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Decree-Law 19-A/2020: A Potential Basis for Investment Claims Against Portugal



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The rapid and exponential evolution of the COVID-19 pandemic has led to an unprecedented level of state action, as governments have rushed to enact extraordinary measures to *flatten the curve* of the spread of the virus,

including social distancing regulations, closure of borders, export and travel restrictions, closure of non-essential businesses, requisitioning or nationalisation of private property, amongst others. All, whilst trying to strike a balance between public health and economic interests, as well as

complying with domestic and international law obligations, namely under investment treaties.

While being one of the European countries that has been more successful in controlling the number of cases and fatalities, Portugal is no exception and

has adopted similar restrictive measures.¹ As the country is slowly starting to open up again, the regulatory focus is starting to shift to mitigating the economic impacts of the COVID-19 pandemic and the economic crisis which is anticipated to come as a result thereof.

In this context, the recently approved Decree-Law number 19-A/2020, of 30 April (Decree-Law 19-A/2020) —which enacted measures that limit rights of private parties under long-term performance contracts in the context

¹ Like most countries around the world, on 18 March 2020, the state of emergency was declared in Portugal and the Portuguese Government implemented several restrictive measures to prevent and contain the spread of the outbreak of COVID-19. The state of emergency was in place until 2 May 2020, but not all the measures then adopted have since been lifted. The Government subsequently declared the state of calamity, approving a wide range of exceptional measures.

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of the COVID-19 pandemic—is likely to become a source of litigation against the Portuguese State, both at a domestic and international level.

Decree Law 19-A/2020: Restrictions on Restoring the Financial Balance and Compensation for ‘Sacrifice’

On 1 May 2020, Decree-Law 19-A/2020 was published, establishing an exceptional and temporary regime in the context of the COVID-19 pandemic with regard to (i) restoring the financial balance of long-term performance contracts to which the State or another public entity is a party (namely, public-private partnership contracts) (Long-Term Administrative Contracts) and (ii) compensation for ‘sacrifice’.

The measures enacted pursuant to the Decree-Law and which aim to fulfil the

aims identified above are, *inter alia*, the following:

(i) Suspension of Contractual Clauses and Provisions

Contractual clauses and provisions that could be relied upon by private parties, on the right to restore financial balance or the right to seek compensation for breaches of use (e.g. traffic levels in a motorway) in Long-Term Administrative Contracts are suspended in relation to facts occurred from 3 April to 2 May 2020 (i.e., during the state of emergency).

(ii) Restoration of Financial Balance Via Extension of the Term

Outside the state of emergency period (i.e., from 3 April to 2 May 2020), the right to seek compensation for breaches

of use or the right to restore financial balance, on the grounds of the pandemic (when applicable), can only be exercised by means of extension of the term of performance of the services or of the duration of the contract and will not give rise to a revision of prices or a duty to compensate by the contracting authority or public entity.

(iii) Suspension or Reduction of Obligations under Public-Private Partnership Contracts in the Road Infrastructure Sector

Certain obligations of the private partner under public-private partnership contracts in the road infrastructure sector will be temporarily reduced or suspended by the public partner, taking into account, in particular, current traffic levels consistent with the reality and

the minimum services to be guaranteed in order to adequately safeguard road safety. When the remuneration of said private partners derives from payments by the public partner, the latter shall also determine, on a unilateral basis, the reduction of said payments.

(iv) Compensation for ‘Sacrifice’

No compensation for ‘sacrifice’ (i.e. compensation as a result from a legal act that imposes a sacrifice to a private undertaking) (*indemnização pelo sacrifício*) will be due for damages resulting from acts regularly performed by the State or another public entity, in the exercise of powers conferred by public health and civil protection legislation, or in the context of the state of emergency, to prevent and combat the COVID-19 pandemic, which is

considered *force majeure* for these purposes.

(v) Challenge of Arbitration Awards

Arbitral awards rendered in disputes that may arise from the provisions set forth in Decree-Law 19-A/2020 are, in certain circumstances, subject to challenge before the Constitutional Court and the Supreme Administrative Court.²

The Potential for Investment Claims Arising out of Decree-law 19-A/2020

Although the terms of the more than 40 bilateral investment treaties (BIT) to which Portugal is a party vary,³ the same

² This will be the case when (i) the awards are contrary to a decision, on the same question of law, rendered by one of the Central Administrative Courts or by the Supreme Administrative Court; and (ii) the matter under examination is of fundamental importance, due to its legal or social relevance, or when the admission of the appeal is necessary to apply the law better; in practice, this reference is unnecessary, given that it simply refers to the regime for challenging arbitral awards set forth in the Code of Procedure in Administrative Courts, in force since 2019. Whether or not this regime is applicable to a claim made under a bilateral investment treaty will depend on what the relevant clause for settlement of disputes between a party and an investor of the other party provides for, namely, whether it provides for a dispute to be submitted to an arbitral tribunal established in accordance with the Code of Procedure in Administrative Courts (in which case it will apply) or, for instance, to the International Centre for the Settlement of Investments Disputes (in which case it will not apply).

