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ARBITRATION REQUIRED TO SETTLE CONSUMER DISPUTES: OVERVIEW OF THE PORTUGUESE REGIME

ARBITRAGEM NECESSÁRIA PARA A RESOLUÇÃO DE LITÍGIOS DE CONSUMO: PANORÂMICA DO REGIME PORTUGUÊS

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Abstract: This study presents an analysis of arbitration as a way to solve consumer disputes in Portugal in a mandatory or necessary way. It puts consumer law and arbitration into context, highlighting the advantages of alternative dispute resolution for consumers. National and European legislation is then addressed. Subsequently, the main constitutional jurisprudence on necessary arbitration and the ordinary regulatory framework are discussed. It also addresses the necessary arbitration and related figures in general and in consumer law. Lastly, the main requirements that necessary arbitration has to meet for the resolution of consumer law disputes are discussed.

Keywords: Arbitration. Dispute Resolution. Consumer Law. Portuguese Arbitration Regime.

Resumo: O presente estudo apresenta uma análise da arbitragem como forma de resolver litígios de consumo em Portugal de modo obrigatório ou necessário. Contextualiza-se o direito do consumo e a arbitragem, destacando-se as vantagens da resolução alternativa de litígios para os consumidores. Em seguida, aborda-se a legislação nacional e europeia. Posteriormente, é discutida a principal jurisprudência constitucional sobre arbitragem necessária e o quadro normativo ordinário. Aborda-se ainda a arbitragem necessária e figuras afins em geral e em matéria de direito do consumo. Por fim, discutem-se os principais requisitos que a arbitragem necessária tem de cumprir para a resolução de litígios de direito do direito do consumo.

Palavras-chave: Arbitragem. Resolução de litígios. Direito do consumo. Regime português da arbitragem necessária.

1. Introduction

The resolution of consumer disputes is an increasingly important issue in contemporary society. With the growing complexity of products and services available on the market, as well as the increase in commercial relations between companies and consumers, it is natural that situations of litigation arise. In this sense, in Portugal, arbitration has proven to be an effective means for the resolution of these disputes, and arbitration may be voluntary or necessary.

The context of consumer law and arbitration has received strong contributions from European Union Law, which has played an important role in promoting alternative dispute resolution. Complementarily, in the context of Portuguese law, necessary arbitration is provided for in several branches of rights, including administrative law, tax law and, for what interests this study, consumer law.

In the Portuguese legal and constitutional framework, necessary arbitration is recognised as a legitimate means of resolving disputes; however, constitutional jurisprudence requires certain guarantees to be respected, namely the right of access to public courts.

In addition to the requirements of necessary arbitration, it should also be considered that the particularities of consumer law also impose other nuances in the understanding of this means of dispute resolution.

2. Framework: consumer law and arbitration

Consumer law has proven to be one of the areas, given its importance and social relevance, of greater intervention by the State. As already referred to on another occasion[1], this area is even a priority State task foreseen at constitutional level [Article 81, paragraph i) of the Constitution of the Portuguese Republic ("CRP")][2].

Seen from the perspective of consumers, it is recognised, under the terms of article 60(1) of the CRP, that "consumers have the right to the quality of the goods and services consumed, to education and information, to the protection of their health, safety and economic interests, as well as to compensation for damages".

[1] RICARDO PEDRO, *Responsabilidade civil do Estado pelo mau funcionamento da administração da justiça: fundamento, conceito e âmbito,* Lisboa, Almedina, 2016, p. 556.
[2] Task developed by the Consumer Protection Law ("LDC"), approved by Law 24/96 of 31 July (with multiple amendments).

Moreover, the development of this constitutional duty has also been reflected in terms of administration of justice[3]. In other words, in the pursuit of public policies for the organisation and administration of justice, priority has been given to the development of alternative means of resolving consumer disputes, namely by encouraging the creation and support of arbitration centres[4].

European Union law, too, in Article 38 of the Charter of Fundamental Rights of the European Union, insists that Union policies shall ensure a high level of consumer protection.

Very briefly, it appears that one of the reasons why the branch of consumer law requires specific treatment in the context of access to justice lies above all in the fact that a cost/benefit analysis reveals that, as a rule and on average, the low values involved in consumer disputes tend not to motivate/justify, from the consumer's perspective, the cost of access to state justice[5].

In this context, it is also important to bear in mind that this is not a new reality among us, since since since the end of the 1980s arbitration centres for the resolution of consumer disputes began to be implemented, as can be seen with the creation of the oldest institutionalised arbitration centre for consumer conflicts among us, that is, the Lisbon Consumer Conflict Arbitration Centre[6].

Considering the above, even if in an introductory manner, it should be clear that arbitration in consumer law emerges among us as one of the main means of guaranteeing access to justice in this area of law.

It should also be added that today there is no doubt that arbitral tribunals are true courts, namely considering the provisions of Article 209(2) of the CRP[7].

It should also be noted that the LDC provides in Article 8(1)(g) that: "1 - The supplier of goods or provider of services must, both at the stage of negotiation and at the stage of

[3] Referring to the doctrine that, in this matter, its guarantee requires, to become effective, "*very open, very simple and very quick mechanisms of access to fair forms of conflict resolution*". Thus, JOSÉ CARLOS VIEIRA DE ANDRADE, "Os direitos dos consumidores como direitos fundamentais na constituição portuguesa de 1976", *in BFDUC*, 2002, p. 61.

[4] See Article 1 of the LDC, which provides: "Public Administration bodies and departments are responsible for promoting the creation and supporting arbitration centres with a view to settling consumer disputes".

