

APUNTES SOBRE EL ARBITRAJE EN PORTUGAL

José LEBRE FREITAS

1. Voluntary arbitration is regulated in Portugal by a special law (Lei 31/86, de 29/8). Before, it was regulated in the Civil Procedure Code, where now only four general rules about mandatory arbitration have still place.

2. Yes.

2.2. No.

3.

3.1. The parties are free to establish how should the arbitrators be appointed. If they don't do so, one chooses an arbitrator and the third one is choosed by the other two or, if they don't agree, by the President of the Court of Appeal.

3.2. A different rule applies for the mandatory arbitration, where the parties never have any influence on the appointment of arbitrators.

3.3. The arbitrators are subject to the same rules which apply for the judge's impeachments when they are not chosen by both parties in agreement.

3.4. No.

3.5. No.

4.

4.1. No.

4.2. No.

4.3. The exception of arbitration regards the procedure. It can't be argued by the judge, but only by the defendant. It is so an "excepção dilatória".

4.4. No. Only former judges now in pension can be arbitrators.

4.5. If a lawsuit is pending in a State Court where the defendant didn't argue the exception, no arbitration can take place (*litispendentia*), unless both parties agree to subject to arbitration.

4.6. Yes.

4.7. The law says nothing about it. Anyway, the suspension would be possible if there was no maximum delay for the arbitration award; but our

law establish a delay of 6 months for a decision, which makes the suspension only possible if both parties agree not arguing the incompetence of the court after this delay has expired.

4.8. The State court can suspend the proceedings while waiting for a decision of a preliminary question by another State court or arbitrators.

5.

5.1. No.

5.2. No.

5.3. If the parties don't agree differently, the arbitrators have the same powers as a State judge, there's to say they can take the initiative of almost any evidence proceedings (there are only some limits about witnesses) and have an active role in the course of these proceedings.

5.4. No.

5.5. No.

5.6. Yes, if the parties agree. No, if they don't.

6.

6.1. Yes.

6.2.-6.3. Arbitrators only can deliver provisional or anticipatory measures ("misure provisorie o antecipatorie") as far as they do not express the exercise of powers of authority. For instance, they can order a party to suspend a construction, but they can not enforce this decision.

7.

7.1.-7.3. Only controversies about "diritti disponibili" can be submitted to arbitration, as well as to transaction.

7.4. No.

7.5. Yes.

7.6. Only the parties in the arbitration clause are bound by the decision.

7.7. Not specifically, but the validity of the arbitration agreement can be put in question, as well as the limits of the award, the respect of parties' guarantees or the competence of the court, by an action in a State court after the award is produced.

7.8. Yes.

8.

8.1. No.

8.2. No.

8.5. Yes.

9. Yes.

10.

11.

11.1.-11.3. No.

12.

12.5. Conciliation and mediation are foreseen for consummator's relationships, as well as in some pilot experiences of peace courts.

12.6. Yes.

12.7. If the conciliation or mediation fails, State courts can be seized. As for the peace courts, their decision is submitted to an appeal to State courts.

12.8. None.

13. Yes.

14. No.

15. Yes.

15.5. Already answered in point 7.6 for subjective limits and in point 7.7 for objective limits.

15.6. Yes.

15.7. The parties have 30 days to argue in the State court some of the reasons against the award referred in point 7.7. If they don't do it, it is still possible for the condemned party to argue them where the other party enforces the judgment.

16. The arbitrators ought to apply for a constitutional issue in their award and they can refuse the application of a rule if they suppose it not being legitimated by the Constitution. From this decision an appeal to the Constitutional court is always possible.

17. Yes, if the parties don't agree differently. But, in international lawsuits, the appeal is only admitted if the parties have so agreed.

18. By seizing the Court of Appeal of the area where the award has been pronounced, in the same terms as a State decision.

19. No.

20. There are 2 main special rules: the parties, as well as the court if they don't do it, can choose the applicable material law; an appeal only can take place when formerly agreed by the parties.

21.-23. There's no special rule. Enforcement can be directly asked for in a State court. There's no need of *exequatur* in Portuguese law, concerning national awards. As for the recognition of foreign awards, they are subject to the same rules as State judgements, after their recognition by a Court of Appeal, if certain requirements are fulfilled; no doubt about la "veracità del documento" containing the award or the intelligence of the

decision; “osservazione del diritto di difesa, nonchè dei principii del contraddittorio e della uguaglianza delle parti”; “conformità con l’ordine pubblica internazionale dello Stato portoghese”; “passaggio in giudicato”; “non invocabilità della cosa giudicata o della litispendenza rispettanti una causa pendente in Portogallo”. These requirements are not applicable for awards given within the field of application of the New York convention of 10.6.58, applicable in Portugal since July 1994.

24. A foreign award is the one produced in an arbitration having taken place out of the country. The award pronounced over disputes connected, even exclusively, with foreign countries is a national one, if the arbitration has taken place in Portugal.

25.-26. As far as the litigation taking place abroad has not given place to a definitive award, its pendency outside the country can not affect the internal arbitration. The contrary applies if a “cosa giudicata” is formed: the foreign award having been recognised, no national award will be given.