BRIEF NOTES ON ARBITRABILITY IN PRE-CONTRACTUAL LITIGATION

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The question of legality control in the pre-contractual scope, by the arbitral instance, has not always proved peaceful in the administrative legal doctrine field.

We must set forth some considerations on the material scope of arbitrability in this matter, especially, after the amendment of the PPC in 2017[1]*. This legal act introduces, in Article 476 (5), the realization of the arbitrability regime in the pre-contractual sphere, already foreseen in Article 180 (3) of the Code of Procedure of the Administrative Courts (CPAC).*

It is imperative that we make some considerations about the legal regime introduced by that legal act on arbitration. There is a primacy granted to institutionalised arbitration and a curtailment of the autonomy of the co-contracting party, making the submission of the dispute to arbitration depend solely on the contracting authority's will, a will which is inescapably imposed on the co-contracting party's legal sphere, once the latter takes the decision to contract.

Finally, we will refer to the appeal regime of arbitration awards above EUR 500 000,00, which represents a reversal of the legal principle of (no)appeal, applicable to administrative arbitration except by agreement of the parties, a widely controversial issue.

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[1] Public Procurement Code, henceforth PPC.

1. HISTORICAL CONTEXT OF ARBITRATION IN THE PRE-CONTRACTUAL FIELD

The material scope of administrative arbitration is defined in Article 180 of the CPAC, which constitutes the legal basis required by the Voluntary Arbitration Law (VAL), in Article 1 (5), in the field of public legal disputes.

With regard to the material scope of administrative arbitration in relation to public procurement, Article 180 of the CPAC provides that "*matters relating to contracts, including the annulment or declaration of nullity of acts relating to their execution*" are arbitrable. This point reveals nothing new.

Prior to 2015 (the date on which the CPAC[2] was reviewed), the issue of the arbitrability of acts relating to the formation of contracts was discussed, an issue that has now been dispelled by Article 180 (5) of the CPAC.

Doubts were raised regarding the arbitrability of pre-contractual acts. The DCPAC[3] expressly provided for the possibility of such acts being subject to arbitration tribunals. However, this explicit provision was not transposed to the law that came into force in 2004. Some authors, shielded in this historical argument, expressly denied the possibility of such acts being arbitrable [4].

This seems to us a fragile argument. The legislator mentioned acts relating to the execution of contracts by way of

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[2] Code of Procedure of the Administrative Courts, henceforth CPAC.

[3] Draft Code of Procedure of the Administrative Courts.

[4] Cfr. ESQUÍVEL, José Luís, *Os contratos Administrativos e a Arbitragem* (Coimbra: Almedina, 2004) on p. 246, "*if the legislator intended to open the litigation of pre-contractual administrative acts to arbitration, it would not, in view of the solution enshrined in the ACPAC, have restricted the wording of the precept*". Fausto Quadros also argues that "*as regards pre-contractual administrative acts, it follows from the final part of Article 180(1)(a) of the CPAC that they are excluded from arbitration. The solution will be the opposite only if a special law allows it (...)*", QUADROS, Fausto de, *A arbitragem em Direito Administrativo*, *in* VILLA LOBBOS, Nuno de, Mónica Brito, *Mais Justiça Administrativa e Fiscal – Arbitragem* 1rst edition (Coimbra: Wolters Kluwer, Coimbra Editora, 2010,) on p. 104-111.

example only. Moreover, let us not forget that pre-contractual acts would always subsume in the first part of the precept, and one could also hereby verify their respective arbitrability. Indeed, the issues raised by pre-contractual acts are also issues related to contracts.

In addition to what has already been stated, it is also important to mention Law 3-B /2010, of 28 of April, a statute in which the legislator clearly included pre-contractual acts in the meshes of arbitration. Said law approved the State budget for 2010 and contained a legislative authorization to amend the CPAC in order to explicitly grant the arbitral tribunal jurisdiction to "*judge matters relating to the formation of contracts, including the assessment of administrative acts*".

In view of the arguments presented so far, we could conclude that there was a gap left by the 2004 legislator which, as such, was still to be integrated.

In the pre-contractual scope, there is a "functional connection" which justifies the global assessment of the pre-contractual acts with the contract to which they refer, due firstly to reasons of logical coherence and procedural economy.

In this line of thinking, the conclusion must be that the "*ratio*" in Article 180 (1)(a) would apply to the case omitted, so by analogy we should consider this provision applicable also to pre-contractual acts[5].

