Arbitration in Contracts and Concessions of Public Construction and Services

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ABSTRACT

Nowadays, arbitration has become one of the most chosen methods for conflict resolution, rather than traditional courts. In Portugal, there has been an increase in the use of arbitration in the area of contracts and concessions for construction and services. It is believed that this method has a high potential in conflict resolution for both public and private sectors, as it is a faster, more flexible and less costly method than the judicial courts.
According to the Portuguese decree law number 10/2011, arbitration is defined as "a way of settling a dispute through a neutral and impartial third party (...) chosen by the parties (...) and whose decision has the same legal value than judicial decisions."
Analyzing the case studies, it is possible to confirm that the arbitral court has always deferred in favor of private entities, and it seems, therefore, to conclude that it is the private entity who most benefits from arbitration. It is noteworthy that in both studies the arbitration proceedings were requested by the private entities, which suggests that public entities do not have the time and capacity to prepare their defense at the level of the accusation of the private entity. Consequently, it is perceptible the tendency of the public entity to focus on issues of lesser importance.
This dissertation discusses the use of arbitration in conflict resolution in contracts and concessions of public construction. Through two case studies, several conclusions are obtained and several recommendations are made to improve their performance.

Keywords:

Arbitration
Litigation
Conflicts
Resolution
Concession
Court

1. INTRODUCTION

1.1. Theme importance

Nowadays, arbitration has become one of the most chosen methods for conflict resolution worldwide, rather than traditional courts, and is increasingly recognized as a successful method of resolving conflicts not only between private entities but also in conflicts involving public entities. In Portugal, the increasing use of arbitration as a method of conflict resolution has mainly occurred in the resolution of conflicts in the area of consumption. In the area of works and services concessions, although there has been an increase in the use of arbitration, this increase has not been as exponential as the increase in consumer disputes, especially in the contracts and concessions for construction and services sector. However, it is believed that this method has a potential element in conflict resolution for the public sector (and the private sector), since it is a faster, more flexible and less costly method than the judicial courts.

The present theme gains its importance as it is necessary to promote arbitration as an advantageous method in the resolution of conflicts in the public sector, by enlarging the understanding and, consequently, the knowledge about the arbitration, its applicability and functionality and its advantages and disadvantages. Moreover, it is important to promote how arbitration can benefit both sectors and to find out what can be done by entities in this sector so that they can derive the best possible use of this method of conflict resolution.

1.2. Aim of the study

Since arbitration in Portugal is not much applied in the area of contracts and concessions of services and construction, one of the objectives of this study is the need to discover arbitration as an alternative method of resolving conflicts against traditional methods for this sector. Due to its greater celerity, flexibility and confidentiality and low costs, it is believed arbitration is a more advantageous method of resolving disputes for public and private entities than judicial courts.

Another objective of this study aims to answer the question: private vs. public - which entity most benefits from the use of arbitration and why? Once again, the low resource of public entities of arbitration as a method of resolving their conflicts is reflected in the preparation and capacity to deal with an arbitration process that these entities do not have. It is therefore believed that it is the private entities in the process who benefit most from this method of conflict resolution, which leads to the ultimate goal of this study: to try to understand what can be done by the public entities to reverse the situation and take the most of this method of conflict resolution.

2. LITERATURE REVISION

2.1. Types of conflict resolution

The existence of different conflicts has led to the creation and development of various types of conflicts resolution, which are used and applied according to the type of conflict, its size, the state of the conflict and also based on the existing relationship between the disputing parties.

- *Governance*

In contracts and concessions of public construction and services, it is applied the corporate governance. Corporate governance corresponds to the system through which business organizations are directed and controlled, including the relationships between those involved and the objectives for which the company is oriented.

Governance can thus be briefly described as the way in which all those involved in public construction and services contracts and concessions relate to one another. It is a mean of reducing the likelihood of conflicts since the better the relationship between the parties, the less likely it is to generate conflicts between them, or, if conflicts arise, the greater the possibility to resolve the conflicts between the parties, without recourse to any other means of conflict resolution.

- *Mediation*

According to article 2, item a), of the Portuguese Mediation Law, mediation is *"(...) the form of alternative dispute resolution, conducted by public or private entities, through which two or more parties of a dispute voluntarily seek to achieve an agreement with the assistance of a conflict mediator.*". The mediator is an impartial and independent intermediary, without any kind of powers of imposition on the parties to the dispute.

