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YEAR -3

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[PREFACE - SOME LIKE IT HOT…] by José Miguel Júdice • [INVESTMENTS AND QUANTUM METHODOLOGY IN THE LINE OF FIRE – LESSONS FROM ROMPETROL GROUP NV VS ROMANIA] by Robert Rothkopf • [NEIGHBOURS FRIENDLY PACT ON DISPUTE RESOLUTION] by Veeraraghavan Inbavijayan and Kirthi Jayakumar • [THE AFTERMATH OF THE REVOLUTION: AN ASSESSMENT OF THE COMPATIBILITY OF THE TUNISIAN LAW FOR INTERNATIONAL ARBITRATION WITH GENERAL CONTEMPORARY PRACTICE IN INTERNATIONAL COMMERCIAL ARBITRATION] by Henry Clarke • [MOTIVATION OF ARBITRAL AWARDS: A FEW NOTES] by Duarte Gorjão Henriques • ["28 USC § 1782": AN AMERICAN "WINGMAN" FOR INTERNATIONAL ARBITRATION DISPUTES] by André Pereira da Fonseca • [THE 2010 REVISION OF THE ARBITRATION RULES OF THE CHAMBER OF ARBITRATION OF MILAN] by Chiara Catti • [THE LONG AWAITED PORTUGUESE MEDIATION LAW – FUNDAMENTAL PRINCIPLES] by Thomas Gaultier • [YAR BRINGS ICC YAF TO PORTUGAL FOR THE FIRST TIME] by Pedro Sousa Uva and Gonçalo Malheiro • [INTERIM RELIEF IN INTERNATIONAL ARBITRATION: EMERGENCY ARBITRATOR PROVISIONS] by Steven P. Finizio and Jeremy Bocock • [CONCURRENT POWERS BETWEEN ARBITRAL TRIBUNALS AND STATE COURTS REGARDING INTERIM MEASURES] Sofia Martins and Miguel Oliveira Martins • [ARBITRAL TRIBUNALS AND STATE COURTS: PARTNERS OR COMPETITORS?- SOME REMARKS ON PRELIMINARY ORDER FROM A PORTUGUESE LAW PERSPECTIVE] by Porfírio Moreira • [LEARNING TO DEAL WITH DIFFERENT LEGAL SYSTEMS. TAKING OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION] by Luis Fernando Guerrero • [STATE COURT' ASSISTANCE OF ARBITRAL AWARDS ON THE TAKING OF EVIDENCE UNDER THE PORTUGUESE ARBITRATION LAW] by Pedro Sousa Uva • [GETTING TO KNOW ABEARB A BIT BETTER…] By Associação Brasileira de Estudantes de Arbitragem.

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# [ARTICLES]

PREFACE - SOME LIKE IT HOT…
by José Miguel Júdice

1 - INVESTMENTS AND QUANTUM METHODOLOGY IN THE LINE OF FIRE – LESSONS FROM ROMPETROL GROUP NV VS ROMANIA
by Robert Rothkopf

2 - NEIGHBOURS FRIENDLY PACT ON DISPUTE RESOLUTION
by Veeraraghavan Inbavijayan and Kirthi Jayakumar

3 - THE AFTERMATH OF THE REVOLUTION: AN ASSESSMENT OF THE COMPATIBILITY OF THE TUNISIAN LAW FOR INTERNATIONAL ARBITRATION WITH GENERAL CONTEMPORARY PRACTICE IN INTERNATIONAL COMMERCIAL ARBITRATION
by Henry Clarke

4 - MOTIVATION OF ARBITRAL AWARDS: A FEW NOTES
by Duarte Gorjão Henriques

5 - 28 USC § 1782 – AN AMERICAN “WINGMAN” FOR INTERNATIONAL ARBITRATION DISPUTES
by André Pereira da Fonseca

6 - THE 2010 REVISION OF THE ARBITRATION RULES OF THE CHAMBER OF ARBITRATION OF MILAN
by Chiara Catti

7 - THE LONG AWAITED PORTUGUESE MEDIATION LAW - FUNDAMENTAL PRINCIPLES
by Thomas Gaultier

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# [ARTICLES]