[5] See, for all, JORGE MORAIS CARVALHO / JOÃO PEDRO PINTO-FERREIRA / JOANA CAMPOS CARVALHO, *Manual de resolução alternativa de litígios de consumo,* Lisboa, Almedina, 2018, p. 13. In the foreign context, see C. HODGES / I. BENÖHR / N. CREUTZFELDT-BANDA, *Consumer ADR in Europe,* Oxford, Hart Publishing, 2012, pp. 25ff.

[6] Inaugurated on 20 November 1989. On the birth and development of this arbitration centre, see JOÃO PEDROSO / CRISTINA CRUZ, *A Arbitragem Institucional: Um Novo Modelo de Administração de Justiça – O Caso dos Conflitos de Consumo*, 2000, pp. 243ff.

[7] On the angolan context, see --, "The new legal regime for administrative arbitration in Angola: a finished model?", *Lex Humana*, 15(2), pp. 1-25.

conclusion of a contract, inform the consumer in a clear, objective and appropriate manner, unless such information clearly and evidently results from the context, namely about: (...) g) System of treatment of consumer complaints by the professional, as well as, where appropriate, about the centres of arbitration of consumer disputes of which the professional is a member, and about the existence of necessary arbitration".

3. Alternative consumer dispute resolution

3.1 European Union law

According to Article 3(2)(f) of the Treaty on the Functioning of the European Union ("TFEU"), consumer protection is one of the competences shared between the Union and the Member States.

In turn, Article 114(3) TFEU provides that: "The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective."

Lastly, Article 169(1) TFEU provides that: "In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests".

At the level of secondary European Union law, account will be taken of Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes, amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (the "ADR Directive") and Regulation No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online consumer dispute resolution, amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (the "ODR Regulation").

In relation to the ADR Directive, Article 1 provides: "The purpose of this Directive is to contribute, through the achievement of a high level of consumer protection, to the proper functioning of the internal market by ensuring that consumers can, on a voluntary basis, submit complaints against traders to entities offering independent, impartial, transparent, effective, fast and fair dispute resolution procedures. This Directive is without prejudice to national legislation making participation in such procedures compulsory,

provided that such legislation does not prevent the parties from exercising their right of access to the judicial system"[8].

3.2 National law

The ADR Directive was transposed into the national legal system by the Law on Alternative Resolution of Consumer Disputes ("LRALC"), approved by Law No. 144/2015, of 8 September and which establishes the principles and rules with which the operation of consumer alternative dispute resolution entities must comply and the legal framework for out-of-court consumer dispute resolution entities in Portugal that operate in a network[9].

It should be noted that, according to the provisions of Article 3(i) of the diploma in reference, ADR procedures are to be understood as mediation, conciliation and arbitration.

In addition, according to the provisions of Article 10(3), it is provided that: "ADR entities shall also ensure that ADR procedures are free of charge or available to consumers against payment of a reduced fee."

One of the rules with relevance to the subject under analysis has to do with the adherence of companies to an arbitration centre. Thus, under Article 18(1), it is provided that: "1 - Without prejudice to the duties to which they are bound in the sector by virtue of special legislation applicable to them, suppliers of goods or service providers established in the national territory must inform consumers as to the ADR entities to which they are bound, by adhesion or by legal imposition arising from necessary arbitration[10] , and indicate their website". In other words, we can see from this rule that there are two ways of being bound to arbitration in consumer law, namely: (i) adhesion and (ii) legal imposition.

In addition to the regime provided for in the LRALC, the Voluntary Arbitration Law, approved by Law No 63/2011 of 14 December, applies subsidiarily to arbitration in consumer matters, since the LRALC has little procedural legislation[11].

It should also be noted that alternative resolution of consumer disputes can be carried out by arbitration centres of generic jurisdiction.

4. Arbitration

4.1 Constitutional Framework and main constitutional case-law

[8] Our highlight.
[9] Amended.
[10] Our highlight.
[11] JORGE MORAIS CARVALHO / JOÃO PEDRO PINTO-FERREIRA / JOANA CAMPOS CARVALHO, *Manual de resolução...*, pp. 192ff.

The Constitution does not expressly refer to necessary arbitration, but only, in Article 209(2), to the power to create arbitral tribunals. According to a common reading of that article, voluntary arbitral tribunals and necessary arbitral tribunals can be created and, in very introductory terms, necessary tribunals are distinguished from voluntary ones in that the former arise at the will of the parties and the latter arise from a legal imposition (or administrative decision).

In national legal doctrine it should be noted that (i) an important fringe of Portuguese constitutionalist doctrine[12] has spoken out - in the context of necessary arbitration in matters of generic and reference medicines - against the necessary arbitration provided for therein on the grounds that it violates the right of access to law and justice (Article 20 of the CRP) and the principle of equality (Article 13 of the CRP) by confronting state justice; (ii) another part of the doctrine considers - with regard to the legal nature of arbitration - that necessary arbitration is no longer true arbitration, since arbitration is by nature conventional[13], and (iii) another part of the doctrine tends - particularly in line with the case law of our Constitutional Court ("TC")[14] - to admit the figure of necessary arbitration[15].

However, some legal doctrine does not fail to conclude that, although conceptually it is no longer arbitration, from a legal point of view, necessary arbitration cannot be totally displaced from the arbitration domain, since, for legislative and historical reasons, it shares to a large extent the legal regime of arbitration[16]-[17].