Even if not construed this way, it must be reiterated that, pre-contractual acts would always be subsumed to the first part of Article 180 (1)(a), with the respective framing in the generic category of "matters concerning contracts".

In 2015, the CPAC dispelled the doubts on this matter, establishing in Article 180 (3) that "the opposition of administrative acts related to the formation of contracts may be subject to arbitration, if the mode of constitution of the arbitral tribunal and the procedural regime to be applied are provided for in the tender dossier" adding that if the formation of any of the

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[5] In this sense OLIVEIRA, Ana Perestrelo de, *Arbitragem de Litígios com entes públicos*, (Coimbra: Almedina, 2007) on, p. 59-60, footnote.

contracts provided for in Article 100 is in question the urgency regime must be implemented accordingly.

2. THE MATERIAL SCOPE OF ARBITRABILITY OF PRE-CONTRACTUAL LITIGATION

Article 180 (3) of the CPAC establishes the material scope of administrative arbitration with regard to pre-contractual litigation, however some questions arise in relation to the regime provided for therein.

Firstly, the expression "opposition" provided for in Article 180 (3) must be interpreted extensively, so as to include therein all forms of reaction against acts related to the formation of contracts (including the conviction of the contracting entity to due acts, a matter already contemplated by paragraph (a)), under penalty of excluding certain requests that may be cumulated with the opposition, restricting the possibility of a global and systematic assessment of the litigation[67].

The second obstacle we may face concerns the plurality of parties to the proceedings, and if there are counter parties, they must also accept the arbitration clause, Article 180 (2) of the CPAC. It seems to us that this is an apparent difficulty. The requirement prescribed by the administrative procedural law only applies as a condition for the regularity of the arbitral tribunal, but there is nothing to prevent them from requesting its subsequent intervention, pursuant to Article 77º-A (1) of the CPAC. In short, at the time of the submission of the proposals, all the parties involved shall accept the possibility of submitting any disputes that may arise to the jurisdiction of the arbitral tribunal, in accordance with the rules established in the tender dossier, notwithstanding to the right to request their intervention, a right that is granted to all legitimate parties to the proceedings[8].

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[6] In this sense, SILVEIRA, Tiago, A arbitragem e o artigo 476º no código dos Contratos Públicos, *Revista de Direito Administrativo*, (Lisboa, AAFDL, 2010), on p. 60-65.

[7] SERRÃO, Tiago, A arbitragem no CPTA revisto: primeiras impressões, *Comentários à revisão do CPTA. E do ETAF*, 2nd edition, AAFDL, Lisboa, on p.283.

[8] MIRANDA, João, Novidades sobre a arbitragem no anteprojeto de revisão do Código dos Contratos Públicos, Atas da Conferência a Revisão do Código de Contratos Públicos, Coordenação Maria João Estorninho e Ana Gouveia Martins, (Lisboa, ICJP, 2016), on p.359-361.

Article 476 of the PPC established the arbitration regime, within the scope of the pre-contractual procedure, acting as an implementing provision of Article 180 (3).

The rule reveals a certain favouritism of the legislator for institutionalized arbitration, and there is even an increased duty of justification in the case of opting for *ad hoc* arbitration, pursuant to article 476 (3) of the PPC (Administrative Arbitration Centre) which is understandable, on the one hand, by the advantages that are already inherent to arbitration itself, speed, degree of specialization of the arbitrators and lower costs for the parties and on the other hand, by the transparency of an arbitration proceeding that takes place in an institutionalized arbitration centre. These are institutions organized and dedicated to the resolution with a list of arbitrators known in advance, and the costs inherent to the process, including the fees of the arbitrators are established in public tables.

The use of *ad hoc* arbitration in the field of pre-contractual litigation is only allowed in the situations listed in Article 476 (3) of the PPC, that is, when: a) the complexity of the issue or the value of the procedure advises it, b|) there are no institutionalised centres in the matter, c) the arbitration procedure in an institutionalised arbitration centre does not comply with the urgency regime of pre-contractual litigation, d) the use of institutionalised arbitration would have a higher cost for contracting entities. In addition to the verification of one of the above conditions, there is also the obligation for the contracting authority to make an assessment of the costs of the *ad hoc* arbitration option.

