

## INTRODUCTION TO ARBITRATION EXAM (January 20th, 2020)- CORRECTION CRITERIA

### 1. List a maximum of 4 arguments that can persuade Shopping Centers that the solution proposed by Jolie is the best

Elements of the answer	Points
<p>The student indicates that the clause proposed by Shopping Centers is a staggered clause, which establishes, first of all, the recourse to mediation and, only in the event that it is frustrated, the recourse to Madrid's judicial courts. In turn, Jolie proposes to enter into an arbitration agreement (arbitration clause).</p>	<p><b>1</b></p>
<p>Arguments in favor of the arbitration clause over the staggered clause proposed by Shopping Centers</p> <p>1- None of the contracting parties is headquartered in Spain, despite the fact that Shopping Centers has an office and the location of the work is in this country. The lack of knowledge or insufficient knowledge of Spanish procedural and substantive law, either on the part of Jolie either, probably, on the part of the World Shopping Centers itself, means that submitting the dispute to the Madrid judicial courts is not the most favorable solution for any of the parties.</p>	<p><b>2,5</b></p>

<p>The solution proposed by Jolie (resolution by an entity other than the Spanish judicial courts, located in a country with no connection to the dispute) generates a greater balance in this matter</p> <p>2- Speed of the arbitration procedure in relation to the judicial process</p> <p>3- Confidentiality of the arbitration procedure (including hearings) vs publicity of the judicial process</p> <p>4- Flexibility of the arbitration procedure with regard to the rules of the procedure and the choice of the rules of law, to the detriment of the greater rigidity that characterizes the judicial lawsuits.</p> <p>5- Lower economic costs with the <i>ab initio</i> submission to arbitration</p> <p>6- Less time spent with the <i>ab initio</i> submission of the dispute to arbitration, given that the staggered clause will forbid that, in the event of a dispute, the parties go to the judicial courts first. They will only be able to do so if the prior resort to mediation has proved to be unsuccessful.</p> <p>(According to international case-law: Engineering Company v Engineering Company, Producer, Final Award, ICC Case Nos. 6515 and 6516, 1994 paragraph 55)).</p>	
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<p>7- Greater specialization of arbitrators in comparison with judges of judicial courts.</p> <p>(Other arguments are accepted, if they show that the submission of the dispute to arbitration – rather than the resource to the mediation or, in case of failure, the appeal to the judicial courts - is preferable in this case).</p>	
<b>Total</b>	<b>3 points</b>

**2. Imagine that you are Jolie’s lawyer. Present the defence in relation to:**

**a. The jurisdiction of the Portuguese state courts**

<b>Elements of the answer</b>	<b>Points</b>
<p>Whether the convention is considered to be non-existent or it is considered to be existing and fully valid (under the terms mentioned below), due to the positive effect of the arbitration clause/ principle of <i>kompetenz-kompetenz</i> (Article 18 (1) of the LAV), the court arbitral would be competent to analyze its own competence in the present case, even if for this purpose it is necessary to analyze the existence or non-existence of the arbitration clause invoked by Jolie.</p>	<b>1</b>

(According to international case-law: Econet Wireless Ltd (UK / South Africa) v First Bank of Nigeria, et al (Nigeria), Award, 2 June 2005 and Engineering Company v Engineering Company, Producer, Final Award, ICC Case Nos 6515 and 6516, 1994).	
The student indicates that the Portuguese judicial courts do not have jurisdiction for the referred action because it consists of an anti-arbitration injunction (articles 5/1 and 5/4 of the LAV- negative effect of the arbitration clause.	<b>1</b>
<b>Total</b>	<b>2 points</b>

**b. The validity of the arbitration agreement**

<b>Elements of the answer</b>	<b>Points</b>
1st defensible solution: the arbitration agreement is non-existent because it does not fulfill the requirement of the written form provided for in article 2 of the LAV. The contract is neither concluded nor signed between the parties and, consequently, none of the circumstances referred to in paragraphs 2 to 5 of the said legal provision is fulfilled in this case. The argument put forward by Shopping Centers is well founded.	<b>3</b>

<p>2nd defensible solution: the arbitration agreement is fully existing, valid and effective because there is a consensus of the parties to submit and it complies with the written form provided for in article 2 of the LAV.</p> <ul style="list-style-type: none"><li>✓ It is not necessary, under the terms of article 2 of the LAV, that the convention be included in a document signed by the parties.</li><li>✓ Although the contract has not been concluded or signed by the parties, there was consensus between the parties as to the conclusion of the agreement. There is a proposal for the submission of the dispute to arbitration made by Jolie to Shopping Centers, accepted by the latter and the acceptance was communicated to the proponent (according: Lisbon Court of 7/7/2016, Case 508 / 14.0TBLNH -A.L1-2). Subsequently, the arbitration agreement was reduced to writing, being found in the contract not concluded.</li><li>✓ The fact that the contract has not been concluded does not in itself prevent the existence, validity and effectiveness of this</li></ul>	
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<p>agreement, since it is independent of the remaining clauses of the contract, under the terms of article 18, paragraph 2, of the LAV . The argument put forward by the Shopping Centers is unfounded.</p>	
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**3. Were the arbitrators obliged to disclose the facts referred to? If so, what are the consequences of the lack of disclosure?**

