

Administrative arbitration in public procurement: a look at Portuguese law

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Abstract

The use of voluntary arbitration to resolve disputes emerging from public procurement is a long-standing reality in Portugal. The Portuguese law allows this way of settling disputes, with limitations, which have been overcome. Traditionally the resolution of this type of litigation resorted to ad hoc arbitration, in accordance with the rules of the Voluntary Arbitration Act, characterized by the free choice of arbitrators, by the lack of publicity and transparency of their decisions. Since 2009, in Portugal, institutionalized administrative arbitration has been increased, creating for the purpose arbitration centers with rules of greater transparency and publicity of its decisions. The recent revision of the legal regime for public procurement in Portugal, for transposition of European Directives N°s 2014/23/EU, 2014/24/EU, 2014/25/EU and 2014/55/EU, introduced, in article 476 (2), a rather innovative regime in this area. This article aims to reflect on the solution now introduced in the public procurement, its sense, scope and repercussion in the future evolution of this dispute settlement in conflict with the principles of judicial organization enshrined in Constitution of the Portuguese Republic.

Keywords: administrative arbitration, institutionalized arbitration, public procurement, administrative law.

JEL Classification: K23, K41

1. Introduction

In 2008, a Public Contracts Code (CCP) came into force in Portugal ⁽¹⁾, which for the first time brought together a set of provisions that govern the procedures for the training of most public contracts.

As is clear from the number 1 of the Article 1º, the CCP regulates the discipline applicable to public procurement and establishes the legal regime applicable to administrative contracts³.

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³ Vd. Almeida, M. A., (2017) *Texto f a Conference about Contratos públicos e contratos administrativos no novo Código dos Contratos Públicos de Portugal* - https://www.fd.unl.pt/docentes_docs/ma/maa_MA_12940.doc (consulted on 1.11.2018).

On January 1st, 2018, the revision of the Public Contracts Code, approved by Decree-Law No. 111-B/ 2017, of August 31st, entered into force.

The reason for this revision of the CCP was the need to adapt the Portuguese Code to the European Public Procurement discipline, as a result of European Parliament and Council Directives 2014/23/EU, 2014/24/EU and 2014/25/EU, of 26th February and of Directive 2014/55/EU of the European Parliament and of the Council of 16th April. This revision of the Public Procurement Code will have a direct and substantial impact on the lives of economic agents by the various changes introduced.

In this paper, we will only⁴ analyze the changes introduced in the settlement of disputes arising from public contracts, through arbitration and its immediate consequences, in particular regarding the possibility of appeals against arbitration decisions.

Of all the changes introduced by the new law, we focus our analysis on the introduction of the possibility of the specifications providing for the use of arbitration. We put three essential questions to which we propose a response:

- a) Does this possibility constitute true voluntary arbitration?
- b) Is recourse to arbitration courts with sufficient transparency, exemption and accessibility guaranteed at competitive costs by small and medium-sized undertakings?
- c) Is the guarantee of appeal of the arbitration decision in this new version of the law sufficiently assured?

As a research methodology, we follow the traditional methods of solution analysis now introduced, investigating its antecedents, the context in which it emerges, the positions taken by the main authors of reference, the position of the magistracy, as well as the professionals of the forum (Lawyers) and the legal community in general. Given that the amendment of the law is very recent, we do not have elements to promote an exhaustive jurisprudential research yet, since this is still non-existent. On the other hand, the arbitration decisions on this matter in the past were the result of an *ad hoc* arbitration model, which is by its nature secretive, and therefore there is no public disclosure of decisions that could allow a study on the past. For this reason, our reflection on the issues under investigation is essentially based on the analysis of the legal solution now consecrated, on the survey of some known doctrinal positions and on the final assessment that we consider to be the most rational and adequate to answer the questions asked.

2. Settlement of disputes and recourse to arbitration

The recourse to voluntary arbitration to resolve litigation arising from public contracts has long been a reality in Portugal. The current legal regime in Portugal allows this route of dispute resolution, with limitations, which have been overcome.

⁴ The Public Contracts Code (CPC) was approved by Decree-Law no. 18/2008, of 29th January, and has since been amended by Decree-Law no. 223/2009, of 11th September, and by Decree-Law no. 278/2009, of 2nd October.

Traditionally, the resolution of this type of litigation resorted to *ad hoc* arbitration, in accordance with the rules of the Voluntary Arbitration Act, characterized by the free choice of arbitrators, the lack of publicity and transparency of their decisions.

