ABA Section of International Law

2014 Fall Meeting – Buenos Aires, Argentina

Do it the American Way: The Rise of Plea Bargaining, Leniency Agreements & Criminal Settlement in Civil Law Jurisdictions

October 23, 2:30 PM- 4:00 PM

Is there plea bargaining in the Portuguese Legal System?

If you ask a lawyer about plea bargaining in Portugal, she will tell you that the concept as such doesn't actually exist in the Portuguese legal system – a system that is founded on the legality principle.

This presumption – the inexistence of plea bargaining – may nevertheless be out of date. Indeed, within the last decades, some forms of diversion have been enshrined in our Criminal Procedure Law. The question is: did they bring plea bargaining along? Let us take a look at the different stages of the Portuguese Criminal Procedure and analyze whether *plea bargaining* exists in any form.

A – Plea bargaining and the commencement of criminal proceedings

From the very first beginning of criminal proceedings, there can be bargaining: the suspect and public prosecutor/police can bargain on the opening of proceedings against the former. The Portuguese Code of Criminal Procedure[1] in its original version stated "*the report of a crime always determines the opening of an investigation*". The opening of a criminal case was subject to strict legality criteria. Even if a crime report was totally ill-founded, the public prosecutor/police would have to open an inquiry and investigate the relevant facts.

The Criminal Procedure Law reform of 2007 changed this and it now states "*subject to the exceptions that are stated in this Code, the report of a crime always determines the opening of an investigation*". These exceptions refer to anonymous ill-founded crime reports and to crimes where the victim must make the report. Although the Public Prosecutor now has more freedom relating to ill-founded and anonymous crime reports, he still cannot refrain from opening an investigation on discretionary grounds (i.e. low probability of achieving conviction, low interest in pursuing a certain crime, etc.).

At this stage, the criminal defense lawyer's role is usually seen as non-existent. In spite of that, and although these rules are recent, we dare say that a criminal lawyer can always try to submit evidence that will reveal the ill-founded nature of a crime report. This might, however, be academic, because he/she will only have knowledge of the existence of a case at the moment when his/her client is called for an interview and formally declared *arguido* (suspect).

Is there any room for plea bargaining at this stage? The answer is "No". All a lawyer can do on behalf of his/her client is trying to submit evidentiary elements to reduce the suspicion against him. No *bargaining* is allowed.

B – Plea bargaining during the investigative stage

What about during the investigation stage? Is plea bargaining admissible? What is the role of the criminal defense lawyer? There are four situations for which the Code of Criminal Procedure allows the public prosecutor to use *diversion* solutions: (1) mediation; (2) provisional suspension of proceedings; (3) closure in cases of exemption of

[1] Código de Processo Penal, enacted by DL (Law Decree) n.º 78/87, of 17 February. The Code was reformed for the first time in 1995 and more recently in September 2007, 2010 and 2013.

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penalty; and (4) *processo sumaríssimo* (summary or speedy proceedings).

(1) Mediation proceedings could be described as a bargaining procedure. However, it is a bargaining procedure between suspect and victim. The public prosecutor will only approve its result. Moreover there is no *plea*. The Criminal Mediation Regime[2] (art. 6, no. 1 and 2) expressly states that the participants may freely determine the terms of the agreement, subject to one exception: sanctions which deprive the suspect from his liberty or demand duties that offend his dignity, or exceed a length of six months cannot be agreed.

The criminal defense lawyer may take part in mediation proceedings. She can also play an active role by requesting the public prosecutor to apply this mechanism and negotiating with the victim's lawyer. If they reach an agreement, the case will be closed (the effect is equivalent to the withdrawal of the complaint by the victim – so, there will be no criminal records whatsoever).

(2) The provisional suspension of proceedings [3] is a mechanism that allows the public prosecutor not to accuse the suspect. Instead of presenting a bill of information against him, the public prosecutor may propose the suspension of proceedings subject to compliance with certain duties by the suspect (moral satisfaction of the victim, compensation, treatment, etc.).