³ Portugal has entered into agreements with the following countries, although not all are in force yet: Albania, Germany, Angola, Algeria, Argentina, Bosnia Herzegovina, Brazil, Bulgaria, Cape Verde, Chile, China, South Korea, Croatia, Cuba, Egypt, United Arab Emirates, Slovakia, Slovenia, Philippines, Gabon, Guinea-Bissau, Equatorial Guinea, Hungary, Jordan, Kuwait, Latvia, Libya, Lithuania, Macau, Morocco, Mauritius, Mexico, Mozambique, Pakistan, Paraguay, Peru, Poland, Qatar, Czech Republic, Democratic Republic of Congo, Republic of Congo, Romania, Russia,

generally provide for the following rights and protections: (i) national treatment; (ii) most-favoured-nation treatment; (iii) fair and equitable treatment; (iv) compensation in the event of expropriation, and (v) full protection and security.

The measures adopted by the Portuguese State in the context of Decree-Law 19-A/2020 may affect investments made by foreign investors in Portugal and, to the extent that they result in essential and unpredictable changes to the legal and contractual regime or in severe limitation of investors' rights, the same may give rise to claims under the applicable BIT, namely on the grounds of breach of the investors' rights to fair and equitable treatment and to compensation in the event of expropriation. Both types of claims are analysed below.⁴

(i) Potential Breaches of Fair and Equitable Treatment

Claims for breach of fair and equitable treatment may be brought in light of certain types of conducts which may (i) deny justice and due process; (ii) constitute manifest arbitrariness in decision-making; (iii) be discriminatory;

São Tomé and Príncipe, Senegal, Serbia, Timor, Tunisia, Turkey, Ukraine, Uruguay, Uzbekistan, Venezuela and Zimbabwe. Several of these agreements contain Non-Precluded Measures and war and emergency clauses. In that regard, see in this Special Issue Heidi López Castro and Jana Lamas de Mesa, 'Non-Precluded Measure Clauses in Times of COVID-19'; and Gabriel Bottini 'COVID-19 and Investment Claims: What Role for War and Emergency Clauses?'

⁴ Depending on the specific circumstances of each case and without prejudice to potential claims under domestic law, namely, on the grounds that said measures may be unconstitutional.



The measures adopted in the context of Decree-Law 19-A/2020 may affect investments made by foreign investors in Portugal

(iv) constitute an abusive treatment or (v) violate investors' legitimate expectations.⁵

Although the protection afforded by the fair and equitable treatment standard does not deprive a state from exercising its regulatory powers and not all regulatory change will constitute a breach of said standard, claims where investors have suffered losses as a result of measures adopted in the context of the COVID-19 pandemic, in breach of the legitimate expectations they had when making the investment, cannot be excluded.

Indeed, in the case at hand, it is in our view possible that some investors may feel that the measures enacted through Decree-Law 19-A/2020 breach their right to a fair and equitable treatment, under the relevant BIT, and decide to challenge the measures enacted on the grounds that said measures breach

their legitimate expectations and are not proportional, as follows:

- Investors may claim that the measures enacted under Decree-Law 19-A/2020 affect their legitimate expectations that the contractual clauses specifically agreed upon by the parties and the legal regime on which they based their decision to invest would remain in place and be enforceable throughout the contract's life,⁶ and, moreover, that it would not be suspended, retroactively;⁷
- Investors may also decide to challenge the proportionality and necessity of the measures adopted, insofar as the same forces the private party to alone bear the risks of the

⁶ Which applies to both the regime of restoration of financial balance in Long-Term Administrative Contracts and the regime of the compensation for 'sacrifice.'

⁷ So much so, that Decree-Law 19-A/2020 only came into force on 2 May 2020 (albeit with retroactive effects), i.e., the day on which the state of emergency ended.