3. MANDATORY ARBITRATION AND THE (UN)APPEALABILITY OF ARBITRAL AWARDS

Mandatory arbitration translates into the legal imposition of the arbitral jurisdiction onto the litigants.

Given the specific features of the required arbitral tribunals[9], the decision to refer the matter to the arbitral tribunal

[9]In this sense, QUADROS, Fausto, *Arbitragem "necessária", "obrigatória", "forçada": breve nótula sobre a interpretação do artigo 182º do CPTA*, *in Estudos em Homenagem a Miguel Galvão Teles*, II, Coimbra: Almedina, 2012, p.257.

is not based on the autonomy of the parties: the litigants must, by law, submit the dispute to the arbitral tribunal[10].

In this sense, when by special law the dispute is assigned to mandatory arbitration, the decision to appeal to the arbitration tribunal is based on the legal command that imposes this form of composition of the dispute, thus the parties are prevented from accessing either the State jurisdiction or voluntary arbitration[11]/[12].

In mandatory arbitration the parties may, in some cases, appoint the arbitrators, although they may not grant them any power[13].

The concept of arbitration presupposes the existence of arbitrators, "*subjects designated by the parties to resolve a dispute*"[14]. Such requirement "*is (...) presupposed in the general rules of the Code of Civil Procedure on mandatory arbitration tribunals (Articles 1525 et seq.)*"[15]/[16]. Therefore, an *ad hoc*

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[10] GONÇALVES, Pedro Costa. *Entidades Privadas com poderes públicos*, Coimbra: Almedina, 2008, p 570.

[11] Ruling of the Constitutional Court nº 230/2013.

[12] Manuel Barrocas believes that even in these cases we are not faced with the figure of arbitration "the basis and breadth of the arbitrators' powers and the strength of their function of seeking a solution to the conflict is based on the commitment given by the parties to obtain a solution, positive or negative, to the dispute. It is on this essential foundation that the whole *raison d'être* and function of arbitration is based. The arbitrator of the mandatory arbitral tribunal, who does not receive this power from the parties, but from the law, does not have a burden conferred and a commitment established on the basis of trust with the parties. He is much more of an expert to whom the law, in view of special qualifications or other particular motive, has decided to assign that function to, preferably to a judge and, in any case, against the will of the parties (...) to argue that mandatory arbitration is genuine arbitration is nothing more than to amputate to it a significant part of what it represents and has conquered over the centuries", BARROCAS, Manuel Pereira. *Manual de Arbitragem*, Coimbra: Almedina, 2013, p. 91 and 91.

[13] "[A] prompt denial should be made of the notion of arbitration contemplating also the settlement of disputes by a court which, in addition to being imposed on the parties, is composed of persons who are strangers to them". GONÇALVES, Pedro Costa. *Entidades Privadas com poderes públicos*, *ob.cit.,* p 571.

[14] JARROSSON, *ob. cit* p. 5.

[15] *Ad hoc* tribunals imposed on the parties and not designated by them shall not be called arbitration tribunals. They should rather be called special State courts, cfr. GONÇALVES, Pedro costa, *ob. cit*. p. 571 and JARROSSON, *ob cit*. p. 13.

[16] *"Since the Corte Constituzionale Italiana understood that mandatory arbitral tribunals are special jurisdictions, it declared a law that imposed the use of arbitral tribunals as*

tribunal imposed on the parties is not an arbitral tribunal, but rather a special State court, because the delegation of powers of the judicial function to private parties that characterizes arbitration is not verified.

In the event of the arbitrators being appointed by the parties, although the tribunal is imposed, it can be said that it is still the will of the parties that gives rise to it, although its power is limited to this act. In this case we understand that it is already a true arbitral instance, even if mandatory.

In any event, the *mandatory arbitral tribunal* clearly differs from the *voluntary arbitral tribunal* – although not as far as to affirm, somewhat recklessly, as in the case of the Ruling of the Constitutional Court No 52/92, nº 52/92, "*the typical public character"* of the mandatory arbitral tribunal. Despite being imposed, we are still faced with traces of private jurisdiction.

This imposition of arbitration jurisdiction stems from a "*privatisation strategy, not to suggest a transfer of the state judicial function to individuals, but to indicate the State's retraction in exercising that function*".[17]

The matters to be submitted to the mandatory arbitral tribunal shall be subtracted from the State courts, causing, in such cases, a disengagement from this jurisdiction.