Mediation is, therefore, a method of conflict resolution that is alternative to traditional methods, since the parties involved have control over the entire process (empowerment), particularly on its development and the final outcome. Mediation is based on the concept that it is in the parties that the resolution of the conflict is found, and it is only through them that the most adequate and fair solution is obtained. [1]

- *Conciliation*

Conciliation is a type of dispute resolution in which litigants, with the intervention of an impartial third party (the conciliator), seek to find a solution to the conflict in question.

The conciliator, along with the parties, guides the conciliation procedure, leading them to discuss their differences and voluntarily reach agreement. Highlighting the objective aspects of the conflict, it encourages a quick and non-exhaustive resolution of the conflict and assists the parties to reach an agreement of their own. Once the agreement is obtained, the parties sign a term produced by the conciliator, which describes the entire conciliation process as well as the final agreement, which will then be approved by a judge thus ending the proceedings.

Comparing the mediator with the conciliator, the conciliator adopts a more active position, and even recommend a solution to the conflict.

- *Experts' committee*

An experts' committee is defined as the authority responsible for the technical analysis and implementation of conventions for accountability between the parties.

Whenever conflicts and/or disputes arise between the parties of a contract or concession of public construction and services, they may call upon an experts' committee to address their own conflicts and/or disagreements.

- *Arbitration*

Arbitration is currently considered as the alternative mean of resolving conflicts that is more similar to the traditional judicial system, since it is "*(...) a mode of judicial resolution of conflicts in which the decision, based on the will of the parties, is entrusted to third parties.*" [1], and is regulated in Portugal by the Voluntary Arbitration Act.

Arbitration differs from the traditional judicial system since, as a private dispute resolution technique, it allows litigants to elect third parties (designated by arbitrators) who will resolve the contentious issue. It also differs from the traditional system since it also enables the parties to choose the type of procedure to be followed in order to resolve the dispute in question (national or foreign law, customs, etc.).

- *Litigation*

Litigation is the term used to describe the resolution of conflicts through the judicial system, in particular the judicial courts.

According to article 202 of the Portuguese Republic Constitution, courts are the sovereign bodies with competence to administer justice in the name of the people. They provide binding decisions for all public and private entities, predominating over those of any other authorities [2]

When the disputes in question are relate to disputes from contracts and concessions of services and public construction, it is the responsibility of administrative and tax courts to resolve such disputes, since these courts function is the adjudication of administrative and tax disputes involving private individuals and/or public corporations.

3. ARBITRATION IN PORTUGAL

3.1. About arbitration

Arbitration gained notoriety during the French Revolution, in which private entities, in order not to submit to the judges of the old regime their disputes, granted the resolution of their conflicts to other private citizens. It is in the French Constitution of 1791 that the arbitration starts to be seen as a procedural institution. In Portugal, this occurs only in the Portuguese Constitution of 1822, which says, in article 194, "*In civil cases and civil penalties, the parties are allowed to appoint Judge Arbitrators to decide them*." [3].

Arbitration continued to be regulated in successive judicial reforms, and was establish in the Portuguese legal system in 1986, through law no. 31/86, of August 29. Due to the increasing need to adapt it to the Portuguese society reality, this law is now repealed by

Law no. 63/2011, of November 14, also known as the Voluntary Arbitration Law (LAV).

According to decree law no. 10/2011, arbitration is defined as "*a mean of settling a dispute through a neutral and impartial third party - the arbitrator - chosen by the parties or designated by the Center for Administrative Arbitration and whose decision has the same legal value as court judgments.*". Arbitration is, therefore, an alternative mean of resolving jurisdictional and adjudicatory disputes [1].

Arbitration is considered a mixed mean of resolving disputes, since arbitration has a contractual basis and, at the same time, it is a jurisdictional activity, which gives rise to a decision with jurisdictional power. Mariana Gouveia states that "*Proof of this mixed character is the executive effectiveness of the arbitral award (public element), on the one hand, and the limitation of the jurisdiction of the arbitral court, on the other, to the arbitration agreement (private element)*." [1].

Disputes submitted to arbitration may be settled by *ad hoc* courts or arbitration centers [4]. The first ones are courts based exclusively on a particular dispute, i.e., the court is only created after the arbitration agreement and is abolished after the arbitration decision has been taken. Arbitration centers, however, consist on permanent arbitration institutions, that have their own rules [1].

According to item 1 of article 1 of the LAV, any litigation may be submitted to arbitration, provided that "*(…) by special law is not subject exclusively to judicial courts or the arbitration required (...)*".