If the suspect complies with those duties, the case will be closed and cannot be reopened (the effect is equivalent to the closure of the case without charges – there will be no criminal records whatsoever, but during the next five years the defendant may not benefit of this mechanisms in future criminal proceedings). If the victim has requested to take an active role in criminal proceedings ("assistant" to the prosecution) her consent is necessary.

The criminal defense lawyer can play an active role by requesting the public prosecutor to apply this mechanism and negotiating with the victim's lawyer.

(3) Closure in cases of exemption of penalty (article 280 Code of Criminal Procedure) is a particular case in which the public prosecutor may refrain from bringing charges against the accused. This happens in those situations for which the Criminal Code[4] foresees the possibility of conviction without applying a sanction to the defendant. These are cases of lower guilt and minor wrongdoings, in which there has been compensation of damages and there aren't any preventive arguments that hinder the non-application of the penalty. The effect is equivalent to the closure of the case without charges – there will be no criminal records whatsoever.

Apart from the Criminal Code, there are several specific regulations that allow the public prosecutor to use of this mechanism – *v.g.*: Tax Crimes allow for exemption of penalty if the tax returns have been properly corrected and all taxes and interest due have been paid before the bill of information has been filed ns has been revealed[5]; legislation on drugs trafficking allows the exemption of penalty for those suspects who cooperate with the authorities in gathering substantial evidence to identify or capture other suspects, in particular if these are members of criminal associations, groups or organizations[6]; a similar provision for terrorist organizations can be found in the Criminal Code [7]; in corruption cases exemption of penalty may be applied to the *whistle blower* who reported the

[2] Law no. 21/2007, of 12 June.
[3] Articles 281 and 282 Code of Criminal Procedure.
[4] Código Penal.
[5] Articles 22 and 44 General Regulation on Tax Infringments (*Regime Geral das Infracções Tributárias)* – Law 17/2001, of 5 June.
[6] Article 31, Law 15/93, of 22 January.
[7] Article 299, no. 4, Criminal Code.

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crime within 30 days of its perpetration or to the person that promises/accepts an undue benefit and withdraws/refuses it before performing the correspondent action[8].

In all of these situations, the defense lawyer may intervene providing advice to the client on a possible cooperation and/or requesting for the application of the diversion mechanism.

(4) *Processo sumaríssimo* [9] (summary or speedy proceedings) is the only situation in the Portuguese legal system in which a criminal sanction may be imposed on a criminal defendant without an oral and public trial hearing. The public prosecutor files the bill of information together with a proposal for a criminal sanction and serves it directly to the defendant. He may accept it and, after judicial approval, the sanction will be enforced. These proceedings may only apply if the public prosecutor finds it unnecessary to impose a custodial sanction.

The defense lawyer may trigger the application of the *processo sumaríssimo*. Nevertheless this is rather unusual and therefore the prosecutorial proposal is typically not negotiated previously with the defendant or his lawyer. Furthermore, once the prosecutor files the bill of information with his proposal, he cannot change it, unless the judge refuses to impose the requested sanction and proposes a different one.

(5) Similarities and differences

These four possibilities of diversion have some differences that must be pointed out. Regarding the maximum applicable sentence threshold, the closure in cases of exemption of penalty may only be applied to crimes punished with a sentence of up to six months imprisonment, or in other cases specifically enumerated in statutory law (such as the above mentioned cases of drugs trafficking, corruption, etc.).

The other diversion mechanisms may in general be applied to crimes punishable with a sentence of up to five years imprisonment.

From a different perspective, mediation may only take place in *private or semi-private crimes* (i.e. crimes regarding which the commencement of proceedings and further prosecution depends on the victim submitting a formal complaint and filing a private bill of information against the defendant – the latter only in private crimes) against the persons or against property.

Moreover these diversion mechanisms – except closure in cases of exemption of penalty – have a particular characteristic: the victim (although in different degrees [10]) is also a part of the agreement and may oppose it.

