

Res judicata in an international arbitration procedure in Portugal

I THE GOVERNING LAW

1. The Portuguese arbitration law

Arbitrations which take place in Portuguese territory are subject to the provisions of Law 31/86 (Voluntary Arbitration Law: VAL). This is established in article 37 VAL, which draws no distinction between internal arbitration and international arbitration, defining the latter as that in which the interests of international commerce are at stake (article 32 VAL)¹. No exception is therefore provided for cases where in the arbitration agreement

¹ The formulation was taken from article 1492 of the French Code of Civil Procedure (CCP), the vagueness of which has been criticised (BELLET-METZER, **L'arbitrage international dans le nouveau Code de procédure civile**, Revue critique de droit international privé, 1981, p. 615). This is connected with the idea of contract, or other legal act, involving the cross-border transfer of capital, goods or services, to the detriment of the idea of connection of the elements generally relevant in international private law with different legal orders (DÁRIO MOURA VICENTE, **Do direito aplicável ao mérito da causa na arbitragem comercial internacional**, Lisbon, 1989, pp. 22-23).

the parties have established recourse to an organization which offers institutionalized voluntary arbitration ².

The system established in Law 31/86 comprises **mandatory** rules (such as that delimiting the validity of arbitration agreements in terms of the availability of rights, that requiring a written arbitration agreement, that extending to arbitrators not appointed by agreement between the parties the rules on impediments and withdrawal applying to judges, that requiring compliance with certain fundamental principles and that setting certain requirements for the award: articles 1-1, 2-1, 10-1, 16 and 23), **permissive** rules (such as those permitting the parties to decide on the designation of arbitrators or the respective selection procedure, on the choice of procedural rules and the venue, on the time limit for issue of the award, on the governing law or the granting of powers to find in accordance with equity, on the exclusion of appeals or on the admissibility of appeals against awards handed down in international arbitrations: articles 7-1, 15-1, 19-1, 22, 29-1 and 34) and **supplementary** rules (such as those determining that, unless otherwise agreed between the parties, the arbitrators are appointed under the terms of article 7-2, that the deadline for issue of the award is 6 months and that no appeal may be brought against the award of an international arbitral tribunal: articles 7-2, 19-2 and 34).

² These are referred to in article 38 VAL, which deals with the granting, by the Government to certain organizations, of powers for carrying out institutionalized voluntary arbitration. and in article 15-2 VAL, which accepts that the parties' agreement on arbitration rules, and on the respective venue, may result from the choice of the arbitration rules of one of these organizations or the choice of such an entity to organize the arbitration proceedings. See also article 24-2 VAL.

This system brings with it the application of (other) general rules from the Portuguese legal system, from the spheres of private international law, material law and procedural law. For instance: the rules contained in article 1-1 (available right) and article 21-1 (existence, validity or effectiveness of the arbitration agreement or the contract in which it is contained, and applicability of the agreement) call for application of the Portuguese rules on conflict, determining the material law applicable to the arbitration agreement (on similar terms to those for determination of the obligational statute)³; the rules contained in article 18-1 (admissibility of any evidence admitted by civil procedure law) and article 29-1 (admissibility of appeals permitted against decisions handed down by the district court, when the parties have not waived this right) refer us to the rules contained in Portuguese civil procedural law.

Portuguese procedural rules, in particular, constitute the whole background for the system contained in Law 31/86. On the one hand, there are **express references** to them: this is the case of articles 10-1 (impediments and withdrawal), 18-1 (evidence) and 29-1 (appeals), as referred to above, declaring as well as in articles 12-4 (appeal, in general terms, against the decision of a court declaring an arbitration agreement null and void), 26-2 (deeming the arbitral awards to have the same value for enforcement as decisions of the judicial courts at first instance), 30 (enforcement of arbitral awards under the terms of civil procedural law) and 31 (opposition to enforcement of arbitral awards under the terms of the

³ LEBRE DE FREITAS, **Algumas implicações da natureza da convenção de arbitragem** in **Estudos sobre direito civil e processo civil**, Coimbra, 2002, pp. 864-868.

same law). On the other hand, there are numerous **implicit references** to or **deviations**, also implicit, from the general rules: this is the case of article 4-2 (general causes for extinguishment of the proceedings), article 10-2 (general rules on the rejection or suspicion of judges), articles 11-3 and 23-1-c (concept of the subject matter of the dispute) articles 11-4 and 28-2 (concept of the bringing of the action), article 12-4 (claim to the panel of judges against the decision of the president of the appeal court judging an arbitration agreement null and void), article 16 (understanding of the fundamental principles set out in the article), articles 23-1-f and 27-1-d (defect deriving from failure to sign the award), article 23-3 (concept of grounds for decision), article 26-1 (timeframe and concept for an award to become final – *res judicata*), article 27-1-e (concepts of omission of and excessive pronouncement) and article 27-3 (assessment of the annullability of the decision in the course of an appeal). Finally, the fact that parties are given the option of determining the applicable procedural rules and that, if they fail to take up this option, identical powers are granted to the arbitrators (article 15) cannot result in the **mandatory rules of Portuguese procedural law** - such as those governing the procedural preconditions and the formation of *res judicata* – being set aside.