As regards their constitution, arbitral courts may consist of only one arbitrator or multiple arbitrators, provided that they are always in an odd number, whether in *ad hoc* courts or institutionalized courts. If the parties have not agreed on the number of arbitrators to composed the arbitral court, it shall consist of three arbitrators (item 2 of article 8 of the LAV).

The arbitrators to be selected by the parties must be individuals, independent, impartial and fully capable of performing their function.

Section 33 of the first part of the English Arbitration Act of 1996 presents the general duty of the constituents of the arbitral court, that is, of the arbitrators:

- To act fairly and impartially between the parties, providing each of them with the opportunity to dispose of their case and deal with that of their opponent;
- Adopt procedures that are appropriate to the circumstances of each particular case, avoiding unnecessary expenses and delays, in order to provide a fair means for resolving the disputes in question.

3.2. Advantages and disadvantages

Arbitration has several advantages and disadvantages for litigants who elect this alternative mean of dispute resolution to end their conflict.

One of the most important advantages of arbitration lies in the confidentiality of the arbitration process. The resource to arbitration allows the parties to maintain confidentiality throughout the proceedings [5]. The confidentiality of the arbitration process is set forth in item 5 of article 30 of the LAV. Nevertheless, it must be borne in mind that judicial decisions are always public [17], which means that decisions issued by arbitral courts which have become final may be published by the Ministry of Justice (article 185-B of the CPTA). It should also be borne in mind that, once the arbitration procedure has been completed, it may become public once the parties may disclose information to the press or as a result of a motion to strengthen the agreement reached. [6]

The celerity of the arbitration process is a significant advantage of this method. The celerity of the process comes from the greater availability of the arbitrator for the ongoing process and from its lower complexity [7]. In addition, according to item 1 of article 43 of the LAV, the final sentence must be proclaimed within a period of 12 months that begins on the date of acceptance of the last arbitrator. The flexibility of the process is also an advantage of arbitrage. This feature can be translated into the greater control that the parties have over the arbitration deadlines, considering that the arbitrators tend to set deadlines that are convenient for the parties, contributing for the greater speed of the process [5] [6].

Another of the great advantages of arbitration lies in the fact that this mean of settling disputes proves to be a more economical mean. The speed of the process is, notoriously, a great saving factor for litigants.

On the other hand, the gathering of depositions concerns a more limited action in arbitration, which substantially reduces the costs of arbitrators' fees and reduces their interference with the time management of arbitration proceedings. Moreover, the introduction of evidence in the process is carried out with greater speed and less dispute. This happens because the rules of the courts for evidence do not apply to arbitration, which leads to a reduction of the motions that challenge the admissibility of the evidence presented. [6]

The possibility given to the parties for the choice of the arbitrators allows the selection of arbitrators with a greater and more adequate knowledge of the matters subject to arbitration. Thus, arbitrators will be able to make decisions that are fairer and more appropriate to the dispute in question [7] [5].

In addition to the choice of arbitrators, the parties are also given the possibility to agree on the rules of the procedure to be followed in arbitration. This possibility can be translated to a great advantage of the arbitration, because it allows "*to create flexible procedural rules (…) that allow a fast and appropriate treatment of the case*" [1].

Nevertheless, the possibility of choosing the rules of the arbitration procedure can also be translated into a disadvantage of arbitration, since this can be influenced in favour of one of the parties, making the arbitration process unbalanced.

Finally, the effectiveness of the decision is another advantage of arbitration. According to item 7 of article 42 of the LAV, except in cases where the judgment decreed by the arbitral court can be judicially annulled, it has "*the same obligatory character (...) and the same enforcement force as the judgment of a state court*."

When the parties are unwilling to cooperate with the arbitral court, in particular in the production of evidence requested by the arbitrators, the arbitral proceedings become vulnerable. This vulnerability of the process translates into a disadvantage of arbitration. Considering that all the information and evidence essential to the clarification of the truth are held by the disputing parties, when they refuse to cooperate with the arbitral court, they make arbitration less effective [7].

The ineffectiveness of arbitration may also be increased when the parties themselves prevent the constitution of the arbitral court, by resorting to anti-suit injunctions or to actions for annulment of the arbitration.

3.3. Operation

In order for a dispute to be submitted to arbitration, it is necessary that the arbitration agreement be formulated in advance. This need arises from the fact that the arbitral court only has jurisdiction over the dispute submitted when it is part of the arbitration agreement. The arbitration agreement must be presented in writing. The specificity of the form of the agreement is due to the need to limit with precision the content and object of the arbitration agreement, ensuring certainty regarding the matters submitted to the arbitration jurisdiction.

