

## The so-called prohibition set on courts from examining the merits of the arbitral award: myth or reality?

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1. Not rarely, in legal commentary dedicated to arbitration law (and, under its influence, in some courts' decisions) one comes across the proposition that the court before which an arbitral award was challenged is "prohibited from examining the merits of the decision rendered by the arbitral tribunal". In this article, we intend to show that this proposition is more mythological than real and cannot be accepted, if understood in accordance with the literal meaning of the words forming it.

### ***The logical untenability of the prohibition of courts examining the merits of the award***

2. It is plainly obvious that, to be able to decide whether the challenged award should be annulled, the controlling court must examine that award in its entirety. As I have repeatedly stressed in my writings<sup>[1]</sup>, most of the times, the dispositive part of the arbitral award (like the dispositive part of a court judgment) is neutral with respect to the substance of the decision. It usually reads like this: "the respondent is hereby ordered to pay the amount x to the claimant" or a similar statement. Therefore, only a careful examination of the circumstances of the case and of all the reasons presented by the arbitral tribunal for the decision rendered enables the supervisory court to determine the real meaning and scope of such decision.

The supposed prohibition of examining the merits of the arbitrators' decision is particularly untenable in case the ground upon which the award was challenged does not have a procedural nature and relates instead to its substance: this is what happens when the challenge is based on the alleged conflict of the outcome of the award with the 'public policy' of the forum (i.e., of the State which the supervisory court belongs to). In such case, the reassessment of the substantive contents<sup>[2]</sup> of the arbitrators' decision is inevitable, which, to some extent, involves a reappraisal of the *merits* of such decision. The great majority of commentators do not have any qualms about acknowledging this<sup>[3]</sup>.

3. Moreover, when analyzing the whole contents of the challenged award, the supervisory court may find the need to recharacterize the acts or contracts carried out by the parties, in the manner how the

arbitral tribunal has qualified them does not allow their comprehensive assessment by the court, in view of the possible violation of underogatable principles or rules by the tribunal's decision. In principle, this does not involve the reopening of the proceedings held before the arbitral tribunal nor the admission of new evidence on the issues decided by it; only in very exceptional circumstances can that take place.

The possible recharacterization of the arbitral tribunal findings, in law and in fact, may be particularly warranted when the award is challenged (or its recognition and enforcement is opposed) on grounds of being contrary to the public policy of the forum[4]. However, such requalification may also be justified in respect of procedural determinations made by the arbitral tribunal, if the supervisory court deems it necessary, to properly assess whether the challenged award should be annulled or not. The courts of the most sophisticated (and arbitration friendly) jurisdictions do not hesitate to do both kinds of recharacterization of findings of the arbitral tribunal[5], when they consider it necessary.

**4.** Other considerations demonstrate that the supervisory court must examine the entire decision rendered by the arbitral tribunal on the merits of the case. Pursuant to article 46 (3) a) v) of the Portuguese Arbitration Law (PAL), the award may be set aside if it is alleged and proven that the arbitral tribunal ordered one party to pay an amount in excess of what had been claimed or dealt with matters beyond those submitted to it by the parties (decision *ultra petitem*), or ordered something different from what was requested (decision on *aliud*), or failed to deal with claims or important issues presented or raised by the parties (decision *infra petitem*). Regarding these cases as well, it is evident that the supervisory court cannot verify whether those allegations are well grounded without having examined the whole award and without having compared the scope of the arbitral tribunal's decision with the contents of the submissions presented by the parties.

**5.** Having in mind what was explained above, one must conclude that the abovementioned proposition, according to which "the supervisory court is prohibited from examining the merits of the case decided by the award", is logically untenable.