Other authors focus on the moment of choosing the arbitrator[18] as a determining element of the arbitration. Emphasis may also be placed on the choice of arbitration

[12] See the positions of Professors Gomes Canotilho and Paulo Otero in Legal Opinions, referred to in RUI MEDEIROS, *Arbitragem Necessária e Constituição*, available at: https://www.fd.unl.pt/docentes_docs/ma/jmm_MA_22901.pdf, consulted on 12.09.2018, e GOMES CANOTILHO / VITAL MOREIRA, *Constituição da República Portuguesa anotada*, II, 4.ª ed., Coimbra, Coimbra Editora, 2010, p. 551.

[13] MANUEL PEREIRA BARROCAS, *Manual de arbitragem*, 2013, p. 92. Also in French doctrine there are major questions regarding mandatory arbitration - considering that, because the element of will is missing in the constitution of the arbitral tribunal, it would no longer be arbitration. For an overview of this doctrine, see CHARLES JARROSSON, *La notion d`arbitrage,* , pp. 16 and 17.

[14] All judgements cited from the Constitutional Court can be found at: https://www.tribunalconstitucional.pt

[15] See, among others, PEDRO GONÇALVES, *Entidades privadas com poderes públicos: o exercício de poderes públicos de autoridade por entidades privadas com funções administrativas*, Coimbra, Almedina, 2005, p. 573. Admitting the necessary arbitration, provided that the impartiality of the arbitrator is guaranteed, see JUAN ROSA MORENO, "El arbitraje en el derecho administrativo espanol" *in Mais Justiça Administrativa e Fiscal: Arbitragem, Centro de Arbitragem Administrativa*, 2010, p. 161.

[16] In this sense, CHARLES JARROSSON, *La notion d`arbitrage*, 1987, p. 20. Towards its admissibility, see a decision of the *Court of Cassation,* see EMMANUEL ROSENFELD, "Cour de Cassation. 1re Chambre civile, 22/11/2005, L'arbitrage forcé: la fin d'un mythe", *Recueil Dalloz,* pp. 2079-2782.

[17] Exactly in this sense, see RICARDO PEDRO, *Responsabilidade civil do Estado*…, p. 544.

[18] ANTÓNIO DE MAGALHÃES CARDOSO / SARA NAZARÉ, "A arbitragem necessária: natureza e regime: breves contributos para o desbravar de uma (também ela) necessária discussão", *in Estudos de direito da arbitragem em*

procedure[19]. In the context of the necessary understanding of the institute of arbitration other authors tend to adopt a broader view in the sense that one will only be outside the scope of arbitration when three moments are removed: (i) choice of court, (ii) choice of arbitrator and (iii) choice of arbitration procedure[20].

In short, from a constitutional point of view, we can cut across two positions in the Portuguese doctrine: (i) a more fundamentalist one which would lead to the unconstitutionality of necessary arbitration and (ii) another which would admit necessary arbitration on condition that appeal to the state courts is assured.

In practical terms, the option for a system of necessary arbitration imposes a restriction, primarily because it prevents recourse to voluntary arbitration and the courts of the State[21]. In other words, unlike what happens with voluntary arbitration, in which the means of dispute resolution available to citizens are being extended, in the case of necessary arbitration the use of these means is being limited, confining it to a single means: necessary arbitration.

It should also be borne in mind that, as we shall see in detail below, necessary arbitration is commonly understood as a whole, even though different legal systems are involved. Thus, for a better understanding, it is important to distinguish between them, and it may be considered that, at least from a certain perspective, it is a genus with two species, on the one hand, arbitration necessary for all the parties and, on the other, arbitration necessary only for one of the parties.

This distinction becomes more obvious in the "necessary" arbitration of consumer law which, as a rule, is partially or unilaterally necessary. That is, this arbitration, as a rule, is only necessary for the economic operator and whose paradigmatic example arises regarding the arbitration of essential public services, this being voluntary for the consumer and necessary for the professional provider/supplier of services and goods.

The distinction referred to between totally and partially necessary arbitration is not found, unless there is some mistake, in the case law of the TC which is known, and which will be discussed below. In other words, the issue of necessary arbitration tends to be treated by the TC in a unitary manner, so it should be understood in this sense.

Homenagem a Mário Raposo [comissão organizadora] Agostinho Pereira de Miranda [et al.] Lisboa: Universidade Católica Editora, 2015, pp. 46ff.

[19] It should be noted that this element tends to assume great relevance when one of the main problems of the administration of public justice is precisely the length of judicial proceedings.

[20] RICARDO PEDRO, *Responsabilidade civil do Estado*…, pp. 544ff.

[21] VITAL MOREIRA, "Tribunais arbitrais e direito de acesso à justiça: uma perspetiva constitucional", *Revista Internacional de Arbitragem e Conciliação*, Lisboa, n.º 9, 2016, p. 147.

According to the Constitutional Court, in Judgement No. 52/92, necessary arbitration should be understood as "a form of private jurisdiction of an imperative nature". It is therefore a legislative option to limit the means of access to justice!

From a positive law perspective - in particular constitutional law - the issue of necessary arbitration - as the doctrine does not fail to emphasise - is a current problem[22], with emphasis on the relatively recent interventions of the Constitutional Court regarding: (i) Law No. 62/2011 of 12/12 (necessary arbitration in matters of generic and reference medicines) and (ii) Law No. 74/2013 of 6/9 (here we highlight the issue of necessary sports arbitration).

Despite the scarcity of constitutional normativity - which is limited to admitting arbitration in Article 209(2) - the TC has developed a jurisprudence that can greatly illustrate the understanding of the regime under analysis, also highlighting a frank openness to the admission of necessary arbitration[23].

