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Did you ask for fast track arbitration?

No so long ago, commercial arbitration was praised for being faster, cheaper, more private than state court litigation and for allowing a procedure tailored to the underlying dispute.[1] Today, the accuracy of these advantages is questionable, to say the least. Commercial arbitration – even more so international commercial arbitration – is nowadays more prone to extensive submissions with voluminous attachments, complex and time-consuming document production stages, and comprehensive and detailed written witness statements. It is also quite often subject to procedural requests leading to jurisdictional hearings or bifurcation, wrapped in a paper tsunami[2] of thousands of pages.

This evolution of modern commercial arbitration has led to a growing dissatisfaction due to the increased formality, length and costs of the proceedings.

The Portuguese arbitral community has seen an increase in the sophistication of arbitration within the country. Portugal's arbitration law is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law and has engendered a pro-arbitration judiciary. The Portuguese Arbitration Association presented a new code of ethics for arbitrators in commercial disputes[3], which incorporates the IBA Guidelines on Conflicts of Interest in International Arbitration. Finally, the Portuguese Commercial Arbitration Centre[4] updated its arbitration rules in 2013[5] and included provisions for emergency arbitrators, multiple parties, consolidation and third-party joinder.

Portuguese arbitration practitioners welcomed these recent developments and benefited from the recent government reforms favouring alternative dispute resolution mechanisms. These reforms increased the number of disputes resolved through arbitration, although this modern commercial arbitration system, with its added costs and complexity, is not always the most suitable solution to resolve an existing dispute.

The Portuguese arbitral community joined the international chorus calling for fast track arbitration, that is, a shorter, cheaper and less complex arbitration process, reflecting a back to basics alternative, which could reconcile arbitration with its users and provide a wider reach for this dispute resolution method.

What it is that makes fast track arbitration so appealing?

Fast track arbitration is not an innovation, nor is it a distinct kind of arbitration.[6] As arbitration is a consensus-based dispute resolution mechanism, it is within the parties' powers to draft an arbitral agreement enabling fast track arbitration, either through an ad hoc or an institutional procedure. Such a procedure can ensure that the key elements of fast track arbitration are appropriately addressed and guaranteed. The question is what are these key elements? What are the distinctive features of fast track arbitration versus *slow* arbitration?

The most important and commonly accepted feature is 'shorter time limits' for both the parties and the arbitral tribunal. Nevertheless, there are other elements unrelated to time limits that may reduce the complexity and increase the cost efficiency of the arbitral procedure, causing the parties to save time. These include establishing limits on the number and extent of written submissions or even on the production of evidence. These may not be called core elements of fast track arbitration but they certainly contribute to its intended end result.

However, it could be quite a challenge for parties, and their respective counsel, to adequately establish an arbitration agreement envisaging fast track proceedings. It is rather difficult – if not impossible – to foresee every possible dispute that may fall within the scope of an arbitral agreement.

There have been some different and meritorious approaches towards regulating fast track arbitration. The International Chamber of Commerce (ICC) is responsible for a rather

minimalistic and successful solution; Article 38 of its Arbitration Rules simply states that '[t]he parties may agree to shorten the various time limits set out in the Rules'. This core provision is then completed by the need to obtain the arbitral tribunal's approval if this agreement is reached after the constitution of the arbitral tribunal and with the possibility of the court extending any of the time limits, if it so deems fit, to enable the tribunal to fulfil its responsibilities under the Arbitration Rules.

Other institutions chose a different path, notably the American Arbitration Association's (AAA) International Expedited Procedure, the World Intellectual Property Organization (WIPO) Fast-Track Procedure and the Arbitration Institute of the Stockholm Chamber of Commerce's expedited arbitration. These examples provide for a more extensive regulation of the fast track model and, despite their differences, they converge in opting for a sole arbitrator, limited submissions and evidence, and holding oral hearings only when requested and deemed necessary by the arbitral tribunal.

The Portuguese Commercial Arbitration Centre (CAC) decided to tackle the issue of fast track arbitration by creating a specific set of rules, as opposed to the minimalistic ICC solution. These rules were only very recently approved[7] and were enacted in January 2016.

The CAC Fast Track Arbitration Rules (the 'Rules') will apply by agreement of the parties or at the initiative of the CAC President. The President will determine the application of the Rules whenever the value of the dispute is lower than €200,000, although this decision may be overturned if both parties oppose it. The President may also decide to apply these Rules to disputes where the amount in dispute exceeds €200,000, if deemed to be appropriate, provided neither party objects[8].

The Rules provide for a sole arbitrator[9], shorter time limits for every procedural act[10] as well as for written submissions[11], a 35-page limit for written submissions[12], and an obligation on the parties to present all evidence with their respective submissions.[13] (There is a possibility of additional written submissions, but these must be filed simultaneously.) Finally, the Rules impose a 20-hour limit for the evidentiary hearing[14].