If the arbitration agreement is defined, it is then possible to submit the dispute to arbitration. Arbitration begins with the formation of the arbitral court, selecting for that the third parties that will constitute it. The designation of the arbitrators constituting the court may be made using the arbitration agreement or in a later written agreement signed by the parties. When the number of arbitrators is equal to or greater than three, the principle of equality of parties must be respected: each party shall appoint an equal number of arbitrators and the arbitrators so appointed shall elect another arbitrator, who shall act as chair of the arbitral court (item 3 of article 10 of the LAV).

It should be noted that no one can be forced to accept the position of arbitrator (item 1 of article 12 of the LAV). If the function is accepted, the chosen arbitrators have a period of fifteen days to communicate the acceptance of the position in writing. If during that period the arbitrators do not declare acceptance of the position nor reveal intentions to act as arbitrators, it is assumed that they do not accept this position (item 2 of article 12 of the LAV).

In respect of the fees, reimbursement of expenses and the form of payment of the arbitrators, a written agreement must be made between the parties and the arbitrators prior to the acceptance of the last appointed arbitrator. If that agreement is not fulfilled, it is the arbitrators' responsibility to determinate the amount of their fees and expenses and to determinate how the parties will pay those sums, by dividing the total amounts by the parties according to a rule of proportionality.

According to item 1 of article 33 of the LAV, the arbitral proceedings begin on the date on which the defendant receives the request to submit the dispute in question. As to the place where the arbitration will take place, it can be freely determined by the parties or, in case of failure to reach agreement, the place is fixed by the arbitral court, always considering the convenience of the parties (article 31 of the LAV). The same is true for the language in which the process is to unfold.

Once the constitution of the arbitral court has been concluded, a formal act is written to initiate the arbitration process. In this act, the parties, the arbitrators and the place of arbitration are identified. Also included in the act is a transcript of the arbitration agreement and a generic description of the dispute in question, as well as some procedural rules. It is also in this act that the fees and charges of the process are established or how to calculate them.

In first stage of the arbitration procedure the parties submit their claims [1]. Thus, the applicant lodges his application, in which he expresses his request and the facts on which it is based, and the defendant lodges his defence, in which he puts forward his defence. The parties may attach to their respective claims any documents they consider relevant and indicate other documents and/or evidence that they may submit (item 2 of article 33 of the LAV).

This is followed by the intermediate stage, during which the organization of the arbitration process is developed, that is, the analysis of the pretensions of the parties and the preparation of the evidence [1].

Whenever one of the parties request, the arbitral court has the duty to hold one or more hearings for the production of evidence. If neither party request it, it is the arbitral court who decides whether hearings will be held for the production of evidence or whether the proceeding is only conducted on the basis of documents and other evidence (item 1 of article 34 of the LAV).

The last stage of the arbitration process covers the arbitration sentence and the closing of the proceeding.

In the case of an arbitral court consisting of more than one arbitrator, any decision on arbitration shall be taken by a majority of the arbitrators. If this majority does not form, the sentence is decreed by the president of the court. The decision must be reduced in writing and signed by the arbitrators.

The verdict must indicate the date on which it was pronounced and the place of the arbitration, as well as the distribution by the parties of the costs resulting from the arbitral proceedings, unless otherwise agreed

by the parties. If they consider it fair and adequate, the arbitrators may also decide in the verdict that one of the parties compensates the other for costs and expenses that the latter may have incurred in their intervention in arbitration.

The arbitral proceedings terminate when the final sentence is pronounced. Arbitration should last for a maximum period of 12 months, counting from the date of acceptance of the last arbitrator. However, this period may be extended by agreement of the parties or by decision of the arbitrator court. With the termination of the arbitral proceedings, the functions of the arbitral court cease.

If the arbitration award is not pronounced within the maximum period established, the LAV determines the automatic termination of the arbitration process, also extinguishing the competence of the arbitrators to adjudicate the dispute. However, this does not imply the expiration of the arbitration agreement, and the parties may initiate other arbitration (Article 43 (3) of the LAV) [7] [1].

If the requirements of article 42 of the LAV are fulfilled, the arbitration verdict acquires the same mandatory character and the same enforcement force as the sentence issued by a state court has (item 2 of article 42 of the LAV).

The power of the arbitrators ceases with the notification of the final sentence or when the court is ordered to close the arbitral proceedings, also terminating the functions of the arbitral court (items 1 and 3 of article 44 of the LAV).