The constitutionality of necessary arbitration has already been assessed by the TC, which ruled for non-constitutionality, among others, in Judgments Nos. 32/87, 85/87 and 52/92, and with the issue having been the subject of constitutional discussion again more recently in Judgments Nos. 230/2013 and 781/2013.

That is, in merely introductory terms, according to the TC's jurisprudence, necessary arbitration is admitted - since the Constitution does not distinguish voluntary arbitration from necessary arbitration - by admitting that "there are not only state courts" (Judgement No. 506/96).

On the other hand, the TC has clarified, namely Judgment No. 2/2013 that it is to consider the "arbitral justice, whether voluntary or necessary, as sharing characteristics characteristic of the jurisdictional function", provided that it is not final, that is, provided that the possibility of appeal to the state courts is provided (Judgments No. 230/2013 and 781/2013).

For the TC, the necessary arbitration presents a "publicistic character" (Judgment No. 52/92) and, therefore, reveals an arbitration distinct from the voluntary arbitration. That is, as reaffirmed in Judgment No. 230/2013, "The necessary arbitral tribunal is an institute

22 See RUI MEDEIROS, *Arbitragem Necessária e Constituição*, available at: https://www.fd.unl.pt/docentes_docs/ma/jmm_MA_22901.pdf, consulted on 15.02.2022.

23 RUI TAVARES LANCEIRO, "Necessidade da arbitragem e arbitragem necessária: uma análise à luz da jurisprudência constitucional", *in A arbitragem administrativa em debate: problemas gerais e arbitragem no âmbito do Código dos Contratos Públicos*, Carla Amado Gomes, Ricardo Pedro (Eds.), Lisboa, AAFDL, 2018, p. 80.

distinct, by its origin, from the voluntary arbitral tribunal; it arises by virtue of a legislative act and not as a result of a legal transaction under private law".

The different nature of necessary arbitration, from the perspective of its legal and not contractual origin, has led the TC to be more demanding on this type of arbitration in terms of impartiality when clarifying, in Judgement No. 230/2013, that "(...) the impartiality of judgement, which in voluntary arbitration could, in theory, be ensured by the free concertation of wills set out in the arbitration commitment, requires, here, another type of guarantees".

In this sense, the legal doctrine has drawn attention[24] to the fact that the necessary arbitration regime should not disregard the TC's jurisprudence regarding the requirements concerning the following guarantees:

> (i) Organic - insisting on the forecast of specific rules concerning the installation and operation of the necessary arbitral tribunals, by determining, in Judgement No. 230/2013, as "problematic[25] " a regime in which the body where the Arbitral Tribunal is to be hosted and which will be responsible for promoting its installation and operation[26] is, "itself, constituted by the entities that may be sued in the scope of the arbitration proceedings that take place before that Tribunal".
>
> (ii) Statutory - (a) clarifying the TC towards the provision of a strict regime that ensures the impartiality and independence of arbitrators, from the outset, by determining, in Judgment No. 52/92, the need to "ensure the appointment by an exempt source of an arbitrator-judge, any 'shadow' of interest of the appointing entity in the outcome of the dispute will affect the constitutional principle of impartiality of courts". This standard of independence should be guaranteed, from the outset, with regard to the list of arbitrators, as referred to in Judgment No. 230/2013: "It should be added that the jurisdiction of the TAD, within the scope of its necessary arbitral jurisdiction, is exercised by a college of three arbitrators, from among those on a predetermined list (in total 40 arbitrators), which is fixed on the basis of proposals submitted by sports federations, professional leagues and other sports entities and bodies representing

[24] RUI TAVARES LANCEIRO, "Necessidade da arbitragem e arbitragem necessária...", pp. 51ff.
[25] See, exactly in this sense, RUI TAVARES LANCEIRO, "Necessidade da arbitragem e arbitragem necessária...", p. 64.
[26] It should be noted that *in casu* matters with authority powers were at stake.

sports agents (...)"; (b) drawing attention to the need to regulate the regime relating to the appointment of the missing referee[27] in order to avoid an imbalance between the parties, in particular, when one of the parties is a consumer. In this context, it was decided in Judgment No. 52/92 that: "The suspicion by the entities adhering to the C.G.V.E.E.A.T. of a possible partiality of the judge-arbitrator, would precisely annul the character of "legitimation by the procedure" (Luhmann) and the function of dilution and mediatization of conflicts which is ensured by the existence of courts and jurisdictional procedures endowed with guarantees of impartiality. The consumer would create the conviction that equality of opportunity in the outcome of the dispute was vitiated from the outset by the way in which the arbitral tribunal was appointed". This concern was repeated more recently in Judgement no. 230/2013 where a normative solution was at stake which provided that the arbitrator in default would be appointed by an administrative entity and "does not provide for a judicial mechanism to overcome the lack of agreement of the parties as to the appointment of arbitrators, referring this competence to an administrative entity - contrary to what occurs under the Voluntary Arbitration Law".

(iii) Procedural - with the TC insisting on the provision for a fair trial and having decided, in Judgment No. 251/2017, in which necessary arbitration on generic and reference medicines was at stake[28] , that "at stake is the specific dimension of the right to effective judicial protection, called "prohibition of defencelessness". This principle, arising from the recognition of the general right to adversarial proceedings inherent to the right to a fair trial implied in the fundamental right of access to justice, enshrined in Article 20 of the Constitution, states a prohibition of the intolerable limitation of the right of defence before the court.".