<b>Elements of the answer</b>	<b>Points</b>
<p>The student states that article 9/3 of the LAV requires that both António Soares and Pilar Sainz be, as arbitrators of the party, independent (distant from the parties) and impartial (distant from the object of the dispute) throughout the arbitration procedure.</p>	<b>0,5</b>
<p>The student states that article 13/1 of the LAV imposes on the arbitrators a duty to disclose all circumstances that may raise well-founded doubts about their impartiality and independence. He indicates that well-founded doubts are doubts that are objectively relevant and likely to affect, in the eyes of the parties, the independence and impartiality of the arbitration.</p>	<b>0,5</b>
<p>The student indicates that, in order to materialize the aforementioned article 13/1 of the LAV and verify whether the circumstances listed require or not the duty of disclosure, we must resort,</p>	<b>0,5</b>

<p>albeit with adaptations, to a soft law instrument: the IBA Guidelines on Conflicts of Interest in International Arbitration.</p> <p>In favour of the application of the guidelines: reference to the ICSID Case No ARB 10/9.</p> <p>The student understands the document and its three lists.</p>	
<p>The fact regarding António Soares does not fall into either the Red Lists or the Orange List of the Guidelines. Point 3.1.4 of this last list does not apply, as the attorney representation took place in 2015 (more than 3 years ago).</p> <p>There is no duty of disclosure.</p> <p>Consequently, there will be no grounds for refusal under the terms of article 13, paragraph 3, and 14 of the LAV or for the future annulment of the arbitral award.</p>	<b>1</b>
<p>The fact concerning Pilar Sainz does not fall into either the Red Lists or the Orange List of the IBA Guidelines, so there is no duty to disclose.</p> <p>This does not even fall under points 4.3.1 to 4.3.4 of the Green List.</p> <p>Consequently, there will be no grounds for refusal under the terms of article 13, paragraph 3, and 14 of the LAV or for the future annulment of the arbitral award.</p>	<b>1</b>
<b>Total</b>	<b>3,5 points</b>

**4. Can the parties object to this rule on the ground of breach of the principle of due process?**

<b>Elements of the answer</b>	<b>Points</b>
The student states that the adversarial principle, as part of the principle of due process, is a fundamental principle of arbitration (article 30/1 c) LAV).	<b>0,5</b>
The student states that, from the adversarial principle, derives the necessary observance of the principle of the due hearing of the case (a variant of the adversarial principle, as far as the production of evidence is concerned), according to which evidence cannot be produced without the hearing of the party against whom produced. Consequently, both parties are entitled to respond to the written depositions.	<b>0,5</b>
The student indicates that article 34/1 LAV allows the entire process to be conducted in writing.  Consequently, the court can dispense with the aforementioned hearing, provided that it gives each party the opportunity to exercise its opposition to the written depositions submitted by the opposing party.  However, whenever one of the parties so requests, there must be an oral hearing for this purpose, unless the parties have waived it by agreement.	<b>1</b>
The student indicates that this clause violates the adversarial principle insofar as it prevents the exercise of the contradictory to the said testimonies	<b>1,5</b>

and leads to the rejection of any requests that one of the parties makes regarding the holding of a hearing for the opposing party's counter-inquiry.	
<b>Total</b>	<b>3,5 points</b>

**5. How can Shopping Centers challenge the arbitral award and on what grounds?**

<b>Elements of the answer</b>	<b>Points</b>
The student states that the arbitration award is unappealable, as the parties did not expressly provide for the possibility of appeal. There remains, therefore, the use of the action for annulment before the Lisbon Court of Appeal (articles 46/1, 53 and 59/1 g) LAV).	<b>0,5</b>
1st ground: the <i>ultra petitum</i> conviction (ordering the defendant to pay 150 million, instead of the 2 million that constituted the claim for damages filed by the plaintiff) (Article 46 (3) (a), subparagraph v) LAV).	<b>1,5</b>
2nd (possible) ground: the content of the sentence violates the international public order of the Portuguese State (subparagraph ii) of paragraph b) of paragraph 3 of article 46 of the LAV). The sentence is shocking because it is proven that the parties did not conclude the contract. Consequently, condemning for non-compliance, as if it existed, violates the principle of private autonomy, a principle which is part of	<b>1</b>

<p>the international public order of the Portuguese State and which, due to its relevance, is part of the material Constitution material.</p>	
<p>3rd (possible) ground: discussion on whether the <i>iura novit curia</i> principle applies in arbitration as in common law civil proceedings; the violation of the adversarial principle, in the aspect of prohibition of surprise decisions, since the arbitral tribunal, despite not being bound by the legal qualification that parties make of the articulated facts, must inform them of the solution it will adopt in the sentence (subparagraph ii) of paragraph a) referred to in paragraph 3).</p> <p>This if it is considered that such a prior hearing results from the application of the <i>iura novit curia</i> in the context of arbitration (dominant thesis (example: LAV Anotada da APA, António Pinto Leite and António Sampaio Caramelo).</p> <p>OR</p> <p>Contrary thesis: the fact that the court has differently qualified the cause of the plea alleged by the parties is not a basis for the annulment of the sentence, as the <i>iura novit curia</i> does not require the parties to be heard beforehand.</p> <p>Since the facts that justify the cause for</p>	<p>2</p>

<p>requesting invoked in the sentence previously alleged in the initial petition, the fact that the arbitrators qualified them differently does not constitute grounds for annulment under the terms of the aforementioned subparagraph (according to: Mário Esteves de Oliveira).</p> <p>(International case-law: prohibition of the court to decide based on facts not alleged by the parties - England and Wales High Court - Case No. 2009, Folio 1645, G-30).</p>	
<b>Total</b>	<b>5 points</b>