Cumulating the appeal against an arbitral award with the request for its annulment

28 June 2018 - by António Sampaio Caramelo

1. Due to the fact that the 2011 Portuguese Arbitration Law (2011 PAL) has not provided – contrary to what the 1986 Portuguese Arbitration Law (1986 PAL) had done, in its Article 27(3) – on the manner how to handle, cumulatively, the annulment request of the arbitral award before the State courts and an appeal lodged against it (in cases where the parties had reserved in their arbitration agreement, the latter right of appeal), it is debated among Portuguese legal commentators how the interested party should proceed when it wishes to use both these forms of recourse against an arbitral award.

In my opinion, this loophole of the law should be filled pursuant to the principle set out in Article 10(3) of the Civil Code, which once applied to this case, will lead us to conclude that, under the 2011 PAL, a solution similar to the one adopted by the 1986 PAL should prevail, because it is, clearly, the most reasonable and efficient, from the procedural point of view. Hereafter, I justify the understanding which I hold.[1]

To Paula Costa e Silva, the reason for the solution adopted in Article 27(3) of the 1986 PAL seemed rather obvious.[2] When the law offers more than one legal remedies against a jurisdictional decision to anyone who may wish to challenge it from the different angles allowed by those legal remedies, what he should not do is to generate a multiplication of challenge proceedings to that effect. This can be avoided by concentrating on the legal remedy against the arbitral award having a broader scope and covering the grounds of challenge which are specific of the other legal remedy, but also encompassed by the former.

Based on this consideration as it was developed in her 1996 essay, this author enunciated the following rule pertaining to the accumulation of the annulment proceedings of the award with the appeal lodged against it: "The annulment application is only autonomous as a means of recourse if the decision is not subject to appeal […] or, should an appeal against the decision be admissible, this was not lodged". In all other cases, the possible grounds for annulment cannot be raised in autonomous annulment proceedings, which should be deemed as inadmissible if it is filed".[3]

2. I think that Paula Costa e Silva's considerations, just quoted above, keep on being valid under the 2011 PAL, as, in my view, its adoption is not hindered nor made significantly more difficult by the circumstance that the time limit for lodging the appeal is now shorter than the time limit for filing the annulment proceedings contemplated in Article 46 of the mentioned law.[4]

In this respect, I recall that the situation existing when the 1986 PAL was in force, regarding the different duration of the time limits for the appeal and the annulment proceedings of the arbitral award was the inverse of the current one, without anyone holding then that such difference of time limits caused insuperable difficulties in relation to the necessary joining of these means of recourse against the arbitral award in one sole procedure.[5]

Thus, if the interested party may and wishes to appeal in order to obtain a full review of the merits of the dispute decided by the arbitral tribunal and, simultaneously, to request for the annulment of the arbitral award under the 2011 PAL, he should do it within the shorter of the time limits which the law provides for the use of said legal remedies against arbitral decision (such time limit being currently the one set for the appeal). If the interested party lets this time limit to expire, he can only use, thereafter, the legal remedy against the arbitral decision having the longer filing time limit.

The opinion herein hold is also buttressed by the fact that the joint processing of those legal remedies was made easier by the 2011 PAL, insofar as it provides that the procedural sequence of the appeal should apply, with the necessary adjustments, to the annulment proceedings after the filing of the initial written submissions therein [see Article 46(2)(e)], differently from what was provided for under the 1896 PAL, where such legal remedy against the arbitral award had to be processed in accordance with the common procedural shape of legal actions.

3. However, the weightiest argument in favour of the opinion herein hold is the one arising from the danger entailed by the solution advocated by those[6] who accept the supposed inevitability of coexistence of the two legal remedies against the arbitral award; this coexistence, by involving a concurrence of competences pertaining the merits, may put indeed the courts in position to contradict themselves (at least, in practical terms).