The envisaged time limit for rendering an award is 30 days from the final hearing and six months from the constitution of the arbitral tribunal, although these limits may be extended by the President of the CAC at the request of the arbitral tribunal[15].

The expectation is that the costs of fast track arbitration under the Rules will be considerably lower than the costs established in the main Arbitration Rules of the CAC[16].

Apparently, the CAC favours fast track arbitration for lower value disputes, as this is the one prerequisite identified in the Rules. This connection, similar to the one established by the AAA, may be seen as a strategic option to accommodate certain types of disputes and to allow institutional commercial arbitration in Portugal to be more accessible to a category of potential users. This approach makes sense given that Portuguese companies are usually smaller when compared with the average size of companies in other jurisdictions.

However, this option may not be the most suitable one for more complex commercial disputes. In fact, given that the Rules are aimed at lower value disputes with lower arbitration costs and arbitrator's fees, they are likely to keep the more qualified and renowned arbitrators and practitioners at arm's length. This means there is a strong probability that the Rules will be used mostly by less experienced arbitrators and less sophisticated lawyers.[17] However, some say that the potential users of the fast track solution should be highly sophisticated practitioners, with the necessary resources to face shorter procedural time limits, and the arbitrators should have enough experience and expertise to cope with the additional time pressure.[18] This possible paradox will be one potential hurdle for the Rules to overcome.

One could argue that the CAC contemplates fast track arbitration for small claims only, to open commercial arbitration to more users and to offer a viable alternative to those who would otherwise be forced into the court litigation. However, commendable this intention may be, resorting to a fast track arbitration procedure encompasses a considerable amount of risk, especially for unexperienced arbitration users. Parties may later consider that some issues were not dealt with – or seen to be dealt with – by the tribunal with the necessary attention. In addition, lawyers may come to recognise that they had insufficient time to prepare or present their cases at the risk of missing deadlines.

We believe there is no right or wrong solution. These two different approaches address different audiences and enable institutionalised commercial arbitration to adapt to disputes for which they

(apparently) were not previously providing an adequate response.

Institutionalised arbitration rules were further developed to cope with the increased complexity of intricate international disputes, sometimes involving multiple parties, arising from more than one arbitration agreement or commercial and legal relationship. Arbitration practitioners grew in recognition by their specialisation, comprehensive industry knowledge and sharp case management skills. Whether to distinguish themselves from ADR or litigation practitioners or to prevent newcomers from settling in, the fact is that the arbitration community pushed arbitration proceedings closer to the formalism and the excessive regulation of judicial litigation.

Arbitration still maintains its most significant advantages when compared to the judicial courts, which include party autonomy, arbitrators' neutrality, due process and broad international enforceability. However, the excessive regulation and complexity of the proceedings have caused discomfort to many users who have forgotten the fundamental importance of party autonomy from the outset, notably when drafting a tailor-made solution for their dispute resolution mechanism.

Going back to the unanswered question above on why fast track arbitration is so appealing, we believe the answer lies in, arguably, the most important element of arbitration – party autonomy. Arbitration is appealing because parties are allowed to draft a tailor-made solution to resolve their disputes. Such heavy reliance in recent years on institutionalised arbitration rules may have caused arbitration users to forget how important this key feature is.

Notes

1 See, for example, the introduction of Fouchard Gaillard Goldman on International Commercial Arbitration, Savage and Gaillard (ed) (1999).
2 Michael E Schneider, 'The paper tsunami in International Arbitration – problems, risks for the arbitrators' decision making and possible solutions', in T Giovannini and A Mourre, *Written Evidence and Discovery in International Arbitration*, Dossiers of the ICC Institute of World Business Law 6 (2009).
3 Approved on 11 April 2014.
4 The Arbitration Centre of the Portuguese Chamber of Commerce and Industry, also known as the Commercial Arbitration Centre is the most important and most frequently used Commercial Arbitration Centre in Portugal.
5 In force since 1 March 2014.
6 See, for example, Irene Welser and Christian Klausegger, 'Fast track Arbitration: just fast or something different?'
7 16 October 2015.
8 Art 3 of the Rules.
9 Art 6 of the Rules.
10 Art 5 of the Rules.
11 Art 9 of the Rules.
12 Art 8 and Art 9 of the Rules.
13 The defendant is granted and additional 20 days following its reply for the submission of written witness statements and expert reports. See Art 8 and 9 of the Rules.
14 Art 11 of the Rules.
15 Art 17 of the Rules.
16 The simple fact of having a sole arbitrator (if compared to the local culture of three arbitrators, irrespectively of the value at stake) reduces the arbitration costs to 50 per cent of the usual solution.
17 As a different possibility, it is arguable that Portugal has already a lot of young practitioners with some international experience eager to apply it to the role of arbitrators.
18 See commentary to Art 38 of the ICC Arbitration Rules, Institutional Arbitral: A Commentary, Rolf A Schültze (ed), Beck/Hart, 2013.