Concerning the competent authority, apart from mediation, a judge must approve the application of diversion mechanisms. Mediation agreements must be approved by the public prosecutor. If the judge does not accept the application of the diversion mechanisms as proposed the proceedings will continue, but the judge he may not preside over the trial.

Another important aspect: with exception of the *processo sumaríssimo*, the suspect doesn't always have a lawyer appointed at this stage. He may request one, but the appointment is neither automatic nor compulsory[11]. This means that during the investigation, when facing the possibility of accepting diversion

[8] Article 374-B Criminal Code. The Law on corruption in international commerce and in the private sector does not foresee the "whistle blower" case (Law 20/2008, of April 21, article 5), but it's applicability on the basis of the Criminal could eventually be sustained.
[9] Articles 392-398 Code of Criminal Procedure.
[10] In the mediation procedure, the agreement of the victim is always required. In the provisory suspension of the procedure, it will only be required if the victim requested her admission as an Assistant (similar to the German *Nebenkläger* and *Privatkläger*).
[11] Although there are cases in which the appointment is compulsory – ex: people under 21, foreigners who do not master Portuguese, detainees, etc.

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mechanisms, the suspect doesn't always enjoy the advice of a criminal defense lawyer.

Finally it must be stressed that only the conviction in *processo sumaríssimo* will be written on the defendant's criminal records [12] and is hence equivalent to a final judgment. The other decisions will also be registered, but this register is only available to the courts and to prosecution authorities and it doesn't have the value of as previous conviction.

(6) Are these mechanisms forms of plea bargaining?

From the formal point of view the mechanism that most resembles plea bargaining is the *processo sumaríssimo*. In theory under this regime both the suspect, through his criminal defense lawyer, and the public prosecutor may propose that the suspect pleads guilty to the facts on the bill of information and accepts a certain criminal sanction. Nonetheless there is usually no real *bargaining* – the proceedings take place in writing, by means of formal written submissions. Usually the defense lawyer is neither able to call the public prosecutor, nor to talk to him in order to negotiate the terms of the agreement, although it may occasionally happen, for instance during an interview of the defendant in the investigative stage.

From the practical point of view, closure in cases of exemption of penalty or even the provisional suspension of proceedings could resemble more a *bargaining* process, as the lawyer could approach the prosecutor and "negotiate" the defendant's providing of a statement against obtaining the application of those mechanisms. This is becoming more and more common in cases of white-collar complex crimes.

Closure in cases of exemption of penalty and provisional suspension of proceedings, as well as mediation do not require a formal guilty plea. Nevertheless, an admission of the facts is usually required. This could be seen as problematic because negotiation by the lawyer of the application of these mechanisms (especially the first two) will imply that his client is willing to admit guilt. Generally a negotiation conducting to the application of these mechanisms will even only take place after the suspect has made a formal statement in which he admits having committed the facts.

If everything goes well, the case will be closed. If there is a breach of the agreement or obligations (in the cases of mediation and provisional suspension of the procedure), proceedings will continue and a bill of information will be filed[13]. Equally if the prosecutor or the judge after "negotiation" refuses to apply the diversion mechanism, a bill of information will be filed and proceedings will continue.

Evidently an admission of guilt by the former suspect and now defendant will be a disadvantage. This happens especially during the investigation – the suspect may have given important leads to the investigating authority. Before the Court the defendant may rely on his right to silence and his former statements may only be used if they were made in front of an investigation judge or a prosecutor and in the presence of a lawyer. This is a major change in our legal system, which occurred in 2013. Until then, if the defendant relied on his right to silence during trial, his previous statements could never be used. This would make it easier for the lawyer to risk advising the defendant to give a pre-trial statement in

[12] Although even in these situations it is possible to exceptionally request the judge not to order the transcript of the decision in the criminal records, for employment purposes.