However, we must not forget that we are already on the verge of exercising the judicial function. The content of Article 209 of our Constitution provides for the existence of arbitration tribunals in the categories of admissible courts, which allows us to conclude that they also exercise the judicial function and that, in fact, "*jurisdictio does not necessarily have to be exercised by judges*"[18].

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unconstitutional (Ruling nº 127 of 1977, in Giurisprudenza Italiana, 1978, I, p. 1809 et seq.- according to the Corte, the law infringed the provision in Article 102 of the Constutuzione, which imposes a ban on special or extraordinary courts, as well as Article 24 (...) which guarantees to all the right to "initiate proceedings to safeguard their rights and legitimate interests", apud GONÇALVES, Pedro Costa, *ob. cit*, p. 571, footnote.

[17]GONÇALVES, Pedro Costa, *ob cit*. p. 572.

[18]Ruling of the Constitucional Court nº 52/92.

The doctrine and jurisprudence have understood that the legal rules that institute arbitration as a mandatory means for the resolution of disputes impel the parties to waive the appeal to the State courts, thereby mortgaging the right to effective judicial protection and the right of access to the law[19].

The right of access to courts, in accordance with Article 20 (1)(4) of the Constitution of the Portuguese Republic (CPR), comprises "*the right to litigate and to access courts (...), the right to a fair trial, with the right to an adversarial procedure, to equality of arms in the proceedings or the right to equality of procedural positions, the right to obtain a decision on the merits and the right to full enforcement of the decision*"[20].

We believe that mandatory arbitration affects the guarantees of equality enshrined in the Constitution: according to Article 20 of the CRP, we can all appeal to the courts on equal terms.

The grounds to be submitted to the mandatory arbitration tribunals, once they are defined and imposed by the legislator, prevent the litigants from appealing directly to the ordinary courts, restricting to a large extent the right of access to the courts. In fact, in a democratic Rule of Law, *"full access to jurisdiction and the principles of legality and equality postulate a system that ensures the protection of the interested parties against the judicial acts themselves".*

More serious, in the case of the mandatory arbitral tribunals, is the limitation in the case of judicial appeal (a limitation which in voluntary arbitration, all things considered, is justifiable). It is up to the ordinary legislator to configure the scope and substance of the system of judicial appeals, but it is forbidden to abolish it in its entirety or to allocate it substantially *"by devising solutions that so restrict the right to appeal that, in*

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[19] In this sense, FONSECA, Isabel Celeste M., *A arbitragem: uma realidade com futuro? A arbitragem administrativa e tributária, problemas e desafios*, Coimbra: Almedina, 2013, p. 173.

[20] FONSECA, Isabel Celeste M., A *arbitragem: uma realidade com futuro? A arbitragem administrativa e tributária, problemas e desafios*, *ob.cit*., p. 173.

practice, they result in the tendentious suppression of appeals"[21], and this assertion is reinforced with regard to the mandatory arbitration tribunals.

In short, the mandatory arbitration presents a clear disadvantage when compared to voluntary arbitration, since it constitutes an alternative to State courts, having the parties, in their sphere of freedom of choice, the option between arbitration or State justice.

Since there is no monopoly on the jurisdictional function, the arbitration tribunals are, of course, true courts under Article 209 of the CPR, which is why it is considered that the right of access to the courts and to effective judicial protection can be exercised through both State and arbitration courts. This is a "*functional competition and equivalence*"[22] between State courts and arbitration tribunals.

In fact, as we have seen, if the right of access to the courts included only the State courts, the arbitration tribunals would also not be bound by the principles laid down in Article 20 of the CPR, which are in fact binding legal frameworks for any judicial proceedings (*e.g.* principal of fair trial, Article 20 (4) of the CPR). In this context, the Constitutional Court has already decided that *"the arbitral tribunal, as the court it is, is part of the very guarantee of access to the law and to the courts*"[23].

However, citizens, within the framework of the autonomy of will, should be able to opt for access to arbitration tribunals, constituting the imposition of use of such courts a duly justified exception. The legislator may therefore only provide for the establishment of mandatory arbitration tribunals for the adjudication of certain matters, limiting, in such cases, the sphere

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[21]MEDEIROS, Rui, Annotation to Article 20, *Constituição Portuguesa anotada* (Jorge Miranda/Rui Medeiros, I, p. 449 and MEDEIROS, Rui, *Arbitragem Necessária e Constituição* in a text that served as the basis for the oral intervention on the III International Meeting of Arbitration in Coimbra on 25 October 2013 and prepared to be published in *Estudos em memória do Conselheiro Artur Maurício*.

