economic burden when resorting to tax arbitration. However, a closer comparative look at arbitration fees and court fees clearly indicates that there is a similar economic impact, thus leveling the financial analysis of choosing between arbitration and judicial procedures. In fact, even though the initial fee payment may be higher in arbitration procedures, the regime was designed so that it would ultimately be less burdensome for a taxpayer to resort to arbitration.

Procedural Rules for Tax Arbitration

Judicial Claims and Arbitration Claims

One of the most important features of the RJAT is that it is an alternative means of dispute resolution in tax matters. This means that the taxpayer can choose between filing an arbitration claim or filing a court claim; conversely, this also means that the taxpayer cannot file both an arbitration claim and a judicial claim. A taxpayer who chooses arbitration over judicial proceedings cannot file a judicial claim on the same issue and on the same facts and legal arguments.

This rule also applies to the interaction between arbitration and other forms of administrative disputes. The taxpayer's choice of arbitration precludes the use of administrative procedures for the same purposes and on the same arguments.

The RJAT provides some exceptions to this rule. If the arbitration procedure ends before the arbitration tribunal is appointed, or if it ends with an arbitration decision that does not consider the material aspects of the dispute, the taxpayer can resort to other dispute resolution methods in order to obtain a final decision on the subject matter.

Coalition and Aggregation of Claims

As happens in court cases, the RJAT also allows for coalition of claimants and aggregation of claims in arbitration procedures, in accordance with the principles of procedural simplification and cost savings.

Under the Tax Procedure and Process Code applicable to the resolution of administrative and judicial disputes, it is possible to aggregate claims, provided that there is a shared purpose regarding the tax claim, the basic factual and legal arguments, and the entity's competence. However, under the RJAT, the aggregation of claims is subject to different criteria, as aggregation is only possible if the claims relate to the same factual circumstances and the interpretation and application of the same principles of law.

This specific rule for tax arbitration precludes the application of the general rules and only allows for the aggregation of claims regarding acts which may be placed together in a relationship of dependency, particularly because they are inserted in the same procedure or because the existence or validity of one depends on the existence or validity of the other. Aggregation of claims also is allowed in connection with acts whose validity can be checked on the basis of assessment of the same factual and legal grounds.

In the judicial process for tax matters, a coalition of claimants is only permitted if the claims rely on identical grounds of fact and law and the contested measures relate to the same type of taxes. Under the RJAT, the coalition of claimants is permitted whenever there is an aggregation of claims.

Rules on Terms and Deadlines

The deadlines for submitting a request for arbitration with the CAAD are different from those established for the submission of judicial claims. The general deadline for submitting a request for arbitration is ninety days (and not three months, as it is now the rule for judicial claims). As a general rule, the term starts from the expiry of the date for the voluntary payment of tax debts or from the date of the citation of the fact that is submitted for arbitration.

Special rules are applicable in particular situations. The RJAT provides for a thirty-day deadline for submission of the request for arbitration in respect of special acts that involve the determination of the taxable basis, of the taxable amount, or of other patrimonial values.

Even though the RJAT was only introduced in 2011, several amendments were brought to it by the State Budget Law of 2013, some of which are on the rules applicable to the duration of the tax arbitration procedure. Under these amendments, the deadlines and terms provided for in the RJAT are in accordance with the Code of Administrative Procedure when the term relates to a pre-judicial procedure and in accordance with the Code for Civil Procedure when the term relates to a judicial procedure.

Tax Arbitration Procedure

Procedural Phases

The arbitration procedure is divided into two phases: the pre-judicial phase and the judicial phase. The pre-judicial phase starts with the request for arbitration and ends with the definitive appointment of the arbitration tribunal, which activates the beginning of the judicial phase. The arbitration procedure typically ends when the tribunal renders the arbitration decision.

Pre-Judicial Phase

Submission of Request

The pre-judicial phase starts with the taxpayer lodging a request for tax arbitration with the CAAD. This request must be submitted electronically through CAAD's website and is completed on a web-based application, where the main elements of the claim are described. The pleadings also are annexed to the request for arbitration

After completing the request for arbitration, the taxpayer (or the person who submitted the claim on the taxpayer's behalf) will receive electronic confirmation of the receipt of the request.

Within two days of the receipt of the request for the establishment of the tax arbitration tribunal, the president of the CAAD will inform the tax administration about this request, also by electronic means. On receiving this notice, the tax administration may review the disputed act and, if deemed necessary, revoke or amend it.

If the taxpayer does not appoint an arbitrator, the CAAD also will appoint the panel of arbitrators and notify the taxpayer and the tax administration about the effects of acceptance of the arbitration tribunal. If the taxpayer opts to appoint an arbitrator, the tax administration also will have to appoint an arbitrator, with the CAAD appointing the third arbitrator. If neither party raises an objection, the chosen arbitrators will constitute the arbitral panel.

Effects of Request

Unless the law provides otherwise, the submission of the request for arbitration will have the same effects as the presentation of a judicial claim, particularly regarding the suspension of tax collection proceedings and the suspension or interruption of the statute of limitations.

The request for arbitration also has the effect of stabilizing the disputed act, in the sense that the tax administration, after being given the option to review the disputed act, can no longer modify it or issue a new act regarding the same taxpayer, the same tax, and the same taxable period, unless it is based on new facts.