⁵ See, UNCTAD, 'Fair and Equitable Treatment - A Sequel: UNCTAD Series on Issues in International Investment Agreements II' (2013), p.64.

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COVID-19 pandemic, instead of said risks being shared between the parties (for instance, by allowing for a partial rebalancing of the contract);⁸

- Likewise, investors may question the measure regarding the challenge of arbitral awards, enacted by Decree-Law 19-A/2020, on the grounds that they breach their legitimate expectation —i.e., that the disputes arising out of the respective contracts would be subject to arbitration, without appeal, as expressly agreed upon,— as well as on the grounds that it is not proportional, as it is in no way necessary to combat the pandemic.

(ii) Breach of Compensation in the Event of Indirect Expropriation

Protection of foreign investors against expropriation (i.e., the attachment of private property by a government acting in its sovereign capacity) of an investment without adequate compensation, is one of the main rights found in investment treaties. Expropriation can be direct or indirect, depending on whether the legal title to the asset is directly transferred

⁸ In this regard, the preamble of Decree-Law 19-A/2020 states the following: *'The exceptional situation that we are experiencing at the moment requires everyone's participation of all and also imposes the enactment of measures with regard to long-term contracts, namely public-private partnership; This decree-law includes extraordinary and temporary measures that aim to limit the negative effects that would arise for the State as a result of the simultaneous exercise of potential compensatory rights by the private contractors without any restrictions; The options exercised by the present decree-law constitute a limitation of rights, which is necessary, adequate and proportional to the aims to be achieved and to the state of exception.'*

to the state or whether the taking of the property occurs through measures that, in practice, amount to expropriation⁹ and has been recognized to apply to both tangible and intangible interests, such as contractual rights.¹⁰

In this instance, investors may claim that the measure, enacted by Decree-Law 19-A/2020, to retroactively suspend contractual clauses and provisions on the right to restore the financial balance or the right to seek compensation for breaches of use, during the state of emergency period, amount to an indirect expropriation, as it constitutes a deprivation of their rights, for which they have not been compensated.

What does the Future Hold?

The COVID-19 pandemic has created unparalleled risks for foreign investors around the world. In the face of an unprecedented situation and the uncertainty of the future, the measures that have been taken by States to combat the pandemic, and in particular, the measures enacted by the Portuguese

⁹ As summarized by the United Nations Conference on Trade and Development, *'indirect expropriations are characterized by the following cumulative elements: (a) An act attributable to the State; (b) Interference with property rights or other protected legal interests; (c) Of such degree that the relevant rights or interests lose all or most of their value or the owner is deprived of control over the investment; (d) Even though the owner retains the legal title or remains in physical possession.'* See, UNCTAD, *'Expropriation - A Sequel: UNCTAD Series on Issues in International Investment Agreements II'* (2013), p. 12.

¹⁰ Tangible interests, such as contractual rights, have consistently been recognized by international law and investment tribunals as being able to be subject to expropriation and, indeed, such rights usually fall within the broad definitions of 'investment' contained in investment treaties. For further information, see UNCTAD (2013), *Expropriation - A Sequel*, ob. cit.

State pursuant to Decree-Law 19-A/2020, will, undoubtedly, give rise to controversy and possibly claims by investors under investment treaties.

In light of the exceptional circumstances we are currently facing, adjudicating such claims will certainly not be easy for arbitral tribunals, as the merits of such claims will be highly fact-specific as to the circumstances of the investments and the relevant measures.

Given the scale of the pandemic, the margin of appreciation afforded by investment tribunals when determining whether a measure is reasonable or proportionate will certainly be wider and significant weight will likely be given to the State's potential defences.¹¹

Accordingly, foreign investors affected by the measures of Decree-Law 19-A/2020 are advised to carefully consider if their investments are covered by an investment treaty and what protections may be afforded to them under the relevant treaty, which regardless of the general analysis above, needs to be established on a case-by-case basis.

¹¹ States can defend against treaty claims by invoking (i) treaty exceptions, i.e., exceptions that expressly set out in the relevant BIT, in which case the treaty may not apply to the disputed measure or (ii) customary international law defences, which have been codified in the International Law Commission's Articles on State Responsibility (i.e., 'circumstances precluding wrongfulness'), which include consent, self-defence, countermeasures in respect of an internationally wrongful act, force majeure, distress and necessity. See in this special issue, Sebastián Green Martínez and Mariana de la Rosa Riera, 'COVID-19 and Circumstances Precluding Wrongfulness in Customary International Law: State of Necessity and Force Majeure'

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