[13] We have to bear in mind that the application of these mechanisms is only allowed if there are strong evidentiary elements, from which it may be concluded that there is a probability that the suspect actually did commit the crime.

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order to try to obtain the application of a diversion mechanism.

C – Plea bargaining during the trial stage?

Firstly, some clarifications on the *pleas* before the Court in the Portuguese legal system must be given. In our system, the defendant doesn't present a *plea* through his lawyer. There is no such thing as formal "pleas".

Rather the defendant is given the opportunity to give a statement at the beginning of the trial hearing. If he states that he is innocent, he should also provide an explanation of the facts – otherwise the "plea" won't have any real effect.

If the defendant confesses the facts on the bill of information or on the indictment in open court – i.e. if he "pleads guilty" – freely and voluntarily, closing arguments will take place and the judge(s) will decide on the penalty (which is not subject to negotiation). The confession will only have this effect on crimes punishable with imprisonment up to 5 years. The contradictory and oral discussion of the case is compulsory whenever a more severe crime comes to play. When deciding on the sentence, the court may take the confession in account as a mitigating circumstance.

A plea bargain as such a trial stage does not exist in our legal system. Despite the total absence of legal regulations of settlements in criminal trials, certain scholars, some branches of the public prosecutions' office and various judges advocated for the possibility of making such settlements on the basis of the existing law.

Clearly influenced by the German experience and the German legal system (where "sentencing agreements" started to be agreed upon without an explicit legal permission), they proposed that on the basis of our legal regulations of "confessions" at trial[14], at the beginning of the trial hearing the prosecutor and the defendant would propose an settlement concerning the maximum applicable sentence, made possible on the basis of the confession made by the defendant in front of the trial judge(s).

Some prosecutors adhered to this practice and entered into these settlements with the defendant's lawyers and some judges accepted them. This practice didn't last long though.

One case – where one of the defendants who entered the settlement considered that his expectations had been violated and appealed his convictions – reached the Supreme Court and it outlawed such agreements declaring them to be illegal and therefore null and void and determining that a confession obtained against a promise of such an agreement had to be excluded[15].

The grounds: the possibility of entering into such an agreement had to enacted by the legislator; accepting such agreements without previous legal stipulations of the proceedings would clearly violate the loyalty principle, the legality (truth-seeking) principle, the exigencies for legal certainty and the principle of equality before the laws, since the admissibility of such agreements would depend of the willing of the prosecutors and courts of a certain location; the defendants made a confession in the expectation to obtain an agreement concerning the sanction that would be imposed, but such a promise was illegal and not permitted by the Code of Criminal Procedure; article 126 (1) of the Code of Criminal Procedure states that "*evidence obtained by torture, coercion, or, as a general matter, infringement of personal physical or moral integrity, is null and void*";

[14] Art. 344 Code of Criminal Procedure.
[15] http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/533bc8aa516702b980257b4e003281f0?OpenDocument.

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article 126 (2) (e) states that evidence obtained by "*promise of a benefit not permitted by law*" is offensive of the personal moral integrity; this is an absolute prohibition and evidence must be suppressed.

The Court underlined that it was not taking a position on the benefits of such a plea bargaining institute for the criminal justice system, but simply deciding whether there was a legal basis that allowed for those settlements.

After this ruling of the Supreme Court, the General Prosecutor's Office issued an Instruction forbidding prosecutors to enter in those kinds of settlements, which put an end to the short-living "sentence bargaining" practice[16].

D – Some words on the role of the lawyer

We described above the possible intervention of the lawyer in negotiating the application of diversion mechanisms akin to some form of plea bargaining, including the practical difficulties of that negotiation. How does this influence the role of the lawyer?

In our system, the criminal defense lawyer sometimes finds himself in a complicated situation: should he advise his client to request or accept the use of diversion mechanisms? Or should he risk going to trial? Once before the Court, should the defendant confess?

The answer to these questions – particularly in cross-border cases – requires a very thorough assessment of the evidence, but also the lawyer's instinct and experience on the functioning of our prosecutorial institutions and courts.