In addition to the aforementioned constitutional jurisprudence - which requires that a set of institutional and procedural guarantees be provided for and which tends not to be satisfied with the regulation provided for voluntary arbitration - it should also be borne in

[27] It should be remembered that, as a rule, the choice of arbitrators must be given to the parties or, in the absence of an agreement, to an independent entity, either a court (in the Portuguese context, as a rule, it is given to the *common* or *administrative* courts) or an arbitration centre.
[28] This compulsory arbitration scheme was later changed to a voluntary arbitration scheme.

mind that the acceptance of necessary arbitration tribunals imposes the need to provide for appeal to the state courts:

In this regard the TC, in Judgement No. 230/2013, clarified that "In general, the requirement to provide for a means of appeal to a state court, in the framework of necessary arbitration, becomes more evident, at the legal-constitutional level, when not mere private law relations are at stake, nor mere administrative legal relations in which the parties are in a situation of parity, but rather legal relations arising from the exercise of authority powers" and lists several regimes of necessary arbitration, provided in our legal system, in which the appeal is always admitted.

In summary, for the TC, being in question necessary arbitration, the last word cannot but be given to the state court. Note that in Judgment No. 230/2013 the exercise of authority powers was at stake, and the TC decided that: "In this context, the unappealability of arbitral decisions, as provided in the contested rule, represents a clear violation of the right of access to the courts, not only because these are decisions adopted in the context of a necessary arbitration, but also because of the nature of the rights and interests at stake and the fact that the exercise of delegated authority powers is at stake."

Additionally, it is also important to consider the question of which appeal should be required. The TC's position does not support the hypothesis that an appeal to the state courts is sufficient with: (a) an appeal to the Constitutional Court, since: "an appeal to the Constitutional Court is always restricted to a constitutionality issue, which consists of knowing whether or not a rule applicable to a pending case is unconstitutional, and is therefore limited to the assessment of a legal-constitutional issue which may result from the arbitral tribunal's application of a rule which is alleged to be unconstitutional or from a refusal to apply a rule on grounds of unconstitutionality"; (b) with the action for annulment of the arbitral award, since "the challenge to the arbitral award also has limited effects" and therefore does not permit the merits of the case to be assessed.

In other words, according to what was decided in the TC's Judgement No. 781/2013, the appeal to the state courts should ensure the "re-examination" of the matter of fact and law, so, being in question an appeal with a regime analogous to the exceptional review appeal foreseen in Article 150 of the CPTA[29], the TC clarified: "In the review appeal it is not possible for the parties to discuss the merit of the decision on the matter of fact adopted by the arbitral tribunal. Thus, as a rule, the last word on the judgment of the factual matter will

[29] Administrative Courts Procedural Code, approved by Law No. 15/2002, of 22 February (with multiple alterations).

rest with the arbitral tribunal and not with the Supreme Administrative Court so, also to this extent, the review appeal, provided for in Article 8(2) of the TAD Law, did not overcome the insufficiency of mechanisms for access to state justice, pointed out in Judgment No. 230/2013."

Lastly, the TC addressed the costs of access to arbitral justice. In Judgement No. 123/2015, which dealt with the necessary arbitration of medicines, the question arose because arbitral justice, as a rule, presents higher values than state justice, and in this case there may be the risk of "representing an imbalance in access to justice, placing those who resort to state justice and arbitral justice in an unequal situation".

The TC also puts forward the argument that although in ad hoc arbitration the costs can be agreed, this tends not to happen in institutionalised arbitration. In this type of arbitration the parties would be "subject to what is established in the rules of procedure of the chosen institutionalised arbitration centre".

It should be recalled that, in this context, the TC, in Judgement No. 123/2015, advances the argument that legal aid should be ensured[30] in the case of economic hyposufficiency and also with the argument that a situation of defenselessness for economic reasons is constitutionally unacceptable - recovering in this regard - the argumentation of Judgement No. 311/2008, in the sense that, in this last hypothesis, there could be a "reassumption of competence of the judicial court".

In very broad strokes, the TC clarifies that costs cannot be an impediment to access to the necessary arbitral justice.

4.2 Legal framework

Although necessary arbitration is not the rule in the Portuguese legal system, the truth is that (i) the Code of Civil Procedure ("CPC") provides a minimum regime on necessary arbitration and (ii) there are several regimes, at the level of the ordinary legal system, in which necessary arbitration (other than in consumer law) is provided for.

Articles 1082 to 1085 of the CPC provide a regime applicable to necessary arbitration. Thus, in terms of the provisions of Article 1082, under the heading Regime of the necessary arbitral award, it is provided: "If the arbitral award is prescribed by special law, the provisions of that law shall be complied with; in the absence of such provisions, the provisions of the following articles shall be complied with"; in Article 1083, under the heading Appointment

[30] On the subject, see VITAL MOREIRA, "Tribunais arbitrais e direito de acesso à justiça…", p. 148.

of Arbitrators - Tie-breaker Arbitrator, it is provided that "1 - Either party may request notification of the other for the appointment of arbitrators, applying, with the necessary adaptations, the provisions of the Voluntary Arbitration Law. 2 - The third arbitrator always votes, but is obliged to conform to one of the others, so as to make a majority on the points on which there is divergence", in Article 1084, under the heading Replacement of arbitrators - Liability of the remiss, it is provided that: "1 - In all cases in which, for any reason, the duties of an arbitrator cease, another arbitrator shall be appointed, in accordance with the terms provided for in the Voluntary Arbitration Act, the appointment, whenever possible, falling to the person who appointed the previous arbitrator. 2 - If the decision is not issued within the time period, this shall be extended by agreement of the parties or decision of the judge, and the arbitrators who unjustifiably caused the default shall be liable for the loss incurred and shall incur a fine; in the event of a new default, the limits of the fine shall be doubled", and Article 1085, under the title Application of the provisions relating to the voluntary arbitral tribunal, provides that: "In all that is not specially regulated, the provisions of the Voluntary Arbitration Law shall be observed, in the applicable part."