[22]RANGEL, Paulo, *Arbitragem e Constituição: um novo lugar e um novo fundamento*, in the *Estudos em memória do Prof. Doutor José Joaquim Gomes Canotilho*, II, Coimbra: Coimbra editora, 2012 p. 647.

[23]Ruling of the Constitucional Court n.º 250/96.

of autonomy of the parties, provided that there is an objective and reasonable basis for doing so[24].

The legitimacy of the mandatory arbitration tribunals will, in our view, depend above all on their compatibility with the principle of proportionality.

It is true that rights, freedoms and guarantees may, within certain limits, be restricted in favour of the defence of other rights which reveal an essentiality at least equivalent to those sacrificed. But it no longer seems reasonable, in light of the principle of proportionality, to impose an arbitration jurisdiction that has as its sole basis the decongestion of State courts.

A strong restriction or limitation, as mentioned above, of the right of access to State courts and to effective judicial protection, in accordance with the Ruling of the Constitutional Court nº 230/2013: *"(...) a) is not justified in safeguarding any other fundamental right; b) it is not even aimed at safeguarding a constitutionally protected interest that has an essentiality or an equivalent or greater weight than that which underlies the legal asset that is sacrificed with the restriction, and the unappealable nature of the decisions of the mandatory arbitral tribunal to administrative courts is not materially justified by the objective of avoiding the congestion of these courts (...) or of constituting the only way for a decision to be taken within a reasonable period of time, in view of the provisions of Article 20 (4) of the CPR"*[25].

It follows from the above that such restriction on the right of access to the courts and the right to effective judicial protection, if it has no serious and objective basis, cannot fail to merit a judgment of unconstitutionality.

With regard to mandatory arbitration, there are two doctrinal factions: the radical one advocates the unconstitutionality of the mandatory arbitration; the moderate one admits the mandatory arbitration, provided that those involved are given the possibility of appeal to the State courts.

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[24] In this sense, Rulings of the Constitucional Court n.º 52/92, 757/95 and 262/98.

[25] Ruling of the Constitutional Court nº 230/2013

The radical doctrine believes that the jurisdictional function constitutes a very essential, inalienable and irrevocable function of the State[26]. In fact, "*the State cannot renounce being a State in areas that justify its own existence, otherwise it will no longer have any reason to exist: the administration of justice, as a typical function of sovereignty, part of the "sacred" nucleus of exclusive functions of the State, cannot be at the disposal of the ordinary legislator*".[27]

A more moderate line of doctrine understands that the Constitution does not completely restrict mandatory arbitration. However, "*it is only conceivable to admit the imposition of the arbitration composition when access to the State courts is not forbidden, a hypothesis that only occurs if the possibility of appeal from the arbitration decision to those courts is not excluded*"[28].

Denying citizens, the right of access to ordinary courts without sufficient grounds is a flagrant case of unconstitutionality. In order to circumvent this situation, the mandatory arbitration tribunals should always be admitted to be *"subject to appeal of the respective judgments to the ordinary courts"*[29].

The constitutional guarantee of equality is also affected by the onerous dimension of arbitration. By establishing arbitration as a mandatory mechanism, the legislator may be establishing an inequality in the face of the financial burden that this alternative

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[26]CANOTILHO, Gomes, Opinion of 15 March 2012 (polic) *apud* MEDEIROS, Rui, *Arbitragem Necessária e Constituição* in a text that served as the basis for the oral intervention on the III International Meeting of Arbitration in Coimbra on 25 October, 2013 and published in *Estudos em memória do Conselheiro Artur Maurício*, Coimbra: Coimbra editora, 2015, p. 1301 et seq.

[27]OTERO, Paulo, Opinion of 1 June 2012 (polic) *apud* MEDEIROS, Rui, *Arbitragem Necessária e Constituição* in a text that served as the basis for the oral intervention on the III International Meeting of Arbitration in Coimbra on 25 October, 2013 and published in *Estudos em memória do Conselheiro Artur Maurício*, Coimbra: Coimbra editora, 2015, p. 1301 et seq.

[28]OTERO, Paulo, Opinion cit. p. 63 et seq.

