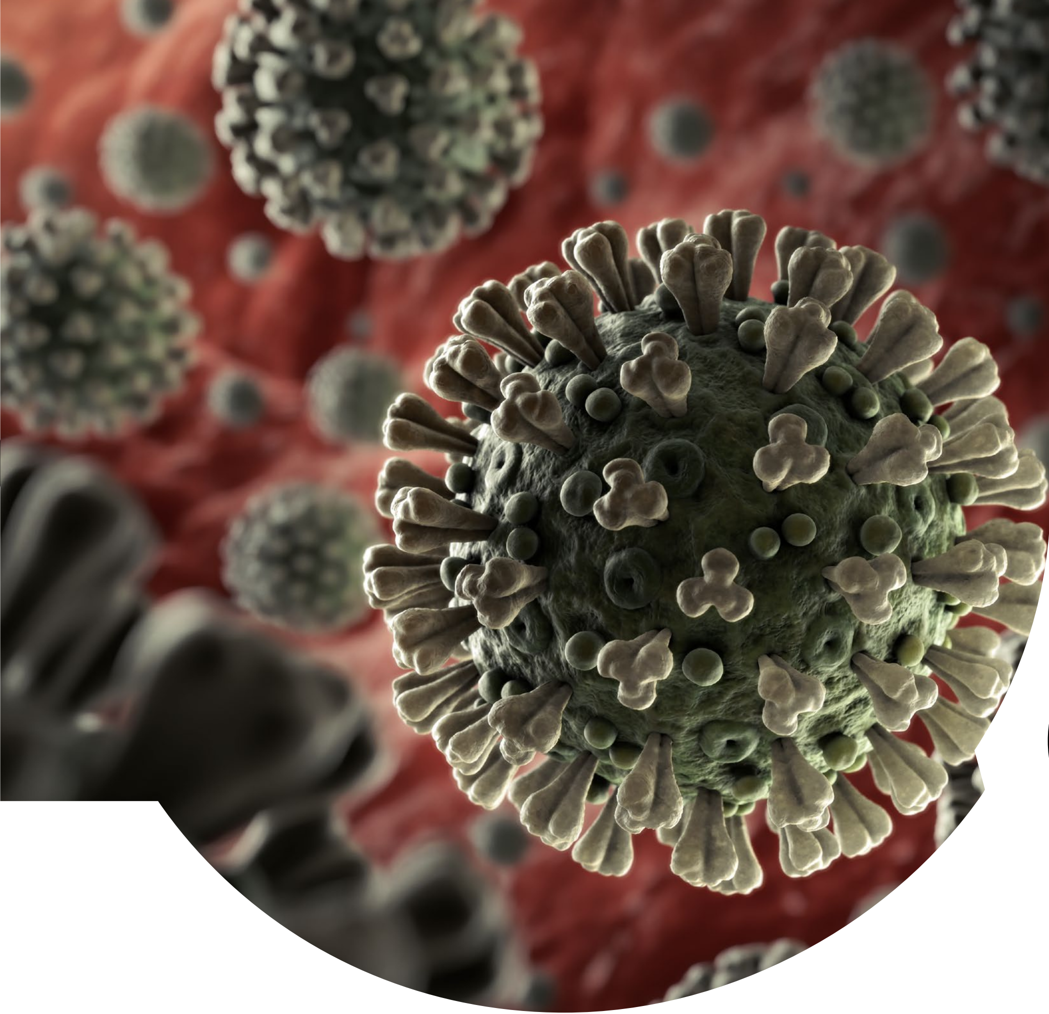
TRENDING TOPIC



MAR. 20

DISPUTE RESOLUTION AND ARBITRATION

Coronavírus: Resolving disputes as quickly and efficiently

We are facing the growing and exponential spread of COVID-19 and a state of emergency was recently declared in Portugal. As a result, it is important to assess what impact this situation may have on the ability of businesses to meet the obligations they have assumed under the contracts they have made.

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The current situation is generating tensions in contractual relationships between companies. These can arise at the level of suppliers, customers, landlords, tenants, contractors, developers, and financial institutions, etc.

If not resolved, the tensions may escalate into conflicts which, in turn, could lead to judicial or arbitral litigation. In any dispute, regardless of the merits of the positions of the parties, the likelihood is that resolving the problem through court litigation is too slow for the speed businesses desire. It is also too costly for businesses with fragile liquidity and will create additional problems, in particular, breakdowns in contractual relationships, many of which are intended to continue over time.

In these exceptional circumstances, companies are faced with three factors that are fundamental in dispute resolution:

- **Time**. Whatever the solution, the urgency of resolving tension or a conflict is crucial to ensuring the impact is as small as possible. Urgency is not compatible with the average time of two years for a court decision at first instance [1] and of one year for an arbitral decision.
- **Cost**. In a scenario of lower liquidity in the short or medium term, it is crucial for disputes to be resolved in the least costly way possible. This circumstance is not consistent with the relatively fixed and comparatively higher costs of judicial and arbitral proceedings.
- **Maintaining commercial relationships**. Most companies are facing problems that result from the current circumstances and they do not want to put at risk the commercial relationships they will need to pursue their activity when things go back to normal.

The solution that takes into account these three factors is the use of alternative dispute resolution (“ADR”) mechanisms. These mechanisms are voluntary in nature and their result can be founded on (i) creativity and consensus, that is, an agreement between the parties involved, or (ii) adjudication, that is, a decision or determination by a third party, which may or may not be binding.