Judicial Phase

After the request for arbitration has been accepted, the judicial phase of the arbitration procedure will be officially under way. The presiding arbitrator will notify the taxpayer and the tax administration about the commencement of the judicial phase, giving the tax administration a thirty-day deadline to submit its answer to the taxpayer's plea and present, if necessary, any additional evidence.

At the end of the deadline, the arbitration tribunal will hold a first meeting with all the parties to address any formal issues that may be pending and define the terms of the proceedings. Unlike the traditional procedure in court proceedings, the arbitration procedure is a very flexible one, with the parties being able to define what steps will and will not be followed in the course of the procedure.

At the first meeting, the arbitration tribunal also will decide whether there is the need for oral pleadings and, if that is the case, schedule the hearing. If the parties decide not to offer oral pleadings, the tribunal may invite the parties to submit their positions in writing.

Finally, the arbitration tribunal will issue its decision, which is binding on both parties involved and may be executed by the "winning" party under the normal terms of enforcement of other judicial decisions.

The judicial phase of the arbitration procedure can last a maximum of six months and may be extended for further two-month periods, up to a maximum of six months. This is one of the most important features of the RJAT, ensuring procedural speed and the quick resolution of disputes between taxpayers and the tax administration.

The entire arbitration procedure — starting with the request for arbitration and finishing with the arbitration decision — typically lasts less than one year. Considering that the traditional dispute resolution methods take several years before a final decision is issued, there are compelling reasons to opt for arbitration to resolve tax issues.

Decision

Binding Effect

Unlike judgments rendered by way of traditional dispute resolution methods, tax arbitration decisions are, in principle, final on the subject matter. In general terms, there is no instance of appeal for the parties, who will have to accept the decision rendered by the arbitration tribunal.

Arbitration decisions have full binding effects, with the same validity and legal result as those of judgments rendered by administrative and tax courts. In view of their binding effect, if any of the parties to the arbitration defaults in fulfilling its obligations, the aggrieved party can resort to the enforcement mechanisms provided for by law.

Appeal

There are, however, exceptional cases in which it is possible to appeal the decisions issued by an arbitration tribunal.

It is possible to appeal to the Constitutional Court on the grounds of unconstitutionality in cases where the arbitration decision refuses to apply a legal rule or applies a rule whose constitutionality has been questioned. Alternatively, an appeal to the Supreme Administrative Court is possible in cases where the arbitration decision conflicts with a

decision of the Central Administrative Court or a decision of the Supreme Administrative Court on the same fundamental legal question.

A decision issued by a tax arbitration tribunal may be annulled by the Central Administrative Court on the grounds of lack of legal and factual reasoning to support the decision. An arbitration decision also may be so annulled in cases where there is a discrepancy between the grounds of the decision and the decision itself, in cases where the arbitrators have failed to address the subject matter or exceeded their powers, as well as in cases of violation of the principles of legality and equality of the parties.

Appeals on the grounds of unconstitutionality and appeals on the grounds of the decision contradicting previous judgments of the Central Administrative Court or of the Supreme Administrative Court are presented together with copies of the arbitration proceedings. The appeal must be notified to the CAAD, so that it can verify whether a decision is indeed final or whether it is still being considered in another court.

Conclusion

The Portuguese RJAT represents a great improvement in the Portuguese tax justice framework, as it provides for a simpler, quicker, and more effective regime for dispute resolution in tax matters.

As a binding dispute resolution method, it brings a unique feature to the arbitration regime which sets it apart from other comparable regimes by providing an innovative and widely accepted forum for tax matters.

It is not just because of its quick response and effectiveness that the RJAT introduced significant improvements in the Portuguese tax world: the fact that arbitrators have to be skilled individuals with actual experience in tax matters ensures that the decisions also are of a very high quality. This is of particular importance, especially considering that the typical tax courts in Portugal share jurisdiction with the administrative courts, which means that not all judges are tax specialists.

Even though tax arbitration is relatively new in Portugal, recent statistics indicate the huge impact this new regime has had in the tax community since its implementation. At the beginning of 2013, more than 200 tax disputes had already been heard by arbitration tribunals — most of them (forty-nine per cent) on corporate tax matters — with decisions issued in an average time of a little more than four months.

The argument has been raised that this is a dangerous regime because the taxpayers can appoint arbitrators, which may reduce their independence. This argument does not have valid ground: so far, taxpayers have opted to appoint the arbitrator in only 1.5 per cent of all cases submitted to arbitration. This is because, on one hand, the arbitrators are typically renowned tax practitioners or academics and, on the other hand, the CAAD takes ethics extremely seriously, thus imposing completely fair and impartial arbitration proceedings.

Despite this encouraging scenario, there is still a cautious approach from taxpayers to arbitration procedures, as indicated by the still low number of cases of high value. Only ten per cent of the disputes submitted to tax arbitration are worth more than 500,000, even though it is expected that the number of procedures with higher amounts in dispute will rise in the near future as people get more used to the regime and are reassured about its fairness and effectiveness. In this particular regard, the CAAD has been doing great work as the umbrella entity for all arbitration tribunals, giving valuable support to several initiatives, with the goal of explaining and promoting tax arbitration.