According to number 6 of article 46, the parties have a period of 60 days to request the impugnation of the sentence. Once this period finishes, the sentence becomes unsustainable of challenge by nullity and unsustainable appeal under the item 4 of article 39 of the LAV. This means that the arbitration award is final and no appeal is lodged on the merits of the decision or on any other aspect [1].

3.4. Arbitration data

The resource to arbitration as an alternative method of dispute resolution has been increasing gradually, not only in Portugal but also in the rest of the world. Having as pioneers in its use the United States of America and Great Britain, it is at the Hague Peace Conference in 1899 that arbitration is accepted and consensual *"(...) as a primary means of resolving conflicts between states.*" [1].

Through the International Arbitration Survey, conducted by the University of London, it is possible to observe the growing adherence to arbitration for the resolution of conflicts. In 2015, 90% of respondents stated that arbitration is their preferred method of dispute resolution, of which 56% preferred its applicability and the remaining 34% its use supplemented by other dispute resolution methods. In 2018, the preference for arbitration rose to 97%, of which 48% chose arbitration as an isolated method of conflict resolution [1] [8].

In this same research, it is still possible to conclude on what are the characteristics most appreciated in arbitration: the possibility of avoiding traditional legal systems, the flexibility and the possibility of arbitrators' selection by the parties. As for the worst characteristics, there is the cost of arbitration and lack of discernment about the efficiency of the referees [1] [8].

This year, respondents believe that the resource to arbitration as a method of settling disputes will increase in the energy, construction, infrastructure, technology and banking and financial sectors [8].

In Portugal, the analysis of information regarding arbitration is complex, since there is no information available for public consultation, due to the secrecy of the arbitration.

4. CASE STUDIES

4.1. Case study 1

On 22 October 2002, the Municipality A began the international public tender for the concession of water supply and sanitation services of Municipality A. At the end of the public tender, entity A decided to select the group organized by entity B. On March 30, 2004, entity A submitted to entity B a draft of the concession agreement to be concluded, and discussions were held between the parties on the final content of the contract to be concluded.

The draft of the concession agreement, including the modifications introduced by entity B, was accepted by entity A on September 20, 2004, and was approved by the Municipal Assembly on October 1 of that same year.

On December 1, 2004, however, entity B submitted to entity A a new version of the contract with further amendments. This new contract was submitted and approved by the entity A on December 15, 2004 and was approved by the majority of the Municipal Assembly on December 28 of the same year. At December 30, 2004, the concession contract between entity A and entity B was signed.

Present in the annexes of the contract was the "Base Case", which showed the economic-financial model of the contract and the one bound in the same and in the other annexes. This annex was only sent to entity A in written version to be included in the contract, and the city council never asked entity B to send it in a computer version. It should be noted that there are differences between the Base Case and the propose made by entity B. However, the differences found for the economically relevant elements - namely the IRR - were not declared disruptive or unreasonable by the arbitral court.

On May 16, 2005, the concession began.

- *Constitution of the arbitration*

On March 10, 2008, entity B filed an arbitration action against entity A, requesting the constitution of the Arbitral Court provided for in the arbitration agreement included in the Concession agreement, indicating, to

that end, the respective arbitrator and submitting the initial petition action. On May 9 of the same year, entity A filed its defence directly with entity B, in which it challenged entity B's claims and requested counterclaims. Previously, the Municipality had already indicated its arbitrator on April 15.

The arbitration commenced on January 25, 2009, with the increasing number of 17 sessions, which ended on June 3 of the same year.

- *Some of the points submitted by entity A to arbitration:*

1. Entity A's right to terminate the concession contract unilaterally, since entity B has not fulfilled its obligations under the law, in the Specifications and in the Contract itself;
2. The occurrence of the alteration of the entity A's decision to contract certain points of the contract;
3. The right of the entity A and the residents of the Municipality A to indemnification due to the damages caused by defaults and disagreements provoked by the entity B.

- *Analysis of the arbitral court*

Finding all the facts collected, the arbitral court began its analysis for the right to indemnify the population and the Municipality A. In view of the fact that this request relates to an indefinite group of persons and to an abstract loss, and also the ambition of the Municipality to be in the right to claim self-indemnification without owning procedural legitimacy, the court ruled that it was an unenforceable claim, by which it ruled that it would not consider it.