In short, the CPC provides for a necessary arbitration regime (i) which only applies in the absence of a special law, (ii) with rules on the tie-breaking arbitrator, (iii) with rules on the replacement of arbitrators - liability of the remiss, and (iv) which presents the LAV as a subsidiary regime.

The ordinary national legal system provides for various regimes of necessary arbitration, with some doctrine referring to arbitration schemes[31], whether relating to arbitration in general or to consumer law arbitration.

4.2.1 Necessary arbitration (and related figures) in general

The necessary arbitration is not a new theme in our country. That is, according to some authors, since the 13th century our legal system admits the figure of the necessary arbitration[32]. In addition to the above, currently, the national legal system foresees several situations of necessary arbitration. The following should be taken into account:

[31] ANTÓNIO MENEZES CORDEIRO, *Tratado da arbitragem: em comentário à Lei 63/2011, de 14 de Dezembro,* Coimbra, Almedina, 2015, p. 19.
[32] JOSÉ A. A. DUARTE NOGUEIRA, "A arbitragem na história do direito português: subsídios", *Revista jurídica,* Lisboa, Nova série n.º 20, 1996, p. 16.

(i) Arbitration concerning collective labour regulation instruments in public functions[33];

(ii) Necessary arbitration concerning copyright[34];

(iii) Necessary arbitration relating to private labour issues (collective bargaining and minimum services during a strike)[35];

(iv) Arbitration required for disputes arising from television services[36];

(v) Arbitration required in sports matters[37].

In addition to the above-mentioned necessary arbitration schemes, it should also be considered that our legal system provides for several hybrid situations, i.e., although they are not true necessary arbitration, they have some affinity with this figure:

(i) Arbitration on matters of public procurement[38], being foreseen in paragraph a) of Article 476(2) of the CCP that: "2 - When opting to submit disputes to arbitration, the contracting entity mandatorily provides for: a) The acceptance, by all interested parties, candidates and competitors, of the jurisdiction of an institutionalised arbitration centre competent for the judgement of issues related to the contract formation procedure, in accordance with the model provided in annex xii to this Code, of which it is an integral part, to be included in the procedure programme".

(ii) Arbitration in expropriation matters, with Article 38(1) of the Expropriations Code[39] providing that: "1 - In the absence of an agreement

[33] See Articles 382 to 386 of the General Labour Law in Public Functions, approved by Law No. 35/2014, of 20 June (with multiple amendments).
[34] As per Article 221(4) of the Copyright and Related Rights Code: "*4 - For the resolution of disputes on the matter in question, the Mediation and Arbitration Commission, created by Law no. 83/2001 of 3 August, is competent, whose decisions may be appealed to the Court of Appeal, with merely devolutive effect*". It should be noted that the immediately referred law was repealed Law 26/2015, of 14 April, which regulates entities for collective management of copyright and related rights, including as to the establishment in national territory and the free provision of services by entities previously established in another Member State of the European Union or European Economic Area.
[35] See Articles 508 to 513 and 538(4)(b) of the Labour Code, approved by Law No. 7/2009, of 12 February, with multiple alterations. The regulation of compulsory and necessary arbitration, as well as arbitration on minimum services during a strike and the means necessary to ensure them, results from Decree-Law No. 259/2009, of 25 September. About this regime, *Código do trabalho anotado*, 2012, pp. 1004ff.
[36] See Articles 32(3)(5) and 59(7) of Law 27/2007 of 30 July, which approved the Law on Television and Audiovisual Services on Demand, amended by Law 8/2011 of 11 April.
[37] See Articles 4 and 5 of Law No. 74/2013, of 6 September, which creates the Court of Arbitration for Sport.
[38] See Article 476(2) of the Public Procurement Code ("CCP"). Moreover, according to the doctrine, the legal framework governing public procurement occasionally imposes arbitration as a mandatory means. This has been happening in matters relating to Public Private Partnerships, namely in the field of health and concessions. For a notion of some of these clauses, see ISABEL CELESTE M. FONSECA, "A arbitragem administrativa: uma realidade com futuro?" *in A arbitragem Administrativa e Fiscal, problemas e desafios,* 2012, pp. 70ff.
[39] Approved by Law No. 168/99, of 18 September (with multiple alterations).

on the value of the compensation, it shall be fixed by arbitration, with recourse to the common courts".

(iii) Arbitration on urban lease issues (issues concerning works to be carried out)[40] .

(iv) Administrative Arbitration, being foreseen in Article 182 of the CPTA a right to grant arbitral commitment under the terms of the law (not yet approved), with the possibility of binding the administrative entities through an ordinance.

(v) Tax Arbitration, with Article 4 of the Legal Framework for Arbitration in Tax Matters (RJAT)[41] binding the tax administration through an ordinance.

The hybrid character of the aforementioned necessary arbitration results from several factors, namely, (i) with regard to the parties' will being limited only to the moment of the choice of court or relative to other moments, (ii) with regard to the "necessity" being dependent on the will of a public entity or a private entity and (iii) the "necessity" or, at least, the loss of some voluntas being for both parties or only for one of the parties.