Since 2009, in Portugal, institutionalized administrative arbitration has been increased, creating for this purpose centers of arbitration with rules of greater transparency and publicity of its decisions.

The recent revision of the legal regime for public procurement in Portugal, for the transposition of European Directives 2014/23/EU, 2014/24/EU, 2014/25/EU and 2014/55/EU, introduced in its Article 476th, number 2, a very innovative scheme in this area, enabling the contracting authority to provide in the contract documents, published for competition, the form of dispute settlement through arbitration.

The Article 476th, number 2 of the CCP ⁽⁵⁾ establishes the following:

“Article 476th - Alternative dispute resolution

1 - Recourse to arbitration or other means of alternative dispute resolution is permitted, under the terms of the law, for the resolution of disputes arising from procedures or contracts to which this Code applies.

2. When the contracting authority chooses to subject disputes to arbitration, it shall include:

(a) the acceptance by all interested parties, candidates and competitors, of the jurisdiction of an institutionalized arbitration center competent for the adjudication of questions relating to the contract formation procedure in accordance with the model set out in Annex XII to this Code, of which it forms an integral part, to be included in the program of the procedure; (our bold)

(b) the need for the contractor to accept the jurisdiction of the arbitration center institution for the settlement of any disputes relating to the contract in accordance with the model set out in Annex XII to be included in the contract documents and in the contract;

(c) the manner in which the court is constituted and the procedural rules to be applied by reference to the rules of the relevant institutionalized arbitration center in accordance with the model set out in Annex XII.

3 - Settlement of disputes by means of arbitration in arbitral tribunals not included in institutionalized arbitration centers can only be determined in one of the following situations:

(a) When, given the high complexity of the legal or technical issues involved, the high economic value of the issues to be resolved, or the lack of an institutionalized arbitration center competent in this matter, it is advisable to submit any disputes to the jurisdiction of an arbitral tribunal not integrated in institutionalized arbitration center;

(b) When the arbitration procedure provided for in the regulations of its institutionalized arbitration center does not conform to the urgency regime provided

⁵ Legal text introduced by article 5th of Decree-Law no. 111-B / 2017 of 08/31/2017- Addendum to the Code of Public Contracts (CCP).

for in the Code of Procedure in the Administrative Courts for contracts covered by it;

(c) When it is shown that the use of an institution of arbitration would result in a longer settlement of the dispute;

(d) When it is shown that the use of an institutionalized arbitration center would result in a higher cost for contracting authorities or public contractors.

4 - If it is decided to submit a dispute to an arbitral tribunal not part of an institutionalized arbitration center, the contracting entity shall prepare an impact assessment of the costs that such an option requires, in particular as regards arbitrators and attorneys' fees, fees, costs and other expenses.

5 - In disputes of more than € 500,000, the arbitral award may be appealed to the competent administrative court, in accordance with the law, with a devolutive effect.”

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A very important first note immediately follows: in case of the contracting authority using the possibility enshrined in this legal provision, recourse to arbitration is a voluntary decision for the contracting authority, but not for potential candidate companies that must comply with this option. It is therefore a mean of settling disputes voluntarily only for one party and imposing on the other, which escapes constitutes a somewhat original solution.

Thus, there are two different types of arbitration provided as a mean of settling disputes: *ad hoc* administrative arbitration and institutionalized arbitration with arbitration centers with jurisdiction in the matter.⁶ In the first case, arbitration is carried out by three arbitrators, two chosen by the parties, sometimes by reference to a predefined list of arbitrators, and the third who presides over the arbitral tribunal usually chosen by the arbitrators of the parties.⁷

The first type of arbitration does not function under the auspices of an institution that ensures its operation and the speed of the process and the costs of the fees of the arbitrators are quite high. On the other hand, the costs associated with the process are not regulated in advance. The second type, institutionalized administrative arbitration, also allows the choice of the arbitrator (s) by the parties, usually from the list provided by the arbitration center, being possible to choose only one arbitrator, instead of three. The process is carried out from a duly authorized institutionalized arbitration center, which ensures its operation and speed of the process, with controlled and lower costs than in *ad hoc* arbitration.⁸

⁶ Vd. Anjos, M. R., (2015), article about: *O âmbito Material da Arbitragem Tributária à luz da Jurisprudência Arbitral*, in „Revista Arbitragem tributária” nº2 janeiro 2015, p. 12 a 17.