Analysing the terms in which the contract was approved by the Municipal Assembly of A, it was proved that, at the meeting of October 1, 2004, only the body of the contract itself and annexes IX and X were presented to the meeting, not having been submitted none of the remaining constituent annexes to the contract. Moreover, at the meeting on December 29 of that year, the missing annexes were not also presented. As the City Council approved the conclusion of the concession agreement containing in its possession since the beginning only the agreement of the body and the Annexes IX and X (which presented the tariff to be applied), and confirming the court that these documents reported the general conditions the contract provided for by law, the court concluded that it was sufficiently compliance with the legal requirement applied to the General Assembly to approve the execution of the concession agreement.

Another point related to the legality of the contract of the concession relates to the vice of the adjudication act with the difference found between the final content of the contract and the initial pieces.

It began by examining the possible occurrence of a "mistake" by entity A or the occurrence of "wilfulness" by entity B that could lead to original invalidity of the contract.

It is true that companies such as entity B have a more advantageous position when compared to municipalities as regards the definition of the content of a concession contract, both technically and economically and financially. However, it cannot be concluded that such a situation has been taken advantage of by entity B in order to act with "intent" or to cause entity A to err in its decision to contract, both at the level of the content of the business and at the level of the actual willingness to hire, once it has been proved:

- That entity A has shown interest in introducing changes to the concession agreement;
- That the changes to be made to the contract led to a number of talks between entity A and entity B, which lasted for months, and during which entity B submitted to entity A the economic and financial implications of these changes;
- That entity A has taken note of the change in tariffs to be applied;
- That entity A has had sufficient time to study all the changes - and the respective impacts - introduced in the contract and to resort, if necessary, to external consultancy or to request clarification from entity B;
- That entity A never asked entity B for any other version than writing the Base Case;
- And that the negotiations on the contract developed in a climate of trust between the two parties.

The court concluded that, in the face of these proven cases, entity A did not accept the contract in error in the declaration, or in error-addiction, nor was it induced in intent by entity B.

Another point analysed by the arbitral court was the divergence found between the contractual Base Case and the economic and financial study that integrated entity B proposal. It is indisputable that between the tender put forward by the concessionaire and the later concluded contract there were marked differences. It should be considered that from the submission of the proposal to the conclusion of the contract, two years elapsed, and certain differences result in updating the factual elements of the proposal, such as the number of existing customers or the number of water meters. However, the differences found went beyond the factual elements of the proposal, which included an increase in investment by the concessionaire, an increase in the concessionaire's costs, a forecast of real tariff increases in the first three years of the concession, total revenues of the concessionaire over the 35 years of the concession and, lastly, the increase of the shareholder IRR.

It was possible to conclude that, although some of the alterations introduced benefit the concessionaire, other changes are in favour of the city council. This conclusion can be drawn from the maintenance of the contractual equilibrium, which is visible through the increase in shareholder IRR. Although the increase in the IRR was only 1.49%, this is a reasonable increase in view of the increase in investment by the concessionaire and, consequently, the increase in investment risk, and therefore the contract is not significantly unbalanced. Thus, the court determined that the divergence found between the contractual

Base Case and the economic-financial study that integrated the proposal does not determine the invalidity of the Base Case, nor does it represent a violation of the principle of competition imposed by decree-law no. 379/93.

It should also be noted that, since no provision of the concession contract or its annexes has been declared invalid, there will be no reduction or reform of the contract in question.

- *Arbitration court's decision on entity A requests:*

1. Not to recognize to entity A the right to an indemnification for alleged damages to the population of A and to the own municipality;
2. To consider inconsistent the other requests placed by entity A. [9]

4.2. Case study 2

The public tender for the award of the concession began on February 19, 2003. After evaluating the competing proposals, the Bid Evaluation Committee classified the proposal submitted by entity B in first place. On October 22, 2003, entity B was informed by letter by entity A of the approval of its proposal and of the intention to be awarded the concession in question.

On September 27, 2004, a contract was signed for water supply and sanitation services between the Municipality A and entity B, through a public deed, and the concession was assigned to entity B in an exclusive regime with a duration of 30 years.

On January 7, 2005, an amendment to the concession contract was signed between the parties, which resulted in the elimination of Annex XVI of the agreement, which reflected the construction contract.

On January 24, 2005, the "Consignment Order" was signed by the parties, with the concession beginning on the same day, on January 24 of the same year.

On June 12, 2008, a new addition to the agreement was made, in which changes were made to several articles of the same, as well as changes to the tariff and the investment plan, with immediate effect as of that date.

It should be noted that this amendment did not lead to amendment of the initial case basis, both at the level of the Investment Plan, as the level of rates. Furthermore, entity A stated that until the date of conclusion of the amendment in question, all the works included in the Initial Investment Plan were completed.