Arbitration which is "necessary" for only one of the parties is of particular interest here. This seems to be the case, at least from a certain point in time, with arbitration concerning: (i) public procurement under the CCP, (ii) administrative law under the CPTA and (iii) tax law under the RJAT.

Regarding arbitration in public procurement, the doctrine discusses, and is not consensual, as to its necessary nature and the resulting effects[42].

With reference to administrative law arbitration (in general), the legal doctrine discusses its necessary or forced nature, considering the right to grant provided for in Article 182 of the CPTA[43]. On the other hand, as soon as there is a binding obligation under article 187(2) of the CPTA, even if in the abstract and by the respective member of the Government, ministries are concretely obliged to accept the resolution of disputes through arbitration.

[40] See article 17(1)(4) of Decree-Law 161/2006, of 8 August, where the last paragraph states that *"The decisions rendered by the CAM have the value of arbitral decisions and may be appealed to the district court*". However, with the limits provided by article 10 of Decree-Law No. 266-B/2012, of 31 December.

[41] Approved by Decree-Law No. 10/2011, of 20 January (with multiple amendments).

[42] See MARCO CALDEIRA, "A arbitragem no Código dos Contratos Públicos revisto*", in A arbitragem administrativa em debate: problemas gerais e arbitragem no âmbito do Código dos Contratos Públicos*, Carla Amado Gomes e Ricardo Pedro (Eds), Lisboa, AAFDL, 2018, pp. 288ff.

[43] See, for all, MÁRIO AROSO DE ALMEIDA / CARLOS ALBERTO FERNANDES CADILHA, *Comentário ao Código de processo nos tribunais administrativos,* Sl, Almedina, 2017, pp. 1326ff.

The binding logic foreseen for administrative arbitration tribunals applies to tax arbitration tribunals since, under the provisions of article 4(1) of the RJAT, it is provided that: "The binding of the tax administration to the jurisdiction of the courts constituted under this law depends on an ordinance of the members of the Government responsible for the areas of finance and justice, which establishes, in particular, the type and maximum value of the disputes covered."

Finally, it should also be mentioned that recently two matters that were once subject to a necessary arbitration regime are now no longer so. This is what happened:

(i) with the amendment to Law No. 62/2011, of 12 December, which, through the amendment brought about by Decree-Law No. 110/2018, of 10 December, no longer provides for a compulsory arbitration scheme, being replaced by a voluntary arbitration scheme, and

(ii) with Decree-Law No. 110/2018, of 10 December, which approved the new Industrial Property Code and that - unlike the previous code which, in article 59(6) referred to necessary arbitration - this new code makes no such provision.

4.2.2 Arbitration required (and related figures) in consumer law

In consumer law, two figures stand out that arise in the context of or are close to necessary arbitration: (i) unilateral necessary arbitration and (ii) the adherence of economic operators to an arbitration centre. Strictly speaking, in neither of these cases is it a question of true or absolute necessary arbitration or, if one prefers, totally necessary arbitration. In the first situation we are dealing with partially necessary arbitration (in the sense that it is only necessary for one of the parties) and in the second situation we are dealing with adherence (prior to the dispute) by companies to an arbitration centre.

The "necessary" arbitration in consumer law is clearly admitted in Article 8(1)(g) of the LDC and also in the LRALC as can be seen from the reading of Article 13(3), which provides: "3 - In situations of necessary arbitration for one of the parties, the latter does not have to be previously informed of the binding nature of the arbitral award".

In turn, the LRALC, in Article 18(1), does not fail to refer - in addition to the necessary arbitration - to the figure of adhesion, by providing: "1 - Without prejudice to the duties to which they are sectorally bound under the special legislation that applies to them, suppliers of goods or service providers established in the national territory must inform

consumers regarding the ADR entities to which they are bound, by adhesion or by legal imposition arising from necessary arbitration, and indicate their website".

(Partially) necessary arbitration is provided for the resolution of disputes within the scope of essential public services. Law No. 23/96, of 26 July[44] provides in Article 15(1) under the heading Dispute resolution and necessary arbitration, that: "1 - Consumer disputes within the scope of essential public services are subject to necessary arbitration when, at the express option of users who are natural persons, they are submitted to the arbitral tribunal of the legally authorised consumer conflict arbitration centres".

Note that, as noted above, in this legal hypothesis, we are, according to some doctrine, before an "atypical case of necessary arbitration", in the sense that "arbitration is only necessary, in this case, for the professional, being still voluntary for the consumer"[45]. That is, as other doctrine (and jurisprudence[46]) does not fail to clarify the aforementioned system of arbitration gives the consumer a potestative right to resort to arbitration[47].

As mentioned above, one of the ways to strengthen the use of arbitration in consumer law is through the figure of adherence of companies to an arbitration centre. Some doctrine refers to full adherence to consumer arbitration centres and clarifies that, despite the doubts, one can qualify this figure as a contractual proposal that gives the consumer the potestative right to accept the proposed arbitration agreement and, subsequently, the potestative right (arising from the contract) to submit their dispute to arbitration[48].

As the doctrine also does not fail to refer to the model harmonised regulation, in Article 10(3) it states that: "suppliers of goods and service providers may effect full membership of the Centre"[49].

