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CHAPTER 19

Administrative Arbitration

Rui Medeiros & Marta Portocarrero

§19.01 THE PORTUGUESE CONSTITUTION'S OPENNESS TO ADMINISTRATIVE ARBITRATION

Since its first revision, approved in 1982, the Portuguese Constitution provides that 'there may be (...) arbitration tribunals (...)'¹ and, since its second revision, concluded in 1989, also establishes the Parliament's exclusive competence to approve legal statutes ruling 'the organisation and competences of non-judicial conflict settlement entities'.²

First, the Constitution's openness to arbitration also applies to administrative arbitration, there being no basis to claim that providing for the possibility of the existence of arbitral tribunals is intended only for private law arbitration based on private autonomy. On the one hand, the Constitution makes no distinction, and neither the legal precedents that can be drawn from comparison with the rules on arbitration in the earlier Portuguese constitutions³ nor the preparatory work itself reveal any intention of the constitutional legislator to limit the scope of this rule. On the other hand, just as private arbitration is in no way prevented by Article 211 (1) of the Constitution,⁴ Article 212 (3) of the Constitution,⁵ should be read in accordance with the constitutional rule that allows for arbitral tribunals. Therefore, there is nothing to

1. Article 209 (2) of the Constitution.

2. Article 165 (1) p), in fine, of the Constitution.

3. Portuguese monarchical constitutions referred to arbitration 'in civil cases and in criminal cases initiated through civil means' (Art. 194 of the Constitution of 1822 – in the same vein, Art. 127 of the Constitutional Charter and Art. 123 § 3 of the Constitution of 1838). For their part, the Republican Constitution of 1911 (Art. 73) and the Constitution of 1933 (Art. 4, single §) alluded to 'arbitration as the best means of resolving international questions' or 'a means of resolving international disputes'.

4. Which establishes that 'the courts of law are the general courts in civil and criminal matters and shall exercise jurisdiction in every area that is not allocated to other judicial orders'.