- *Constitution of the arbitration*

On June 29, 2010, entity B filed an arbitration action against entity A, by sending a letter, in which it defined the subject matter of the litigation, appointed its arbitrator and filed its initial petition.

On July 19 of the same year, entity A accepted the development of the arbitration process, having agreed to the subject matter of the litigation defined by entity B and added more issues to be resolved by the court. Entity A also lodged his defence and appointed his arbitrator.

- *Some of the points submitted by entity A to arbitration:*

1. The validity of contractual provisions;
2. The occurrence of vice in the formation of the will;
3. The existence of an error in the formation of the "Base Case".

- *Analysis of the arbitral court*

Nullity of the contract for violation of article 13 of Decree-Law no. 379/93, of November 5

Entity A was alleged that the concession agreement was null, since entity B did not assume any risk arising from the operation of the concession, thus violating Article 13 of Decree-Law No. 379/93 of November 5. Entity A also supported its allegations that entity B argued the right to restore the economic and financial balance of the concession from its inception.

However, item 1 of that article reads: "The operation of the concessionary service is carried out at the concessionaire's risk." Moreover, the court found it clear that there was a risk to the concessionaire arising from the exploitation of the concession, such as the risk arising from the diversion of the flows, which would have to be assumed by entity B, since the restoration of the economic- would only occur if there were a decrease of more than 20% in total annual water supply flows relative to the expected flows in the base case.

The court thus determined that entity A's argument did not render the contract null and void.

Error in the formation of contractual will

Another reason put forward by entity A as justification for the invalidity of the contract is the error in the formation of its will. It claims that it had not had a notion at the time of the contract's development that the restoration of the economic and financial balance of the concession would be incompatible with entity A, since the value it would have to restore to entity B could exceed twice the value of the Chamber's annual budget.

However, as found by the arbitral court, entity A was well aware of what was involved, since:

- Since the opening of the tender the contract has had a mechanism to restore the economic and financial balance;
- Had more than enough time to analyze the base case proposed by entity B;
- The criterion of equilibrium replacement was discussed between both parties and this criterion was already known by entity A since the same criterion was already applied in other concessions in the area.

The court thus determined, once again, that the reason put forward by entity A did not invalidate the contract.

Violation of the specifications for the replacement clause

Lastly, entity A further alleged that the contract was invalid since the restoration of the economic and financial balance of the concession embodied in the contract was contrary to what was laid down in the contract documents.

In fact, the specifications did not have the 20% criterion, only providing for the restoration of the economic and financial balance of the concession if there was a "significant change in total annual water supply flows in relation to the amounts foreseen in the present Bidding Process" [10]. However, the arbitral court considered that the difference found between the two parties was not a contradiction, but an achievement, in that the contract quantified the merely qualitative criterion of the specifications, in order to financing of the concession itself.

The court again determined that the argument put forward by entity A did not invalidate the contract.

- *Arbitration court's decision*

1. To consider as viable the request for restoration of the economic-financial balance of the concession in favour of entity B;
2. To consider as unviable all other requests.

4.3. Case studies' conclusions

After analyzing the former case studies, it is possible to confirm that, in both situations, the arbitral court always deferred in favor of the private entity. This confirmation concludes that, in general, the private entity is the entity that most benefits from arbitration as a method of resolving conflicts. That being said, and considering that both studies are in the same area - public water supply and wastewater treatment services - and similar to each other, both studies were sought to know what were the reasons why public entities weren't favored in arbitration proceedings.

It is easy to recognize that in both case studies arbitration proceedings were required by private entities. This leads one to believe that public bodies do not have the necessary time that requires the preparation of their defense at the level of the prosecution developed by the private entity. Consequently, the tendency of the public entity to focus its efforts on matters of lesser importance is perceptible. In both studies, the public entities invoke the invalidity of the contracts, claiming error. In study 1, the city council attempted to invoke the invalidity of the contract alleging error, when it was clear that both parties were well aware of the decisions made at the time of conclusion of the contract. In study 2, the city council attempted to invoke the invalidity of the contract, alleging an error in the formation of its contractual will, when, again, it was clear that the city council was fully aware of what was involved in the concession agreement in cause.

It is also possible to recognize that, as a general rule, public entities have fewer monetary means and, consequently, fewer human resources than private entities. Here, it is possible to find one more disadvantage that public entities support have face to private entities. The fact that the latter have more resources, enables them to be better prepared for the arbitration proceedings in which they are involved, whether at the level of the prosecution or at the level of the defense.