**REPORT ON ICC YAF & YAR EVENT IN LISBON – MAY 16 2013**

8 - YAR BRINGS ICC YAF TO PORTUGAL FOR THE FIRST TIME
by Pedro Sousa Uva and Gonçalo Malheiro

9 - INTERIM RELIEF IN INTERNATIONAL ARBITRATION:
EMERGENCY ARBITRATOR PROVISIONS
by Steven P. Finizio and Jeremy Bocock

10 - CONCURRENT POWERS BETWEEN ARBITRAL TRIBUNALS AND
STATE COURTS REGARDING INTERIM MEASURES
by Sofia Martins and Miguel Oliveira Martins

11 - ARBITRAL TRIBUNALS AND STATE COURTS: PARTNERS
OR COMPETITORS?- SOME REMARKS ON PRELIMINARY ORDER
FROM A PORTUGUESE LAW PERSPECTIVE
by Porfírio Moreira

12 - LEARNING TO DEAL WITH DIFFERENT LEGAL SYSTEMS. TAKING
OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION
by Luis Fernando Guerrero

13 - STATE COURT' ASSISTANCE OF ARBITRAL AWARDS ON THE
TAKING OF EVIDENCE UNDER THE PORTUGUESE ARBITRATION LAW
by Pedro Sousa Uva

14 - GETTING TO KNOW ABEARB A BIT BETTER...
By Associação Brasileira de Estudantes de Arbitragem

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# MOTIVATION OF ARBITRAL AWARDS: A FEW NOTES

By Duarte Gorjão Henriques

"Decide promptly, but never give any reasons. Your decisions may be right, but your reasons are sure to be wrong."
William Murray, 1st Earl of Mansfield

I. Giving reasons for any judicial, administrative and even arbitral decision comes to our mind almost as an intuitive requirement for such decisions and seems to be a natural reflection of elementary principles of any rule of law. Specifically in the arbitration context, motivating an award enables the parties to understand the reasoning of the award, persuades the parties to comply with it and helps to ensure the award's enforceability.

For the Portuguese legal culture and judicial system it is rather unquestionable and patently obvious that any given decision, being a judicial or an arbitral one, shall state its reasons as any person or persons affected by such decision is entitled to know exactly what the respective grounds are. Like the legal Latin proverb stated, a decision has the power to turn white into black and square into circle ('facit de albo nigrum aequat quadrata rotundis') and as so, any person subject to that kind of change should know exactly why the colour or shape has changed.

Somehow conversely there was a tradition that could be found within some jurisdictions, some statutes on international arbitration and also among some legal commentators, according to which grounding and motivation was not required in order to ensure a valid and enforceable award. Lord Mansfield's quote above is the reflection of this legal tradition and we would easily concede to this point of view if we would thought of the single and conspicuous advantage of having decisions without motivation: if no motivation was required, no reason or doubt would arise to substantiate an appeal and the decision would be by itself peacefully sufficient to settle any dispute. And this would be even more true if we thought of one of the general and primarily rules of arbitration, which is precisely the absence of appeal (at least by default).

But disregard motivation of the award has the enormous danger of allowing the confusion between the service of justice (or the settlement of disputes if we should so limit the role of arbitration) and the individual discretion or even the arbitrariness, specially when the arbitral tribunal may decide the dispute "*ex aequo et bono*". This is the reason that the motivation of any decision is considered as an aspect of the right to a 'fair trial' according to Art. 6 of the European Convention on Human Rights and is also reflected in various Constitutional Laws, namely the Constitution of the Portuguese Republic (Art. 205, par. 1). This principle extends not only to judicial

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decisions but also to administrative decisions and there is no reason for being inapplicable to arbitral awards.