In order to render this evident, let us consider the hypothesis where, having the two legal remedies against the arbitral award been used separately and, consequently, been assigned to different collectives

of judges of the competent Court of Appeal, one of those collectives comes to reject the appeal and confirm the appealed award, while the other ends up annulling such award. Even more absurd is the outcome which may be reached in the reverse hypothesis: one of the collectives of the Court of Appeal comes to uphold the lodged appeal, revoking the appealed award and, in accordance with Article 665(1) of Portuguese Procedure Civil Code, replacing it by a new decision on the merits of the dispute which had been previously decided by the arbitrators, while the other collective of judges ends up dismissal the annulment proceedings of the award, affirming its validity!

Contrary to what was asserted by those who defend the solution I refuse[7], it would not be possible to prevent this risk of practically contradictory decisions, by raising the procedural exception of *lis pendens*.

As a matter of fact, in this case there would not be *lis pendens*, because of the fact of being different not only the requests made to competent state courts but also the effects of their decisions, in each of legal remedies against the arbitral award. In the appeal, one seeks the revocation and the replacement of the appealed decision by another one which decides the merits favourably to the appellant, whereas, in the annulment proceedings, one can only obtain the nullification of the challenged award. Therefore, the invocation of *lis pendens* in the proceedings subsequently initiated would not be successful.

The latter part of the understanding herein hold coincides with the one adopted recently in a decision rendered by the Lisbon Court of Appeal[8], in which it was held that *lis pendens* did not exist in a case where the losing party had reacted against the arbitral award, by lodging an appeal and by filing annulment proceedings. The Court of Appeal held that the requests made in each of these legal remedies against the arbitral award were different. In this judgement one reads the following:

“In the case at hand, while the request of the applicant consists only in the annulment of the challenged arbitral award, the appeal requires that the judge appreciates the merits of the dispute, decides upon it and replaces the arbitral award by a decision that rejects the exception of limitation and orders the continuation of the procedure, so that a substantive decision be rendered on the merits of the dispute, since, in the applicant’s view, ‘this has not happened because of the wrong finding on such statute of limitations’”.

Furthermore, according to the Court of Appeal, the causes of action invoked in the lodged appeal against the arbitral award and in the annulment proceedings brought against it were also not identical:

"In the action for annulment the cause of action was a procedural flaw, while in the appeal cause of action was the alleged fact that the law had been wrongly applied in the arbitral award".

In my opinion, the Lisbon Court of Appeal has decided well on this matter.

4. In conclusion: whenever, under the 2011 LAP, the interested party may and wishes to appeal in order to obtain a review of the judgement made by the arbitral tribunal and, simultaneously, to request for the annulment of the arbitral award, he should lodge the appeal (within the respective time limit) against the arbitral award and, within the framework of such appeal, should request for its annulment, based on the legal grounds provided to that effect. In other words, he should do the same thing which the 1986 LAP set forth for that purpose.

[1] The above mentioned understanding was included in the 2nd edition of my book, A. Sampaio Caramelo, *A Impugnação da Sentença Arbitral* (2014), currently in print.

[2] P. Costa e Silva, *Os Meios de Impugnação de Decisões Proferidas em Arbitragem Voluntária no Direito Interno Português*, 56(I) Revista da Ordem dos Advogados 179, 194.

[3] *Ibid.*

[4] Differently, M. Esteves de Oliveira (ed.), *Lei de Arbitragem Voluntária Comentada* (2014), pp. 549-550.

[5] Similarly, A. Ribeiro Mendes, *A Nova Lei de Arbitragem Voluntária e as Formas de Impugnação de Decisões Arbitrais*, in A. Marques Guedes *et al.* (ed.), *Estudos em Homenagem ao Prof. Doutor José Lebre de Freitas*, II (2013), pp. 720-721.

[6] Notably, A. Menezes Cordeiro, *Tratado da Arbitragem em Comentário à Lei 63/2011, de 14 de Dezembro* (2016), p. 437.

[7] *Ibid.*

[8] Decision from the *Tribunal da Relação de Lisboa* of 11 January 2018, case no. 927/17.0YRLSB-8 (Ilídio

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