⁷ Vd. Anjos, M. R. (2015b) article subject: *Reenvio Prejudicial por tribunal arbitral tributário e Imposto de Selo sobre aumentos de capital - Comentário ao Acórdão do Tribunal de Justiça da União Europeia de 12 de Junho de 2014 - «Acórdão Ascendi»* in „Revista de Direito da Universidade Lusófona do Porto” nº5, pp. 107-122.

⁸ Silveira, J. T (2018) article about: *A arbitragem e o artigo 476.º na revisão do Código dos Contratos Públicos* in RDA, Nº 1 – Jan-Apr 2018, pp. 60-65.

This institutionalized arbitration modality is, however, a more recent reality and with less tradition than *ad hoc* arbitration, which has decades of functioning and implementation in the legal community.⁹

3. Administrative arbitration in Portugal: brief notes

The recent reform of the Public Contracts Code in Portugal, and specifically on the solution adopted by the Portuguese legislator in the resolution of disputes, through recourse to arbitration, deserves some reflection, for the solutions it introduces in this matter.¹⁰

The solution does not appear to be properly innovative, as regards the possibility of recourse to arbitration, since this has been the most common way for many years to resolve disputes (large disputes) relating to public procurement.¹¹

The novelty also has to do with the concrete solutions of the legal regime now introduced in Article 476th of the CCP, which is not exempt from reparations and has received some strong criticism, written by Authors apologists of the arbitration solution, but critics of the regime law now stipulated in the law¹². Let us see, then, the question that is at the origin of this controversy.

The recourse to voluntary arbitration to resolve litigation arising from public contracts has long been a reality in Portugal. Traditionally, the resolution of this type of litigation resorted to *ad hoc* arbitration, according to the rules of the Voluntary Arbitration Act¹³, characterized by the free choice of arbitrators, the lack of publicity and transparency of their secret decisions, by nature, in light of the regime resultant of the voluntary arbitration law (LAV).

Nowadays, we are evolving to a mandatory arbitration, even in public law¹⁴. In fact, this is a new challenged in arbitration.

In Portugal, since 1984, with the Statute of the Administrative and Fiscal Courts (ETAF), it has been clear the possibility of resolving disputes through arbitration in administrative matters, even evolving to a kind of compulsory arbitration.¹⁵

The administrative process law in 2003/2004 (CPTA) and the new code for public procurement in 2008 (CCP) reinforced this route of administrative dispute

⁹ Vd. Cadilha, C. (2018) in onference about: *A arbitragem no novo Código de Contratos Públicos*, in CAAD, 08 de fevereiro de 2018, available in www.caad.pt, (consulted on 1.11.2018).

¹⁰ Vd. Martins, A. G. (2018), article about: *A arbitragem na contratação pública: algumas questões*", in RDA, N° 1 – Janeiro-Abril 2018, p. 12-17.

¹¹ Vd. Gonçalves, P. (2015) article about: *A relação jurídica fundada em contrato administrativo*, in „Cadernos de Justiça Administrativa” n° 64, p. 39.

¹² Vd. Martins, A. G. (2018), *op. cit.*, p. 12.

¹³ Vd. Steffek, F., et al. (2014), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*. Oxford, U.K.

¹⁴ Vd. Ali, S. (2018), *Global Lessons in Mandatory and Voluntary in Arbitration in Belgium: A Practitioner's Guide*, edited by Niuscha Bassiri, Maarten Draye – Wolkers Kluber – Kluber Arbitration.

¹⁵ Anjos, M. R., (2015a), *O âmbito Material da Arbitragem Tributária à luz da Jurisprudência Arbitral*, in „Revista Arbitragem tributária” n°2 janeiro 2015, p. 15.

resolution, with particular emphasis on public procurement. Now, this intention was reworked, in 2017, with the revised of the law for public procurement.

This greater breadth or openness to arbitration had, as its main reason, the extreme slowness of the administrative courts, to which is added the preference for the use of arbitrators specialized in the matters under discussion, of particular complexity, namely in public procurement.

4. The institutionalized arbitration: the creation and implementation of arbitration centers with jurisdiction in administrative matters

The extension of the scope of arbitrary administrative matters paved the way for the creation of institutionalized arbitration centers. The first arbitration center with administrative competence was created in 2006 by the Regional Council of the Lisbon Bar Association, designated the Arbitration Center for Civil, Commercial and Administrative Litigation of the Bar Association. The Order of Lawyers was undoubtedly the source of this new means of achieving the constitutional imperative of access to law and a just decision in due time. However, the small number of cases indicates that this arbitration center has not been a success in this regard.