Accordingly, that tradition is being progressively abandoned giving room to a trend on recent statutes of international arbitration and recent arbitration laws where the requirement of motivation of the award can be found. For example, one can find such requirement under the 1961 European Convention on International Commercial Arbitration, under the Belgian Law, under the German Law and even under the English 1996 Arbitration Act. Giving a glance at the rules of arbitration of some institutionalized centres of arbitration, reasoning is required under the ICC 2012 Rules (Art. 31, par.2), under the Swiss Chambers of Commerce Association rules (Art. 32, par. 3), under the LCIA rules (Art. 26.1), under the AAA- ICDR Arbitration rules (Art. 27.2) and under the SCC rules (Art. 36, par.1) among others.

II. The Portuguese Law is no exception to this understanding. As a matter of fact, one can also find the reasoning requirement under the Portuguese Civil Procedure Code (Art. 668, par. 1, al. b) and Art. 158) and more particularly under the new Portuguese Arbitration Act (Law No. 63/2011, of December 14, 2011, simply "LAV"). However, also reflecting a general trend, the "LAV" admits that the parties may agree to dispense with reasons. According to Art. 42, par. 3 of the "LAV", 'the award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is rendered on the basis of an agreement of the parties under article 41'.

Reasoning is therefore required by default and the absence of motivation, when the parties have not agreed to dispense with reasons, is a specific and clear ground for annulment of the arbitral award: 'an arbitral award may be set aside by the competent State court only if [...] vi) the award was made in violation of the requirements set out in article 42, paragraphs 1 and 3' – cfr. Art. 46, par. 3, a) of the "LAV".

The first cited legal provision of "LAV" matches exactly the Art. 31 (2) of the UNCITRAL Model Law on International Commercial Arbitration (2006 amendments) but under the Model Law, absence of motivation is not an express ground for set aside an award or even to refuse the recognition of an arbitral award (cfr. Art. 34 and Art. 36 of the Model Law).

Nevertheless it is crystal clear that any arbitral award drawn up under and submitted to the "LAV" shall state the reasons upon which is based. This conclusion applies both to "domestic" arbitrations and to international arbitration procedures having its place in Portugal : 'the provisions of this Law on domestic arbitration shall apply to international arbitration, with the necessary adjustments' (par. 2 of Art. 49 of the "LAV"). Thus, no doubts arise concerning the necessity of motivating any arbitral award subject to the Portuguese Law (both domestic and international arbitrations held in Portugal).

The question remains as to the foreign arbitral awards that are subject of a request for recognition and enforcement procedures in Portugal. This is the key issue that I wish to address in this article, which will be therefore related to determine the extension of the reasoning required, if any, under the Portuguese law.

III. We shall firstly look at the Portuguese legal regime concerning the recognition and enforcement of foreign arbitral awards. This legal regime is primarily set out in the "LAV".

The Art. 55 of the "LAV" provides that 'without prejudice to the mandatory provisions of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as well as to other treaties or conventions that bind the Portuguese State, the awards made in arbitrations seated abroad shall only be effective in Portugal, regardless of the nationality of the parties, if they have been recognized by the competent Portuguese State court, under the present chapter of this Law".[2]

There is also a legal provision foreseeing the grounds for the refusal of the recognition and enforcement of foreign arbitral awards (Art. 56 of the "LAV") which is identical to the Art. 36 of the UNCITRAL Model Law and similar to the Art. V of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("NYC 1958").

However, none of these provisions addresses the question of lack or insufficiency of reasoning as an explicit and specific ground to refuse recognition and enforcement of an arbitral award.

Furthermore, there is a peaceful understanding that the legal provisions concerning the refusal of recognition and enforcement of arbitral awards set out an exhaustive list of the grounds for that refusal.[3] The legal provisions of the Portuguee "LAV" (Art. 56) are no exception to this understanding.[4]

Notwithstanding, looking at the range of possible grounds for refusal of the recognition and enforcement of the award provided for at the Art. 56 of the "LAV", there are two possible paths to explore, although none of them seems to be solid ground at first sight.