In consumer law there are several legal solutions that provide for a regime of adherence of companies to an arbitration centre:

(i) The legal framework on access to the activity of payment institutions and the provision of payment services, approved by Decree-Law

[44] With several changes.
[45] AA. VV., *Resolução Alternativa de Litígios, Justiça Económica em Portugal*, FFMS, Caderno 6/6, p. 54, available at: https://www.ffms.pt/FileDownload/10dc40ce-758b-4cbb-9ddd-6ee32acfb95b/justica-economica-em-portugal-resolucao-alternativa-de-litigios-caderno, consulted on 20.02.2019.
[46] Cf. judgment of the Lisbon Court of Appeal of 12.01.2017, P. 794/16.1YRLSB-6. Available at: www.dgsi.pt
[47] JORGE MORAIS CARVALHO / JOÃO PEDRO PINTO-FERREIRA / JOANA CAMPOS CARVALHO, *Manual de resolução...*, pp. 189ff.
[48] JORGE MORAIS CARVALHO / JOÃO PEDRO PINTO-FERREIRA / JOANA CAMPOS CARVALHO, *Manual de resolução...*, p. 177.
[49] JORGE MORAIS CARVALHO / JOÃO PEDRO PINTO-FERREIRA / JOANA CAMPOS CARVALHO, *Manual de resolução...*, p. 177.

No. 317/2009 of 30 October[50], provides in Article 92(1) and (2): "Without prejudice to payment service users' access to competent judicial means, payment service providers shall offer their respective payment service users access to effective and adequate out-of-court complaint and redress procedures for disputes with a value equal to or lower than the jurisdiction of first instance courts, concerning the rights and obligations established in Title III of this legal framework. 2 -The offer referred to in the previous paragraph is made through the adhesion of the payment service providers to at least two entities authorised to carry out arbitration proceedings under Decree-Law No. 425/86, of 27 December, or to two entities registered in the voluntary registration system for out-of-court settlement of consumer disputes, established by Decree-Law No. 146/99, of 4 May".

(ii) The regime on credit agreements for consumers, approved by Decree-Law No. 133/2009, of 2 June[51], provides in Article 32(1) and (2): "1 - Without prejudice to the access by consumers to competent judicial means, creditors must offer consumers access to effective and appropriate out-of-court means of complaint and dispute resolution, concerning the rights and obligations set out in this decree-law. 2 - The offer referred to in the preceding paragraph is effected through membership of at least two entities that enable alternative dispute resolution, under the terms provided for in Law No. 144/2015, of 8 September".

(iii) The regime on access to the activity of electronic money institutions, its exercise and prudential supervision, approved by Decree-Law No. 242/2012 of 7 November[52] provides in Article 92(1) and (2): "1.1 - Without prejudice to payment service users and electronic money holders' access to competent judicial means, payment service providers and electronic money issuers shall offer their respective payment service users and electronic money holders access to effective and appropriate out-of-court means of claiming and redressing disputes with a value equal to or less than the jurisdiction of the courts of first instance in respect of the rights and obligations laid down in Titles iii and iv of this legal framework. 2 - The offer

[50] With several changes.
[51] With several changes.
[52] With several changes.

referred to in the previous paragraph is made through the adherence of payment service providers and electronic money issuers to at least two entities authorised to carry out arbitration proceedings under Law No. 63/2011 of 14 December, or to two entities registered in the voluntary registration system for out-of-court settlement of consumer disputes, established by Decree-Law No. 146/99 of 4 May".

5. Arbitration required for resolving consumer disputes: by way of conclusion

Although the legal-constitutional framework is not very dense regarding arbitration and, even more so, regarding necessary arbitration, it has allowed for a frank development of constitutional jurisprudence which, in this regard, has imposed the need to observe certain requirements so that certain constitutional guarantees essential to arbitration are met:

(i) The right to appeal to the state courts must be guaranteed, i.e., necessary arbitration is constitutionally admissible if the decision on the merits of the matter of fact and of law is not final.

(ii) In addition to the guarantee of access to state courts, the following guarantees must also be ensured:

a. Organic, insisting on the provision of specific rules concerning the installation and functioning of the necessary arbitral tribunals;

b. Statutory provisions, imposing a strict regime to guarantee the impartiality and independence of the arbitrators, namely as regards the appointment of the defaulting arbitrator;

c. Procedural, insisting on the provision of a fair trial.

(iii) Lastly, the TC clarifies that costs cannot be an impediment to access the necessary arbitral justice. As the issue of the costs of access to consumer justice is a defining and determining element for the choice of an alternative means of dispute resolution, the aforementioned jurisprudence should be read in the context that the cost does not concretely generate situations of non-access to necessary arbitral justice or of defencelessness of the arbitral proceeding for reasons of economic hypo sufficiency.

The provision of a regime on necessary arbitration cannot disregard the regime provided in Articles 1082 to 1085 of the CPC. That is, the said regime will apply if not set

aside by special law. However, the CPC regime may still not apply if the consumer arbitration situation in question does not call for its application, as tends to happen with several institutionalised consumer law arbitration regimes.

The analysis of the national body of law on the alternative resolution of consumer disputes allows us to conclude that the necessary arbitration (in the improper sense) is admissible with a variable geometry, i.e., it admits regimes of (i) unilateral necessary arbitration and (ii) adhesion. On the other hand, one cannot forget that a raison d'être of the alternative resolution of consumer disputes is the one related to cost, i.e., the imposition of a free or reduced cost resolution, so that the right of access to consumer justice is ensured. Seen from another perspective, non-compliance with that rule - which aims to avoid evasion of the LRALC regime - tends to cause a violation of the right of access to consumer justice, since, as pointed out by the doctrine above, the way to ensure consumer justice tends to be through alternative means of dispute resolution.

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