In 2009, the Portuguese legislator decided to move forward with the creation of the Administrative Arbitration Center (CAAD), a public arbitration center, subject to transparency and publicity rules for its decisions, a public list of arbitrators and an ethics and exemption council necessary for the function¹⁶.

It should be noted that the birth of this institutionalized arbitration center took place after a profound administrative reform in the legal framework of public employment, with the introduction of the Law on Liaisons and Careers (LVCR) in 2008, accompanied by the new legal regime for the performance evaluation of (SIADAP) and the disciplinary status of workers who exercise public functions, introduced into the Portuguese legal system and fully implemented as from 2008.

At the time of the creation of CAAD, the number of pending cases in the administrative and tax courts (TAF) was more than 45,000 (forty-five thousand), according to figures released by the General Administration of Justice Administration¹⁷. The situation was therefore chaotic, recognized by all agents of justice, including the Higher Council of Administrative and Tax Courts, the Bar Association, the Union of Judicial Officials, and many other forces of civil society who recurred for more speed and for the effective judicial protection of their rights, according to the Constitution of the Portuguese Republic.

All of this was coupled with the devastating economic crisis, which began in 2008, recurring in 2011 and the collapse of the country's public finances with the need to request international aid.

¹⁶ Vd. Anjos, M. R. (2015b) article subject: *Reenvio Prejudicial por tribunal arbitral tributário e Imposto de Selo sobre aumentos de capital - Comentário ao Acórdão do Tribunal de Justiça da União Europeia de 12 de Junho de 2014 - «Acórdão Ascendi»* in „Revista de Direito da Universidade Lusófona do Porto” – nº5, p. 111.

¹⁷ *Ibid.*

This "perfect storm" associated with the neglecting of justice has determined the impossibility of demanding more means or greater expense for the achievement of access to public, state, expensive, and scanty results. This obviously had obvious results in the context of recourse to alternative means of dispute settlement in the context of public contracts, because it was impossible to obtain a decision in good time before the Administrative and Tax Courts that are part of the public justice system.

The enormous economic relevance of public contracts has for many years been incompatible with so much delays and, therefore, recourse to ad hoc arbitration has become the most usual way of settling disputes, despite the high cost of this arbitral channel. However, the secrecy inherent in the functioning of these arbitral tribunals does not allow the number of proceedings to be determined.

Arriving here, the truth is that the extension of the arbitration route seems irreversible.

It should be noted that from the statistical analysis of the number of administrative cases submitted to the arbitration centers in the last ten years, it appears that the use of institutionalized arbitration is far from impressive.

In fact, the CAL (institutionalized center operating at the Regional Council of the Lisbon Bar Association) has registered a very small number of cases, and it may be noted that, in 2017, the data released by the center show two cases concluded, 214 notifications issued, some steps taken, 10 processes carried over from 2016 and 9 ongoing processes. In turn, the Administrative Arbitration Center (CAAD), which was created in 2009, has received on average 40 to 50 cases per year in administrative litigation, which is well below the high number of tax cases (600-700 per year). But it should be noted that the introduction of the possibility of recourse to the arbitration channel for resolving tax disputes with CAAD has been a success, with an ever-increasing number of cases. In this case, the Portuguese legislature introduced the possibility of recourse to tax arbitration as an option (alternative) for the citizen, who may choose the arbitration route or judicial route, but the tax administration is obliged to accept the arbitration route in case it has been the citizen's choice. Therefore, we also have, in this case, arbitration as a voluntary means only for one of the parties. From this point of view, we can say that the option now introduced in Article 476th, paragraph 2 is not totally innovative, as we shall see.

5. Arbitration in the field of public procurement: article 476th of the revised CCP

The recent revision of the legal regime for public procurement in Portugal, for the transposition of European Directives 2014/23/EU, 2014/24/EU, 2014/25/EU and 2014/55/EU, introduced in its Article 476 number 2, a somewhat innovative scheme in this area.

In addition to the Public Contracts Code (CPC), through Decree-Law no. 111-B/2017, of August 31st, article 476 comes, along the same lines as the CPTA, to institutionalized arbitration or other means of alternative dispute resolution under the

law for the settlement of disputes arising out of procedures or contracts to which the CCP applies (disputes arising from public procurement procedures).

It includes, therefore, the challenge of administrative acts adopted in the context of public procurement procedures; requests for condemnation of the act of due act; questions relating to civil liability of contracting authorities; and also, the challenge of administrative rules contained in procedural documents.