The first one would be to consider that the absence of motivation entails the violation of the principles of due process.[5] The second would be to consider this failure as a breach of public policy principles.

Considering the lack of reasoning as a breach of the principles of due process is certainly a long shot with too many shortcomings. In fact, the principles of due process are mostly related to the right of both parties being treated equally and have an equal chance to fairly and properly be heard during the course of the proceedings (presenting its factual and legal arguments in an adversarial manner) which clearly does not have any connection with the award itself and the motivation behind it. As this issue has been clearly place '[d]ue process should not be confused with the requirement that arbitrators give reasons for their award. (...) the failure to give reasons is not in itself contrary to the principle of due process".[6]

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This 'due process' theory does not seem to be a reasonable argument to sustain.

IV. On the other hand, approaching the possible breach of public policy principles would justify by itself a deeper analysis, which is not within the scope of this article. Therefore, I will limit myself to summarize some short ideas.

First of all, one should pay particular and careful attention to the specific wording of the "LAV".

The Art. 56, par. 1 of the "LAV" provides that 'Recognition and enforcement of an arbitral award made in an arbitration taking place in a foreign country may only be refused (...) b) If the court finds that: (...) ii) The recognition or enforcement of the award would leads to a result clearly incompatible with the international public policy of the Portuguese State.'

In this text there are some key words that I would like to stress: 'may only be refused'; 'would lead to a result'; 'clearly incompatible'; and 'international public policy'.

"May only be refused", I should stress once again, entails the conclusion that we are facing an exhaustive list of possible grounds for the refusal of the recognition and enforcement. But besides that, this conclusion also leads to a restrictive interpretation of any of the provided grounds for the refusal. All possible grounds as provided by this legal provision must not be regarded with any broad meaning and wideness must not be allowed. Even the breach of public policy, which has a broad and vague scope by nature, should be construed and interpreted with restrictions.

'Would lead to a result', establishes a direct connection to the final result or determination of the award not the logic process of construing and producing such award. What should be regarded as producing a result (*clearly incompatible with the international public policy of the Portuguese State*) are the contents of the award, more precisely the dispositive part of the award. What is able to produce a certain result is the effective determination of the issues in dispute, not the reasons (or the absence of reasons) of such determination.

'Clearly incompatible', in the sense that the incompatibility shall be 'manifest', 'notorious' or even 'egregious'. Any incompatibility does not suffice. It must be a notorious one.

Finally, the result of the award must be incompatible with the 'international public policy' of the Portuguese State. The international public policy of a State is by nature narrower than the domestic public policy as the latter comprises the former. At least they are different. As Albert van den Berg wrote,

> The distinction between domestic and international public policy means that what is considered to pertain to public policy in domestic relations does not necessarily pertain to public policy in international relations. According to this distinction, the number of matters considered as falling under public policy in international cases is smaller than that in domestic ones. The distinction is justified by the differing purposes of domestic and international relations.[7]

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Therefore, any approach to a possible breach of the international public policy of the Portuguese State necessarily entails a more restrictive assessment, to which is predominant the consideration of the purposes and principles of the international relations and international commerce.

Thus, the question that needs to be asked is whether or not the lack of motivation of a foreign award necessarily implies a breach of those purposes and principles (better said, leads to a result violating those purposes and principles). And is it clearly incompatible?

Considering those key points, I think that the lack of motivation of a foreign award shall not produce a "clear" incompatibility with the international public policy of the Portuguese State. This understanding is broadly accepted:

> The courts have likewise held that other procedural rules are not matters of international public policy.
>
> This is the case of the requirement that the arbitrators should give reasons for their award. The 'Cour de Cassation' held in one case that the failure to give reasons is not "in itself contrary to the French understanding of international public policy." It is only where the law applicable to the procedure or the arbitration rules stipulate that reasons must be given to that non-compliance with such requirement would justify the award being set aside or refused enforcement, on the grounds that the arbitrators failed to comply with their brief.[8]

Although it may not be a decisive argument, the fact is that allowing a broad perspective and understanding of the public policy is capable of open the door to discuss and review the merits of the dispute which is a result that clearly has to be avoided.