On the other hand, the attempt of some commentators to support the validity of the aforesaid proposition with some words contained in art. 46 (9) of the PAL is unwarranted by the wording of the legal provision in question. As I stressed before[6], the exclusive purpose of that provision is to make clear that the Court of Appeal ('Tribunal da Relação') which has annulled the challenged arbitral award

does not have the power to decide the merits of the respective case, which power the 2<sup>nd</sup> instance court would have (pursuant to art. 665 of the Civil Procedure Code) in case it would have annulled a judicial decision from a lower court. Indeed, the decision of the Court of Appeal setting aside a challenged award has only a “rescissory” effect; it does not have a substitutive effect. As its wording unequivocally shows, art. 46 (9) provides for the *phase coming after* the annulment of the award. The time during which the supervisory court is weighing whether to annul or not the challenged award is definitely not contemplated by that legal provision.

***Although the courts must examine the whole award, they are not allowed to review the merits decided therein***

6. In this respect, the distinction between *reexamination* and *review* is critical. Indeed, in the domain of law, it is necessary to use accurate terms to express one’s thought. No productive thinking can develop, and no fruitful debate can take place, if the participants do not constantly seek to use precise and unambiguous words to convey what they intend to mean.

Therefore, to convey the idea that the purpose of favoring arbitration as a jurisdiction means of dispute resolution requires that the judicial control of the substance of arbitral awards be limited, it is much more correct to assert that “the supervisory court is prohibited from reviewing the merits decided by the arbitral award”. As a matter of fact, this proposition is by far the most often found in treatises and essays on this field of law as well as in international documents of reference, in connection with the topic analyzed in this article[7].

On page 78 of the *ICCA’s Guide to the Interpretation of the 1958 New York Convention*, one finds a useful definition for that proposition: “The court does not have the authority to substitute its decision on the merits for the decision of the arbitral tribunal if the arbitrator have made an erroneous decision of fact or law”.

In my view, this definition is very elucidative, because it identifies the crucial difference between the task of the appellate court which must decide an appeal from a lower court’s decision and the task of the controlling court which must decide whether to annul an arbitral award which was challenged, notably, on grounds of violating the public policy of the forum.

7. When deciding an appeal, the appellate court has the (intellectual) duty to adjudicate anew the dispute, to verify if it would reach the same result as was achieved by the appealed decision. In other words, the appellate court shall carry out the same intellectual operations[8] which it should have performed if it was the first adjudicator of the dispute submitted to the lower court – the object of the appellate court’s assessment constitutes what one may call the “primary dispute”[9]. When doing that, the appellate court substitutes its decision (in fact or in law) for the decision made by the lower court, which is revoked or annulled. Accordingly, the resolution of the dispute is *rewritten* by the appellate court. Therefore, one may say that the essence of the appellate court’s mission is to carry out a *review*[10] of the merits of the dispute decided by the lower court.

Clearly different is the task to be performed by the court that must decide whether to annul, or not, an arbitral award which was challenged before it. When deciding on a setting aside application, the controlling court does not reason upon the ‘primary dispute’ (defined as indicated above) and it does not express its view on the manner how the dispute was decided, in fact or in law, by the arbitral tribunal. The controlling court should only seek to verify (i) whether the arbitral tribunal had jurisdictional power to decide that dispute, (ii) whether the proceedings leading to the decision were conducted in accordance with the standards of fairness and procedural justice prescribed by the law of the forum (i.e., the law of the seat of the arbitration or of the place of enforcement of the award), (iii) whether the award was sufficiently reasoned to be intelligible, (iv) whether the decision(s) contained in the award was (were) in conformity with the parties’ submissions and (v) whether the material result[11] of the decision rendered by the arbitral tribunal is contrary to the legal rules and principles which constitute the ‘public policy’[12] of the State which the supervisory court belongs to.

Thus, instead of verifying whether the arbitral tribunal was right or wrong in respect of the facts established or of the law applied (such verification pertaining to the ‘primary dispute’, as defined above), the controlling court shall ascertain whether the arbitral award, having regard to its form, to the process through which it was made and to the outcome produced, does fulfil the conditions of regularity and validity[13] which justify that the State makes available its coercive means to enforce what the arbitrators have decided. The verification of the existence of these conditions, forming what some authors called the “secondary dispute”[14], is the sole subject matter of the controlling court’s analysis[15].