However, this standard does not stand without criticism. For example, it should be noted that if the contracting authority chooses to use arbitration, those interested in participating in the competition will have to accept this condition, which removes the voluntary nature that characterizes the use of this means of litigation resolution.

Although it is not a necessary arbitration (as it is not required by law), we can not say that it is voluntary arbitration, since it is only truly voluntary for the contracting authority.

This implies that, in addition to the impediments set forth in Article 55 of the CCP, only those interested parties who waive their right to appeal to the State courts may agree to participate in the procedure, accepting arbitration under the terms established by the contracting authority. Only interested parties who waive recourse to the State Courts and accept arbitration under the terms established by the contracting authority may participate in the procedure, which is at least controversial.

However, this is not the only criticism we can point to the solution found in Article 476 of the CCP. The revision of the CCP, approved by Decree-Law no. 111-B/2017, of August 31st, establishes, in the new article 476, paragraph 5, that, "in litigation valued at more than 500,000 €, of the arbitration decision can be appealed to the competent administrative court, according to the law, with merely devolutive effect".

According to Rui de Medeiros¹⁸, *"The majority of the doctrine tends to interpret the new legal precept that, in addition to the possibility of challenging arbitration decisions under article 185-A of the CPTA in the 2015 review - a revision expressly repealed the previous Article 186 (2), which states that "decisions handed down by an arbitral tribunal may also be appealed to the Central Administrative Court, in law on voluntary arbitration provides for an appeal to the Court of Appeal where the court has not ruled on equity" - if it intends to reintroduce the rule, deleted in the review of the CPTA of 2015, from the right to appeal"*.

Some authors defend a different interpretation and understand that the remedy provided for is to be exercised "under the law"¹⁹, which means that this expression would refer to the possibility of appeal and not to the 'competent administrative court'. If this is the case, an appeal in excess of € 500,000 exists only 'under the law', that is, if the parties agree on its existence, as stipulated in Articles

¹⁸ Vd. Medeiros, R. (2018) article about: *Regime de recurso das decisões arbitrais no CCP revisto – uma reflexão constitucional*, in „Cadernos Sêrvulo de Contencioso Administrativo e Arbitragem”, #01.2018.

¹⁹ *Idem*.

185 - A of the CPTA and 39 number 4 and 46 number 1 of the LAV. Under that amount, it would appear that there would be no appeal.

This solution raises serious doubts about the constitutionality of the solution adopted²⁰.

It is also worth mentioning the creation of a new institutionalized arbitration center under the aegis of the Portuguese Association of Public Markets (APMEP), specifically designed for this type of public procurement arbitration, which together with the CAAD, an administrative arbitration center, become the two arbitration centers with the greatest impact on this matter. It should be noted that, in the case of the CAAD, the list of arbitrators is open to competition, that is to say, the annual public consultation, allowing wide access of jurists with curriculum appropriate to the legal requirements of recruitment in full transparency.

By order, it was decided to extend CAAD's administrative jurisdiction to cover public procurement litigation, in the much larger new format established by article 476 of the CPP.

6. Conclusions

Thus, our biggest doubts are about the mandatory nature that arbitration assumes in the cases of the public entity wishes so and the system of appeal of the arbitration decision.

These two issues, given the high value that these processes can take. We can say that arbitration, as a means of settling disputes in administrative matters, is evolving from voluntary arbitration to compulsory arbitration.

In this context, the drafting of an administrative arbitration law would be urgent, since the set of rules governing this matter (Articles 180 to 187 of the CPTA and 476 of the CCP, as well as the application of subsidiary of LAV) does not appear to be sufficiently clear to respond to all the specific features of public law litigation.

In conclusion, the new solution introduced in Article 476 of the CCP will have to be carefully assessed in light of the constitutional legal principles in force in our legal system. If the law allows to remove the Administrative and Fiscal Courts of this type of litigation, we must guarantee total transparency in the functioning of the arbitral tribunals with competence in the matter.

So, we defend that it must be done with institutionalized arbitration centers having equal transparency, publicity and accessibility. In this regard, we hope that this new arbitration in public procurement, as set out in the current article 476 of the CPP, can be a good example else of transparent way of conducting administrative justice. This is a very special field of law, a subject dominated by the principle of legality in order to pursuit the public interest and the good administration of the public money coming from the colossal and sometimes inhuman effort and sacrifice of the Portuguese taxpayers.

²⁰ Cadilha, C. (2018), *A arbitragem no novo Código de Contratos Públicos*, in Conferência CAAD, 08 de fevereiro de 2018, in www.caad.pt (consulted on 1.11.2018).

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