There are several ADR mechanisms available that can respond to the pressing needs of businesses. They have already been tested to a certain extent in Portugal, but are widely used at the international level. The most significant are (I) assisted negotiation, (II) mediation, (III) expert determination, and (IV) emergency or fast-track arbitration.

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What these ADR mechanisms have in common is that they are voluntary in nature, because their use as an alternative to the traditional method (the courts) depends on the express agreement of the parties.

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1 755 days, according to the World Bank publication “Doing Business" in the chapter on Portugal available here.

However, their outcome can depend on agreement between the parties, in a consensual solution, or it can depend on a determination or decision of a third party, where the parties give the third party the power to resolve the dispute.

These forms of ADR have been actively promoted and developed at the international, European and national levels. As a consequence, today the result obtained through these ADR mechanisms may constitute an enforceable title (a legal basis to bring an enforcement action). For this reason, they are a real alternative to the courts.

I. Assisted negotiation

Assisted negotiation is a more or less informal process for bilateral or multilateral negotiation. It uses negotiation concepts, tools and techniques in line with the Harvard negotiation method.

Any agreement that is eventually reached may amount to an enforcement title under the applicable law, inter alia, with the recognition of signatures.

Estimated time: 2 to 3 weeks

II. Mediation

Mediation is a negotiation procedure conducted by a neutral third party, the mediator. The mediator introduces a new dynamic that is often decisive to overcoming deadlocks and finding solutions to the dispute. Although it is informal, the mediation procedure follows a set of rules laid down in the law and, if applicable, in Portuguese or international mediation regulations.

Mediation can be facilitative. In this case, the mediator helps to clarify the positions of each of the parties involved, both in joint sessions and in private sessions (caucus) with each party, seeking to identify their interests and the ZOPA (Zone of Possible Agreement).

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In this type of mediation, the mediator rarely gives an opinion, and much less so an opinion on the result.

Mediation can also be evaluative. In this case, the focus is more on the outcome and less on the interests of the parties as the mediation seeks to produce a possible forecast of how the conflict would be resolved in an adversarial scenario. Hearing the parties jointly or separately, the mediator will evaluate how the dispute would probably be decided by a court.

The aim of mediation, whether facilitative or evaluative, is for the parties to reach an agreement. These agreements may amount to an enforcement title, particularly when the mediator of the process is certified by the Ministry of Justice.

With the recent Singapore Convention, agreements reached in mediation are also enforceable in the signatory countries. However, Portugal is not yet a party to this Convention.

Estimated time: 1 to 2 months

III. Expert determination

The expert determination is, essentially, an informed opinion given an expert, college or panel of experts, appointed by the parties or by whoever they designate to do so. This determination may be binding on the parties or not.

The procedure for the expert determination may be more or less formal, depending on the use of international regulations and administration by arbitration centres.

It has the advantage of resolving technical matters and it (i) avoids the hostility of a dispute, which usually ends up introducing more subjective matters, and (ii) reduces the risk of a wrong decision on a complex technical issue which an arbitral tribunal or court would not be as well prepared to decide.

One of the most widely used formats for expert determination is the "dispute board". This is a panel of experts set up to monitor the performance of a contract of continuing duration (*contrato de duração continuada* - a contract for the continuous provision of works or services for a specific period). The panel intervenes whenever a technical dispute arises in the execution of the works. It has the advantage of allowing the work to continue normally. The decision (whether binding or not) is issued by a panel of experts who are familiar with the contract and the parties.

Estimated time: 2 to 3 months

IV. Fast-track and arbitration and the emergency arbitrator

With its known flexibility, arbitration provides quick and efficient dispute resolution service. Even faster arbitration proceedings are also available to respond to disputes whose urgency is not consistent with time taken in normal arbitrations. In particular, we have fast-track arbitration and the figure of the emergency arbitrator.

The decision rendered in fast-track arbitration is equivalent to a court judgment and is also enforceable as such. As a rule, these streamlined and expedited cases are decided by a sole arbitrator, the procedural periods are shorter, evidence is essentially documentary (so there may be no need for a hearing), and there is a short period for arbitral award to be issued.

The decision of an emergency arbitrator corresponds to an interim decision. It does not constitute an enforceable in the strict sense of the term. However, when an adversarial process is used, the applicant can obtain an enforceable interim decision.

Estimated time: Fast-track arbitration, 6 months; Emergency arbitrator, 2 to 3 weeks.

What practical advice should be followed?

- Analysis of the factual and legal situation.
  - i) Crucial to identify the real interests underlying the positions of the parties.
- Identification of the most appropriate form of ADR
  - i) Use of instruments that allow you to identify the probable scenarios in the resolution of the conflict – SWOT, BATNA, WATNA, and PATNA[2].
- Encouraging the opposing party to agree to an ADR solution is essential because without a prior or current agreement it is not possible to use these voluntary dispute resolution mechanisms.
- Identification of online platforms available to carry out the ADR procedure chosen.
  - i) Ensure agreement and with compatibility of the form between all those involved.
  - ii) The institutions that deal with these disputes are nowadays equipped with technological means to help resolve domestic and international disputes, which means that geographic factors are no longer an obstacle to a speedy solution. ■

2 SWOT - Strengths, Weaknesses, Opportunities, and Threats; BATNA – Best Alternative to a Negotiated Agreement; WATNA – Worst Alternative to a Negotiated Agreement; PATNA – Probable Alternative to a Negotiated Agreement

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