Even if the court must examine all the questions of fact or of law which form the substantive contents of the award – as it must, to be able to control it, as explained above –, such examination should not amount to a review of the merits of that award[16].

**In conclusion:** When deciding on the requested annulment of arbitral awards or on the recognition and enforcement of foreign arbitral awards, the supervisory courts are not allowed to review the merits of those awards, but they must reexamine them in their entirety. Therefore, the so-called prohibition of the courts from examining the merits decided by the arbitral award is definitely a myth, not a reality.

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[1] Following the observation made in this respect by many reputed scholars and commentators; see, among others, the authors and works referred to in my works *Anulação da Sentença Arbitral Contrária à Ordem Pública*, in ‘Temas de Direito da Arbitragem’, Coimbra Editora, Coimbra, 2013, p. 328, and *A Impugnação da Sentença Arbitral*, 2<sup>nd</sup> ed, Almedina, Coimbra, 2018, p. 144.

[2] Or, as I prefer to put it, the ‘result’ of the application of the award, that is, the solution given by the arbitrators to the dispute submitted to them; see my *Anulação da Sentença Arbitral Contrária à Ordem Pública*, supra n. 2 p. 332, and *A Impugnação da Sentença Arbitral*, supra n. 2, p. 146.

[3] See, among many others, Paula Costa e Silva – *Corrupção, Ordem Pública e Decisão Arbitral: A propósito do caso Alstrom*, Arbitragem Comercial. Estudos Comemorativos dos 30 anos do Centro de Arbitragem Comercial da Câmara de Comércio e Indústria Portuguesa, Almedina, Coimbra, 2019, pp. 841 and note 1; Mariana França Gouveia – *Curso de Resolução Alternativa de Litígios*, 3rd ed., Almedina Coimbra, 2014, p. 314; António Pedro Pinto Monteiro – *Da Ordem Pública no Processo Arbitral*, in ‘Estudos em Homenagem ao Professor Doutor José Lebre de Feitas’, Volume II, Coimbra Editora, Coimbra, 2013, p. 663; Armindo Ribeiro Mendes – *A Nova Lei de Arbitragem Voluntária e as Formas de Impugnação de Decisões Arbitrais*, in ‘Estudos em Homenagem ao Professor Doutor José Lebre de Feitas’, Volume II, Coimbra Editora, Coimbra, 2013, p. 743; António Sampaio Caramelo – *A Impugnação da Sentença Arbitral*, supra n. 2, pp. 136-140; Juan Cadarso Palau – *Motivos de Anulación del Laudo*, in ‘Comentarios a la nueva Ley de Arbitraje’, 2nd ed., Aranzadi /Thomson Reuters, 2011, p. 584; Christophe Seraglini &

Jérôme Ortscheidt – *Droit de l’arbitrage interne et international*, Montchrestien, Paris, 2013, pp. 890-894; Jean-François Poudret & Sébastien Besson – *Comparative Law of International Arbitration*, Thomson /Sweet & Maxwell, 2<sup>nd</sup> ed, 2007, pp. 757-758 and 761-762; Gary Born – *International Commercial Arbitration*, 2<sup>nd</sup> ed., Volume III, Wolters Kluwer, 2014, pp. 3355-3358.