On the other hand we might well consider the strength that the international public policy may lay on this issue. It is quite peaceful the understanding that public policy is considered as a certain set of principles and legal provisions of an economic, cultural, social, ethical and legal nature, being of fundamental concern to the state and to the whole society. If those principles and provisions are related to the relations between entities from different countries or to the international trade in a general sense, we may refer it as 'international public policy'. Due to the nature of the interests involved in such provisions (of public policy) it is understood that those provisions cannot be derogated nor even waived by the parties or the respective rightholder. But the fact is that under the Portuguese Law, despite the fact that 'motivation' is a requirement that may find a constitutional harbor, arbitral awards may not require their reasoning. The parties may dispense with motivation (as seen above). By mutual consent, it is true, but in any case they may dispense with. Which leads us to the conclusion that 'motivation' is not of the same nature or relevance as the interests beneath the public policy principles and rules. And if this is accurate about domestic arbitration and 'domestic' arbitral awards more has to be about foreign arbitral awards. There's no reason here to treat differently domestic and foreign arbitral awards.

Again, I don't think that the principles and rules of international public policy may set out a requirement of motivating any arbitral award.

V. One should assert that under the "LAV" legal provisions and specifically under the provisions for the recognition and enforcement of foreign arbitral awards, lack of motivation is not a ground for refusal such recognition and enforcement.

The Portuguese "LAV" intended to draw a parallel with the "NYC 1958" where the absence of reasoning is not a ground for refusal of foreign arbitral awards. Hence, the main issue that we should assess here is whether the foreign award was made and is valid and binding according to the law that applies to the arbitration proceedings ("lex loci arbitri"). If the award was not made according to those provisions, the award may well be subject to an annulment law action in the state court of the place of arbitration and such legal action will then be a ground to refusal of recognition and enforcement under the Art. 56, par. 1, a), v), of the "LAV", even with the option of staying the recognition or enforcement proceedings (cfr. the Art. 56, par. 2 of "LAV"). If the "lex loci arbitri" allows awards with no reasoning one should reasonably raise the question of whether should the court of recognition or enforcement demand such requirement. And I think that it should not.

In my opinion, this is the reasoning underlying the "LAV's" recognition and enforcement of foreign arbitral awards legal framework, which tends to disregard such requirement in what foreign arbitral awards are concerned.

VI. Nevertheless, we may reasonably discuss another argument to consider the absence of reasoning as a ground for refusal of recognition and enforcement of foreign arbitral awards. This argument is found outside the legal framework of the "LAV" and is of a constitutional nature. As above mentioned, the Art. 205, par. 1 of the Constitution of the Portuguese State provides that 'court decisions that are not merely administrative in nature shall set out their grounds in the form laid down by law.'

Once again, the scope of this article will just allow me to line out very short ideas, mostly collected from the strict literal sense of this constitutional provision.

This constitutional provision grants the law ('ordinary law' as we may categorize it under the Portuguese legal system) the power to lay down 'the how' or 'the manner'[9] in which the motivation of court decisions is required which means that a certain amount of freedom was granted to the 'ordinary legislator'. Accordingly, the Art. 42, par. 3 of the "LAV" provides that the motivation of arbitral awards is required unless the parties have dispense with motivation. This new version matches exactly the former Portuguese Arbitration Act (Law n º 31/86 of 29 August – 'LAV 86'). The contractual freedom that underlies the right to resort to arbitration justifies and allows that the parties may dispense with reasons of the award and no injunctive provision was set out in this matter turning the right to motivation as of a non-waivable or non-disposable of nature. These principles would

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also allow the legislator to generically dispense with reasons of the arbitral awards (which was not the case of the Portuguese Law).

As far as the Portuguese jurisprudence is concerned, I am not aware of any court decision that challenged the constitutionality of such provision of the "LAV" (both new "LAV" and "LAV 86").