2. The procedural preconditions cannot be determined by the parties

The mandatory nature of the rules governing the **procedural preconditions** (“*pressupostos processuais*”) is clearly expressed in the rule on consideration, on the court’s initiative, of procedural objections

(“*excepções dilatórias*”), save for the objection of relative incompetence (except in the cases of article 110 CCP ⁴) and the failure to bring arbitral proceedings. Neither the principle of **autonomy of will**, which is the basis for voluntary arbitration ⁵, nor the possibility for the parties to dispose of the proceedings (*princípio dispositivo*), which in voluntary arbitration has the same scope as in judicial procedure ⁶, may therefore be invoked to defend the availability, to the parties, of the preconditions of the legal procedural relationship: **the jurisdictional power of the arbitrators**

⁴ Relative incompetence results from breach of the rules on competence based on the value of the cause, the form of procedure applicable or the judicial division of territory, or else deriving from the provisions of a private agreement on jurisdiction or competence (art. 108 CCP). Breach of the rules on competence based on the value of the cause and the form of the proceedings may in all cases be considered on the court's own initiative (article 110-2 CCP). Breach of the rules on territorial competence may in some cases be considered on the court's own initiative (article 110-1 CCP). Other than in these cases, relative incompetence must be alleged by the respondent.

⁵ The principle of autonomy of will is expressed in the arbitration agreement, in relation to the determination of the composition of the arbitral tribunal competent to settle the dispute, the possibility of excusing it from strict application of the law, the option of choosing the applicable material law, when the arbitration is international, and the determination of the rule on the proceedings to be followed. It is also connected with the *princípio do dispositivo*, in the same manner as in the judicial courts, in the act of desisting from the claim, admitting the claim or entering into a settlement.

⁶ The parties are able to request jurisdictional protection or to desist from it, to agree (to a limited extent) on suspension of the proceedings, or to bring them to an end, through a desistance from the claim, an admission of the claim or a settlement, those being acts of a private nature. The parties may also model the proceedings, bringing the claim and basing it on a cause of action. All these forms of conduct are manifestations of the “*princípio do dispositivo*”, as enshrined by Portuguese procedural law (for a more precise description; LEBRE DE FREITAS, **Introdução ao processo civil**, Coimbra, 1996, pp. 123-129), and which, with only some slight differences, are to be found at work in the field of voluntary arbitration (also for a more precise description: RAUL VENTURA, **Convenção de arbitragem**, Revista da Ordem de Advogados, 1986, II, pp. 352-353 and 359-361; LEBRE DE FREITAS, **Algumas implicações da natureza da convenção de arbitragem** cit., pp. 855-860).

derives from the constitutional enshrinement of arbitration ⁷ and, although the constitution of the arbitral tribunal depends on the will of the parties, the conditions without which the law will not allow a judicial decision on the merits do not fall within the scope of “available law” (i.e. matters on which the parties may decide) ⁸.

Given that the non-existence of *res judicata* constitutes a **negative procedural precondition**, in relation to the subject matter of the proceedings, and that the failure to satisfy this precondition, due to the existence of *res judicata* (a procedural objection), leads to acquittal from the proceedings (articles 288-1-e CCP and 494-1 CCP), the matters relating to it are likewise **unavailable**: the parties cannot waive the rules governing it, broadening or restricting the scope defined for it in law. Nor may the arbitral tribunal do this. *Res judicata* may only be considered by the arbitral tribunal on the terms on which it is defined in Portuguese law, and the rules governing it include those which, in addition to those contained in Law

⁷ Article 202-2 of the Constitution of the Republic assigns to courts the function of settling conflicts of public and private interests and article 209-2 CPR considers arbitral tribunals to be included as courts.

⁸ Except for exceptional cases where the court cannot consider the non-satisfaction of preconditions on its own initiative (above, note 5). In these cases, German legal scholarship speaks of *Porzeßhindernisse*, distinguishing this from *Prozeßvoraussetzungen*, which the court may consider on its own initiative (see, for instance, JAUERNIG, **Zivilprozessrecht**, München, 1998, p. 121). The latter includes, as a negative procedural precondition, the non-existence of *res judicata* concerning the subject matter of the proceedings (*idem*, p. 122). *Ex officio* considerability does not extend to the **fact** which may show the precondition not to be met, which have to be submitted to the proceedings by the parties, in accordance with the general rule in articles 264 CPP and 664 CCP; so, as to the facts on which the decision on the merits is based, the general rules apply here on the burden of proof (*idem*, p. 123). Leaving terminology aside, these distinctions are perfectly valid in Portuguese procedural law (see, for all, LEBRE DE FREITAS, **A acção declarativa comum**, Coimbra, 2000, pp. 104-105, and **Introdução** cit., pp. 116 (3) and 134 (49)).