Further conclusions could be drawn from the analysis of the case studies, which, although not entirely within the scope of the present study, are considered relevant.

In both case studies, there were situations that, if they had been avoided, are believed to not have beneficiated the public entity throughout the arbitration process. It should be noted that the situations in question have occurred before the arbitral proceedings were instituted.

In study 1, one of these situations is that the city council has consistently allowed entity B not to present all the constituent documents of the contract, leaving the city council in an unfavorable position when concluding the concession contract, since it could contain documents that would commit the city council.

Another of the situations, present in both studies, was the acceptance of public entities in entering into a contract without updating the data present in the tender pieces and in the base case, such as the population existing in the county in the year of conclusion of the contract, the number of customers, actual consumption and consumption forecasts. Failure to update the data in these documents has, from the outset, resulted in the economic and financial imbalance of the concessions, placing the Chambers in an unfavorable position since they would be obliged to restore the balance in favor of private entities.

5. FINAL CONCLUSIONS

5.1. Conclusive synthesis

Arbitration, defined as the most similar alternative method of dispute resolution with the judicial courts, is in its advantages that gains its importance and a major relevant and appliance in the public sector. Among others, the flexibility is one of arbitration advantages, which allows the adaptability of the procedural duration to each process. Another advantage is the speed of the arbitration process, wich is very significant since the judicial proceedings tend to extend over severel years. Consequently, this brings to the economy of the process, making the arbitration process less expensive. It should also be emphasized the possibility litigants have in the choice of arbitrators who will direct the process, which allows the selection of specialized personnel in the disputed matters and, consequently, a better understanding of the subject and a better adaptation of the final sentence. However, some of its disadvantages must be recognized, such as the taking of testimony, that it is a more limited action in arbitration, which may result in the loss of essential evidence of the proceeding, as well as the possibility for the parties to influence arbitration in its favor, when selecting the rules of the arbitration process, provoking its imbalance.

By analyzing the case studies, it is possible to verify that, in both case studies, the arbitral court always defered in favor of the private entity. It is therefore concluded that, in general, it is the private entity that most benefits from arbitration as a method of resolving conflicts. It is believed that, since the cases in both

case studies have been instituted by the private parties, the public entity does not have the time to prepare its defense at the private prosecution level. Consequently, it is also believed that, in the absence of time, the public entity will eventually focus its efforts on issues of lesser importance, as was the case in case study 1, in which the city council tried to plead that the contract was invalid claming error on the will, although it was clear that both parties were well aware of the decisions made at the time the contract was concluded. Finally, it is concluded that the public entity is at a disadvantage compared with the private entity because it has fewer means, especially in terms of human resources and funds, which, if they existed, would allow a better preparation in defense of the case.

It is, therefore, necessary for public entities to modify the above mentioned aspects so that the raising of funds will enable them to bear the costs with the necessary specialized human resources and, consequently, be constantly prepared for any eventuality of occurrence of an arbitration action. This preperation will also supress the lack of time, allowing the focus on issues of greater relevance to the case.

There are also some situations that need to be highlighted, which are believed that would have benefited public entities if they were avoided. These situations are allowing private entities not to present all of the necessary documents, as was the case study 1, in which the city council allowed entity B not to present the documents that form part of the contract in its entirety, and to proceed to the conclusion of the concession contract without the information present in the tender pieces and in the base cases being updated. The latter situation can be found in both studies, in which the city councils entered into a contract without updating data such as the population existing in the county in the year of conclusion of the contract, number of customers, actual consumption and consumption forecasts, among others. It is believed that the above-mentioned situations have, in both studies, placed public entities in unfavorable situations, which were highlighted when developing the arbitration process.

It is, therefore, necessary that the public entities start to be more cautious and correct such situations in a timely manner so that they do not weaken their position during an arbitration process.

5.2. Study limitations

The study of arbitration as an alternative method of conflict resolution is a study that is subject to some limitations, which are imposed mainly due to the stealthy nature of the arbitration.

The confidentiality present in arbitration, being one of its greatest advantages, makes the study of arbitration a process of difficult resolution, since there is not a vast amount of information available for public consultation on arbitral proceedings that have taken place.

The lack of information on arbitration proceedings restricted the present study to two case studies, since these were the only ones available publicly. It should be noted that both case studies are available for public consultation once one of the parties of the proceedings has deliberated on its own behalf to disclose arbitration proceedings.

The lack of information on arbitration in Portugal also conditioned the study developed in the present dissertation, inasmuch as it was not possible to obtain data to perform a statistical analysis on arbitration without the use of surveys on the subject.

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