Thus, if a foreign arbitral award has no motivation in compliance with a "lex loci arbitri" that requires no reasoning for a valid and enforceable arbitral award, I don't think that a breach of this Portuguese constitutional provision arises.

But if I am seeing right, if a party is seeking in Portugal the recognition or enforcement of a foreign arbitral award that has no motivation in breach of a "lex loci arbitri" that requires such requirement, we may well face a final result of a decision violating this constitutional command. In other words, if a foreign "lex loci arbitri" requires motivation of the arbitral award, a Portuguese court decision that would interpret and construed the Art. 56 of "LAV" in a sense that dispenses with reasons, recognizing or enforcing an arbitral award in breach of such "lex loci arbitri" provision would lead to a result materially breaching the above cited constitutional provision. I am not aware of any court decision or opinion that stands for this understanding but I did not find any decision or opinion in the reverse sense either and I can't think of a reason to eliminate it at its outset. Therefore, I think that preponderance has to be granted to this 'constitutional' argument.

VII. Anyway, it is indisputable that a recognition and enforcement proceeding of a foreign arbitral award in Portugal will have to face and deal with the local legal tradition and with a certain propensity of the local courts to apply the Portuguese law in strictly and stiffly terms to any subject matter that is submitted to its decision. That is, it is not unthinkable that a court decision will require motivation of a foreign arbitral award in any circumstance and regardless of the fact that such requirement is not set out in the "lex loci arbitri".

Therefore, a cautious approach is advisable specially because using such caution does not involve a great deal of effort. Motivation is therefore recommended. But what is the extension of such reasoning? I will spare just a few considerations.

Firstly, we should bear in mind that the "LAV" does not set up any degree or extension of the motivation. It simple provides that the arbitral award shall state the 'reasons upon which it is based'.

Secondly, there are court decisions that require just a simple and mere motivation. For example, the decision from the Portuguese Supreme Court of Justice dated of 10-07-2008 (available at www.dgsi.pt) determined that only total and absolute lack of motivation would be a ground for annulment of the arbitral award, but not the simple insufficiency or shortcoming of the reasoning of the arbitral award.[10] On the other hand, although some decisions require the statement of the facts and the evidence produced to ascertain those facts (for example the decision from the Portuguese Supreme Court of Justice dated of 15-05-2007), one very stiff and rigid decision

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can be found requiring a 'critical analysis' of the evidence produced (decision of the Oporto Court of Appeals dated of 11-11-2003, available at the above referred website).

Generally, there is a common understanding that the legal criteria applicable to the court final decisions should be also applicable to produce a final arbitral award (for example the decision from the Portuguese Supreme Court of Justice dated of 17-05-2001 also available at dgsi's webiste) and those legal criteria are simply stated as follows: listing of the established facts, designation, interpretation and application of the legal rules (cfr. Art. 659, par. 2 of the Portuguese Civil Procedure Code).

Thirdly and following last note, any decision necessarily involves a legal syllogism where the major premise is the law, the minor premise is the fact (or bundle of facts) and the conclusion is the determination itself. Giving this generic notion, one can easily adhere to the idea of using the criteria required under the Portuguese Civil Procedure Code as a (mere) guideline where some basic milestones have to be verified, but not as a mandatory roadmap.

Accordingly, the first requirement for the motivation shall be a list of the facts established by the arbitral tribunal as a result of the evidentiary activity taken during the proceedings. I don't think that a list of the facts that remain to be proven is required nor even a 'critical analysis' of the evidence produced shall be demanded. What is paramount is a set of facts that shall be used by the arbitral tribunal to decide the dispute.

Further, finding, interpreting and applying the legal rules is necessary. And afterwards, it will follow the legal reasoning which is supposed to produce and afford an intelligible determination.