[29]MONCADA, Luís Cabral de, *A arbitragem no Direito Administrativo: uma justiça alternativa*, *Revista da Faculdade de Direito da Universidade do Porto*, 2010, year VII, p. 183.

means of dispute resolution entails, since in these cases, by definition, the parties cannot benefit from legal aid.

It should be noted that, although arbitration presents itself as the most efficient mechanism, it can be more expensive than State justice, especially in the field of legal aid – this is without prejudice to the fact that, as it should be reiterated, all the characters evidenced by arbitration lead one to believe that any increase in its costs is justified by its greater efficiency.

According to PAULO OTERO, the mandatory arbitration mechanism ends up creating an imbalance in the access to justice, given that the costs of its operation are higher than the procedural costs in a State court, thus leading, *"to a privilege in favour of private actors who have more financial resources while, on the contrary, a solution involving the intervention of the State courts guarantees, from the outset, a justice, economically more accessible to all*"[30].

We must take into consideration that mandatory arbitration justice cannot *"be denied by insufficient economic means*" (Article 20 (1) of the CPR).

According to the Constitutional Court, since legal aid cannot be granted in arbitration proceedings, one of the parties will necessarily be in a fragile situation[31]. It is urgent to *ensure that the procedural costs, although they do not have to correspond to a fixed amount for all proceedings, are not arbitrarily higher.*

The intention is to have maximum limits to amounts in mandatory arbitration by reference to the amounts practiced by the State courts[32].

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[30] OTERO, Paulo, Opinion of 1 June 2012., *apud MEDEIROS, Rui*, *Arbitragem Necessária e Constituição*, in a text that served as the basis for the oral intervention on the III International Meeting of Arbitration in Coimbra on 25 October, 2013 and published in *Estudos em memória do Conselheiro Artur Maurício*.

[31] Ruling of the Constitucional Court nº 311/2008

[32] In this sense, MEDEIROS, Rui, Annotation to Article 20, in *Constituição Portuguesa anotada* (Jorge Miranda/ Rui Medeiros) I, Coimbra: Coimbra Editora, 2010, pp. 431-432.

In Administrative Law we are faced with numerous situations in which arbitration is required as a mandatory means of resolving disputes[33].

The main problem that is discussed in administrative arbitration is the (in)susceptibility of the appeal determined by the repeal of Article 181 (2) («Constitution and Functioning ») and of Article 186 («Dispute of the arbitration decision»), both of the CPAC carried out by Law 63/2011 of 14 December, which approved the New Voluntary Arbitration Law (NVAL).

On the matter under study, the legislator in the NVAL, in Article 39 (4), established the following: "*[a] judgment ruling on the merits of the case, or that without hearing the case, shall be subject to appeal to the competent State court only if the parties have expressly provided for such possibility in the arbitration agreement, provided that the case has not been decided according to equity or by amicable settlement*".

The law states in Article 19 that "*in matters regulated by this law, the State courts may only intervene in cases where the latter provides for it*".

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[33]For example: Arbitration for the settlement of compensation and damages arising from the implementation of electricity lines in buildings (Article 38 of Decree-Law n.º 13335, of 9 November 1960); Arbitration for resolution of disputes between the holder of television rights and other operators interested in the transmission of a particular event (Decree-Law n.º 32/2003, of 22 August); Arbitration for setting compensation for losses arising from the constitution of gas servitude or for the implementation of concession of public services infrastructure relating to natural gas (Article 17 of Law nº 11/94, of 13 January); Decree-Law nº 380/2007, of 13 November and subsequent amendments, which approved the bases of the concession, project, conservation, exploitation, requalification and enlargement of the national road network; Decree-Law nº 86/2008 of 28 May which foresees the bases of the Marão tunnel concession; Regulatory Decree nº 14/2003, of 30 June, which approves the specifications of the management contracts which involve the activity of conception, construction, financing, conservation and hospital exploitation Ministerial Order nº 1120/2009, of 30 September through which the Ministry of Justice, all the central services of public legal entities and entities operating in the wake of that Ministry submit to the jurisdiction of the Administrative Arbitration Centre for the resolution of disputes with a value equal to or less than EUR 150 million and relating to issues arising from legal relationships of public employment, when there are no inalienable rights and, when not resulting, from work accidents or occupational diseases and issues relating to contracts entered into by such entities. Through the Ministerial Order nº 1149/2010, of 4 November the Ministry of Culture also submits to that jurisdiction.