[4] It is worth noting that the French higher courts (notably, the Paris Court of Appeal and the *Cour de Cassation*), which, for about ten years (2004-2014), have taken a very strict “minimalist approach” regarding the control of awards challenged on the ground of being contrary to public policy, have, in the latest five years, adopted a more in-depth assessment of the allegations made by the setting aside applicant, at least when allegations of corruption and, more generally, of acts of a criminal nature were made to support that application. Examples of this new orientation of French higher courts are the decisions rendered in the following cases: *Belokon* (February 2017), *Republique démocratique du Congo* (May 2017), *Indagro* (September 2016 and 2017) and *MK Group v. Onix* (January 2018). In these cases, the said courts have asserted that, in order to exercise his control, “the judges must research, in law and in fact, all the elements allowing to rule on the alleged illegality of the questioned agreements and to determine whether the award infringed in a concrete and effective manner the international public policy of the French State; and that in the course of this analysis, the competent judges are neither bound by the arbitral tribunal’s findings, nor by the law chosen by the parties on the merits”. More recently, in *Alstom v. Alexander Brothers* (April 2018) the Paris Court of Appeal reframed the argument of the challenging party’s argument and took upon itself to verify whether the parties’ contracts (acknowledged by the arbitral tribunal as being consultancy agreements) were contracts of corruption; instead of deciding the challenge, the Court of Appeal reopened the proceedings and ordered the parties to provide further documentation. In their turn, English courts have adopted, since long, an orientation like that of French courts just described, at least when plausible allegations of corruption or other serious illegality were made in support of the challenge of an arbitral award.

[5] See, for instance, the decision rendered on 10.01.2018 by the *Cour de Cassation* (rec. 16-21391), confirming the Versailles Court of appeal’s decision which recharacterized the decision of the arbitral tribunal that had wrongly qualified the arguments raised by the parties as pertaining to the scope of the tribunal’s ‘jurisdiction’ (which the courts have competence to control, in setting aside proceedings),

whereas the controverted issue related instead to the ‘admissibility’ of the request submitted by one of the parties (which the courts cannot check, in that context). Taking into consideration the rationale of this decision, one can anticipate that a reverse requalification (i.e., recharacterizing the disputed issue as pertaining to ‘jurisdiction’ rather than to ‘admissibility’) would also be made by French courts, if the particulars of the case justify it.

[6] See *A Impugnação da Sentença Arbitral* (supra n. 2, pp. 169-172).

[7] Indeed, this proposition (“no review on the merits”) and its correspondents in the most used languages in international arbitration (“prohibition de révision au fond” / “no hay revisión sobre el fondo”) are the ones invariably used in the legal literature and in international guides on the annulment of arbitral awards by state courts and on the recognition and enforcement of foreign arbitral awards (notably, those published by the ICCA, UNCITRAL and the IBA).

[8] I.e., determining the facts which are to be established as proven and applying to them the pertaining legal rules and principles.

[9] Using here the term proposed by Louis Christophe Delanoy, in *Le Contrôle de l’Ordre Public par le Juge de l’Annulation: Trois Constats, Trois Propositions*, *Revue de l’Arbitrage*, 2007, N° 2, Comité Français de l’Arbitrage, Paris, especially at pp. 200-204.

[10] In this sentence, the term “review” is used with the meaning given by the most used dictionaries (for instance, the Cambridge Dictionary: “to think or talk about something again, in order to make changes to it or to make a decision about it”) or adopted in several areas of thinking (for ex: to make a review of History, as carried out by the so-called ‘historical revisionism’).

[11] I.e., the legal effects created by the arbitrators’ decision in the legal spheres of the parties (constituting new rights or obligations or extinguishing others held until then).

[12] Under the PAL, the normative reference in this respect is the ‘international public policy’ of the Portuguese State.

[13] Such validity being assessed in the light of the elementary requirements of material justice that every jurisdictional decision should fulfil.

[14] Louis Christophe Delanoy - *Le Contrôle de l'Ordre Public*, supra n. 9, p. 201.

[15] These considerations apply either in the context of an annulment application or in the context of a request for the recognition and enforcement of a foreign arbitral award.

[16] The opinion exposed in this article, which I have already defended in *A Impugnação da Sentença Arbitral*, supra n. 2, at pp. 136-152, does not coincide with the way in which Gary Born addresses this topic. This author argues (in *International Commercial Arbitration*, supra n. 5, pp. 3357-3358) that a limited measure of judicial review of the substance of the arbitral awards by the courts of the seat is legitimate and even desirable, whereas I prefer to defend that the subject matter of that indispensable judicial control is the so called “secondary dispute” (the ‘primary dispute’ being excluded therefrom). However, the practical effects of these two approaches are not significantly different.

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