If there is strong evidence against the client, it might be better for him to admit his guilt and to get in exchange the assurance of a non-custodial sanction (*processo sumaríssimo*), a conditional closure of the case or a closure with exemption of the penalty (which means no criminal records...). This is evidently a weighty aspect in any legal system.

A highly relevant factor concerning our legal system is also time – proceedings in Portugal, especially in white-collar complex cases, may take years and therefore it could be preferable for the defendant to accept the minor consequences of a diversion mechanism and have the case closed swiftly.

In cross-border cases it is crucial that a multi-national team assesses whether the client is able to obtain a more beneficial settlement in a foreign jurisdiction and if it could be adequate to preclude further proceedings also in Portugal (cross-border *ne bis in idem* or double jeopardy).

Sadly the task of reaching a decision on advice is sometimes made very difficult, because we do not have a precedent system and our case law is everything but coherent and uniform. In a system like this, it is difficult – though not impossible – to assess the probability of conviction and, most importantly, the degree of sanction that the client risks. Ultimately this can lead to a tendency to advise clients to accept the application diversion mechanisms (to avoid criminal register or a custodial sanction) or to give a confession in court (in order to possibly getting a milder sentence), in order to trade risk of an unpredictable possibly custodial sanction for the certainty of a minor consequence or a lower sentence. Downside – certainty is not always 100% granted and does not include the length or type of the criminal sanction to be applied when the defendant is facing trial. On these grounds the principle that "*a bad settlement is always better than a good law suit*" must be considered most

[16] http://www.pgr.pt/grupo_bases/documentos_hierarquicos/Directiva_2-2014.pdf.

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prudently when giving advice in criminal proceedings in our legal system.

E – Towards plea bargaining in the Portuguese Legal System?

Do we have *plea bargaining* then? It does seem like we are moving away from a principle of strict legality to a more discretionary system based on the principle of opportunity. But there is still a long road to walk in the direction of a plea bargaining model, such as e.g. the systems in the United States, mainly on four grounds:

- Firstly, we have a very formal system that sometimes makes it difficult to approach prosecutorial authorities with a view of starting negotiations in which the defendant's lawyer may contribute to the contents of a possible agreement.

- Secondly, when these negotiations are possible, they are not specifically regulated by law and therefore "agreements" possibly made with the prosecutorial authorities are made informally and are not binding upon the prosecutor until they have been converted in a formal proposal to apply a diversion mechanism. This leads to an insecure bargaining model, since if the defendant's lawyer "agrees" with the prosecutor on having his client giving a statement in trade for e.g. a closure with exemption of penalty or a provisional suspension of proceedings, this "agreement" will not be recorded in any way whatsoever. If for some reason the prosecutor does not respect the "agreement" (it could simply be the case if after the statement were given, there responsible prosecutor changes), the defendant will have trouble having his statements suppressed, as such agreements are not clearly regulated in our law and it is doubtful whether an exclusionary rule would apply. In any event it would be hard to picture how the defendant could prove that such an agreement even existed.

- Thirdly, most of the diversion mechanisms that resemble a form of plea bargaining (save closure with exemption of penalty) are limited to minor offenses.

- Fourthly, as we will explain beneath, bargaining in ordinary criminal proceedings (save *processo sumaríssimo*) is limited to the pre-trial stages.

Whether our system will walk the road towards a "pure" plea bargaining model is unlikely. But the influence of foreign plea bargaining models is present and it is likely that the pressure of economic crisis, the rising quantity of pending proceedings, as well as the increasing complexity, length and number of white-collar criminal cases and the associated financial burden[17] will lead to a wider and more flexible plea bargaining model and probably the enactment of laws allowing for settlements for the application of criminal sanctions at the trial stage. This will require a rethinking of the lawyer's role and defense strategy, which will also have influence on advising clients in cross-border cases.

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[17] Trial hearings in high profile complex cases usually takes months and sometimes even years.

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