In this sense, with the repeal of Articles 181 (2) and 186 of the CPAC, which allowed the challenge of arbitral decisions at the Central Administrative Court, either by annulling them, with the grounds provided by the VAL, or by lodging an appeal against such decisions, when the court has not decided according to equity, as well as with the wording of Article 39 (4) of the NVAL, a transformation of the principle of appeal of arbitral decisions took place.

At present, the principle of intangibility of arbitral awards applies unless all of the following requirements are met: (i) there is an express agreement to the contrary, (ii) the dispute has not been decided on the basis of equity nor has it been amicably settled.

Consequently, *"the silence of the arbitration agreement has the effect of an appeal waiver"*[34].

However, in mandatory administrative arbitration, given the absence of an arbitration agreement, and in the absence of a legal document that provides otherwise, the principle of the intangibility of arbitral decisions cannot be applied. Here, the concept of "*an arbitration without the possibility of revision of merit constitutes a reversal of the guarantee*"[35].

In fact, the configuration of the mentioned rules is not consistent with the pursuit of the public interest by the Public Administration, the ultimate goal to be achieved in the course of its activities. However, the waiver of the judicial appeal (by definition to the courts of the State) in the context of mandatory arbitration frustrates the mission that the Constitution entrusts to the Public Administration to defend the public interest in those courts, a commitment that neither the Administration nor the legislator itself can forget or dispose of.

We therefore consider that, in cases of mandatory establishment of an administrative arbitral tribunal, the

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[34]Gonçalves, Pedro. *Administração publica e arbitragem –em especial, o princípio geral da irrecorribilidade de sentenças arbitrais* in the Studies in Homage to António Barbosa de Melo, *Ob.cit*., p. 793.

[35] MEDEIROS, Rui, Annotation to Article 20, in *Constituição Portuguesa anotada* (Jorge Miranda/ Rui Medeiros) I, Coimbra: Coimbra Editora, 2010, pp. 431-432.

admissibility of an appeal of the respective decisions to the Central Administrative Court is imperative in order to ensure a review of the merits of the arbitral award by a State court. This is the only way to ensure compliance with the guarantees provided for in Articles 268 (4) and 20 (1) of the CPR.

In short, the legislator, on mandatory administrative arbitration, must take into account the constitutional requirements imposed by the pursuit of the public interest. And this can only be ensured through the institution of an appeal to the State courts.

4. On the (Un)Appealability of Arbitral Awards in Pre-Contractual Litigation

Article 476 merely gives the contracting authority the option of the institute of arbitration and does not make it compulsory or mandatory. However, if the contracting authority opts for arbitration, it will be subject to those rules, which by the co-contracting partner deciding to apply will result in the submission to the latter.

We conclude that Article 476 of the PPC does not provide for mandatory arbitration, since if the contracting authority opts for arbitration, it will be for the interested party to make an overall judgement on the procedure, including the choice of arbitration by the contracting authority, with autonomy of will being granted to both parties, albeit restricted.

In short, this is not mandatory arbitration, because it is not imposed by law, but neither can we have arbitration, which is voluntary, because it only takes this status for the contracting authority. The person interested in contracting should be subject to all the conditions laid down.

We cannot assess arbitration as voluntary or mandatory depending on the co-contractor's choice to contract or not. Only those who decide to contract, and therefore participate in the procedure, fulfil the subjective scope of the rule[36].

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[36]On this track, CALDEIRA, Marco, *A arbitragem no Código dos Contratos Públicos*, A arbitragem Administrativa em Debate: Problemas Gerais e Arbitragem no Âmbito do Código

It could be considered that this is a semi mandatory or forced arbitration imposed by virtue of the will of the contracting authority, which has a powerful right to impose administrative arbitration on the counterparty.

Article 476 (5) also states that "in disputes where the claim is higher than EUR 500 000,00 the arbitral award shall be subject to appeal to the competent administrative court, in accordance with the law, if only with non-suspensive effects".

It follows from Article 185-A of the CPAC in articulation with Articles 39 (4) and 6 (1) of the VAL that arbitral awards are unappealable, unless otherwise provided by law. Unappealable arbitral awards are established as a rule.

However, Article 476 (5) of the PPC reverses the rule by establishing that in cases where the claim is higher than EUR 500 000 00 an appeal will be possible.