Concerning this issue, it should be borne in mind that produce reasoning is not deciding all the legal arguments raised by the parties. As is common understanding, a decision is supposed to determine legal issues, not legal arguments. Further, Redfern and Hunter's advice still remains accurate in face of the Portuguese Arbitration Act: 'The object should be to keep the reasons for a decision as concise as possible and limited to what is necessary, according to the nature of the dispute. The parties want the essential reasoning underlying the decision, not a lesson in the law'.[11]

VIII. In short: a) motivation of an arbitral award shall be regarded as a mandatory requirement unless i) the "lex loci arbitri" grants the parties the power to dispense with reasons (which is the case of the Portuguese Law) and the parties effectively have dispensed with reasons or; ii) the "lex loci arbitri" does not set out motivation as requirement for the validity and enforceability of the award; b) the motivation should follow the Portuguese Civil Procedure Code provisions as a guideline: listing of the established facts, designation, interpretation and application of the legal rules (cfr. Art. 659, par. 2 of the Portuguese Civil Procedure Code); c) it is crucial that the arbitral award determines the issues at dispute (and all the issues at dispute …) but not the legal arguments invoked by the parties; d) any simple, concise but nevertheless conspicuously thorough decision shall meet the legal requirements in what the motivation is concerned.

Lord Mansfield's advice, although colourful, should not de regarded as a rule at least at the current status of the Portuguese law.

Duarte Gorjão Henriques

1. According to paragraph 1 of art. 49 of the "LAV" 'an arbitration is considered international when international trade interests are at stake'.
2. There is a very disturbing decision from the Portuguese Supreme Court of Justice, dated of 19/03/2009 and available at http://www.dgsi.pt/jstj.nsf?OpenDatabase which stated that foreign arbitral awards were not required to be recognized in Portuguese state courts as Portugal became party of the "NYC 1958". This decision was (somehow) overruled or at least forgotten by a decision from Lisbon Court of Appeals dated of 08/06/2010 and available at http://www.dgsi.pt/jtrl.nsf?OpenDatabase that clearly stated that despite the fact that Portugal is a party bound to the "NYC 1958" this would not exempt the process of recognition of foreign arbitral awards. That Supreme Court decision was also sharply criticized by José Miguel Júdice and António Pedro Pinto Monteiro - Portuguese edition of "Do reconhecimento e execução de decisões arbitrais estrangeiras ao abrigo da Convenção de Nova Iorque – Anotação ao acórdão do Supremo Tribunal de Justiça de 19/03/2009", in "Revista Internacional de Arbitegem e Conciliação", 2010. Nevertheless, I think that now the new wording of the Art. 55 of "LAV" leaves no room for such bold interpretation of the "NYC 1958" and the Portuguese Law.
3. Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter - Redfern and Hunter on International Arbitration, 5th edition, Oxford, 2009, pag. 639.
4. Cfr. inter alia, Manuel Pereira Barrocas, Portuguese edition of "Lei de Arbitragem Comentada", Almedina, 2013, pag. 202.
5. This principle is supposed to be construed from the Art. V, 1., (b) of "NYC 1958", Art. 36, (1), (a), (ii) of the UNCITRAL Model Law and Art. 56, 1, a), ii) of the Portuguese "LAV".
6. Fouchard Gaillard Goldman ("On International Commercial Arbitration", Kluwer Law International, 1999), pag. 948.
7. Albert van den Berg, 'The New York Convention of 1958: An Overview' available online at http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf
8. Fouchard Gaillard Goldman ("On International Commercial Arbitration", Kluwer Law International, 1999), pag. 959.
9. I should note that I collected this wording from an English version of the Constitution of the Portuguese State available at the official site of the "Assembleia da República" - Parliament of the Republic of Portugal: www.parlamento.pt - and the word "form" is used here in a sense of "manner" or "way" but not in a sense of "formality".
10. Nevertheless, applying the general principles of civil procedure and the rules applicable to the judicial decision, I think that it is possible to draw a conclusion according to which the flagrant and irreconcilable contradiction between the reasoning and the determination of the award may be considered "absolute lack of reasoning." However, this is an issue that time and size of this article does not allow me to deepen.
11. Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter - Redfern and Hunter on International Arbitration, 5th edition, Oxford, 2009, pag. 557.

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