That device reintroduces a rule removed from the CPAC in 2015, the Right to Appeal.

One might think, at first sight, that this would be a cautious solution on the part of the legislator, as it is understood that this is a mandatory arbitration, it would be mandatory to guarantee the possibility of appeal, as the Constitutional Court has been defending[37][38].

On the other hand, we can understand that the legislator, by establishing in Article 476 the possibility of appeal "in accordance with the law" would be establishing a reference to Article 39 (4) of the VAL, underlining unappealable arbitration awards as the general rule.

For the lack of a better view, we do not think that this is the *mens legislatoris*. As we have said before, this is not an arbitration

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dos Contratos Públicos, (coord. Carla Amado Gomes and Ricardo Pedro) (Lisboa, AAFDL: 2018), pp. 277-322

[37] Ruling of the Constitutional Court n.º 230/2013 and 781/2013.

[38] In this sense, SILVEIRA, Tiago, A arbitragem e o artigo 476º no código dos Contratos Públicos, *Revista de Direito Administrativo*, Coimbra: Wolters Kluwer, Coimbra Editora, 2010, p. 60-65.

MEDEIROS, Rui, Arbitragem Necessária e Constituição, *Estudos em memória do Conselheiro Artur Maurício,* Coimbra, Coimbra Editora, 2014, pp.1301.

situation, but rather, if anything, a forced arbitration, because although the co-contracting party has the possibility of not contracting if he decides not to submit the dispute to arbitration, his decision-making sphere will be quite conditioned. Not to accept institutionalized arbitration will mean for the contracting party not to contract.

Since this is a "forced" arbitration imposed on the private economic operator, provisions should be made for the possibility of appeal, irrespective of the value and not only when the claim is higher than EUR 500 000 00[39].

The legislator, when redeeming the possibility of appeal in Article 476 of the PPC, establishes the scope and effect of the appeal, however leaving the modality and processing of the appeal open, the appellant is able to make use of the various typologies provided by the CPAC, including the appeal, which allows a re-examination of the matter of fact under the terms of Article 149 of the CPAC.

In short, the legislator, shielded from the inherent advantages of arbitration, using arbitration as a motto for the need to decongest the State courts, a reflection of the very preamble of the PPC, builds a rule that incorporates a mistrust of arbitration. This means of alternative dispute resolution for the resolution of the overwhelming majority of administrative justice matters is acknowledged, but with this legal solution it reveals mistrust in this form of dispute resolution when substantial economic values are at stake, creating a mechanism that delays justice and may even act as a deterrent to the use of arbitration.

Finally, the last issue to be addressed is the possible organic inconstitutionality of Article 476 of the PPC.

Article 164 (p) of the C.R.P. requires that matters relating to the "organisation and jurisdiction" of non-judicial entities for dispute resolution belong to the relative reserve of the Parliament of the Portuguese Republic.

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[39] MEDEIROS, Rui, Regime de recurso das decisões arbitrais – uma análise constitucional, *Cadernos Sérvulo, 01/18,* Lisboa, Sérvulo & Associados, Sociedade de Advogados, 2014, pp.3.

It should be noted that the PPC does not define rules on organisation and jurisdiction, but rather provides for arbitrary matters in public procurement, the organisation and jurisdiction of the courts being originally provided for in both the CPR, and the CPAC.

In short,

— Article 180 (3) of the CPAC dispels all doubts regarding arbitration in pre-contractual litigation, although it does not reveal any novelty, since acts relating to the formation of contracts would always be subsumed within the material scope of Article 180 (1)(a) of the CPAC;

— Article 476, introduced in the Public Procurement Code in 2017, shows a clear preference for institutionalised arbitration over *ad hoc* arbitration, which is easily understood in view of its inherent advantages, among which the special relevance of the principle of transparency stands out.

— That legal provision denotes a restriction of the autonomy of the contracting party, since Article 476 states that if the contracting authority chooses not to accept this alternative means of dispute, the alternative will be not to contract. However, this does not materialise in a mandatory arbitration mode. The subjective scope of application of the rule is restricted to the parties who decide to contract.

— Article 476 (3) establishes the rule of appeal for disputes with a value of more than EUR 500 000.00, reversing the unappealability of arbitral awards as the general rule, materialized in Article 39 (4) of the VAL, revealing a feeling of distrust towards the institute of arbitration, which has been overcome for some time, especially with regard to claims of considerable economic value!