31/86, apply **imperatively** to arbitrations taking place in Portuguese territory.

Article 15 VAL only allows the parties to agree on the **rules on the proceedings** (“*regras de procedimento ou tramitação*”) for the arbitration, as literally revealed by the heading for chapter III in which the rule is contained: articles 15 VAL to 18 VAL relate to the **workings** of the arbitration, to the way in which the arbitral proceedings are conducted, i.e. to the **procedural form**. The other procedural rules (“*normas processuais*”) are contained in the “**arbitration statute**”, a set of adjective rules which arbitrators are required to observe and which are, as a rule, those in force at the arbitration venue⁹. These include those relating to **procedural preconditions** and the **scope of effectiveness of the award**.

3. Res judicata and the law governing the merits of the cause

Moreover, the definition of the scope of effectiveness of the decision is not solely, or even mainly, a procedural question. **The main effect of res judicata is preclusive**: not only does it preclude all the possible **means of defence** of the respondent against whom the award is pronounced, and all the possible **reasons of the claimant** losing the case, but it also precludes,

⁹ DÁRIO MOURA VICENTE, *cit.*, p. 377 (conclusions 3 and 4), and, prior to this, p. 96; JOÃO LOPES DOS REIS, **Representação forense e arbitragem**, Coimbra, 2001, pp. 183 and 196 (in particular for rules on judicial representation).

with wider effect, all allegations on the disputed relationship ¹⁰, as it is **delimited by the decision circumscribed by the respective grounds**, as determined, in turn, by the claim which was brought before the court on the basis of the cause of action; this is fundamentally an **effect of substantive law** ¹¹, and the prohibition of a repetition of the cause or contesting the decision is no more than a consequence on the procedural level ¹². The **procedural rules** do no more than **delimit**, objectively and subjectively, the scope of this substantive definition, calling on the concepts of **claim**, **cause of action** and **party to the proceedings**, and rule on the means of invoking the **objection** of *res judicata* in any fresh proceedings which may be brought. **Given that the main effect of the decision is substantive in nature, the legal system under which we must fundamentally verify the extent of its scope should, in principle, be that applicable to the merits of the cause**, without prejudice to recourse to the procedural rules which

¹⁰ ÂNGELO FALZEA, **Accertamento (teoria generale)** and **Efficacia giuridica**, Enciclopedia del diritto, Milano, Giuffrè, respectively I, pp. 504-506, and XIV, pp. 213-214 and 217; LEBRE DE FREITAS etc., **Código de Processo Civil anotado**, Coimbra 2001, p. 679. As I state below (section 5), the principle of the merger of claims or causes of action does not hold in Portuguese law, meaning that the preclusion does not cover claims not brought or causes of action not invoked. This is what we precisely read in ALBERTO DOS REIS, **Código de Processo Civil anotado**, Coimbra, 1984, V, p. 174, MANUEL DE ANDRADE, **Noções elementares de processo civil**, Coimbra, 1979, p. 324 (citing the maxim of *tantum judicatum quantum disputatum vel disputari debet*, expressly with this reduced scope), and myself. The **reasons** of the claimant are his **arguments** or **conclusions** (of fact or law), not the facts on which the action is based (**cause of action**) nor the **claim** which is based on them. These distinctions are consensual under Portuguese civil procedural law. See also below, notes 23 and 41.

¹¹ ÂNGELO FALZEA, **Efficacia giuridica** cit., pp. 506-507. The legal situations of the parties are configured on the terms set out in the decision, whether or not this corresponds to the pre-existing substantive reality.

¹² LEBRE DE FREITAS, **A confissão no direito probatório**, Coimbra, 1991, p. 291 (67).

made it possible to reach this outcome and to those which make it possible to prevent it being set aside in fresh proceedings.

These affirmations are wholly valid for arbitration. Accordingly, once an arbitral award has been handed down in Portuguese territory, it is **interpreted** and its **content delimited** in the light of the law applicable to the underlying cause, even if to this end it is necessary to have recourse also to the rules of Portuguese procedural law which define *res judicata*, claim, cause of action and the parties to the proceedings. When the objection of *res judicata* is later on invoked in subsequent proceedings, the means which is used for this is determined according to the procedural rules for the new proceedings; but the acceptance of this objection depends on the delimitation of the content of the previous decision, in the light of the rules applied in the preceding arbitration.

4. The subsidiarity of local procedural law

We would arrive at the same practical outcome if we considered that the delimitation of the effectiveness of the decision is determined solely on the basis of application of procedural rules and that the granting to the parties of the faculty – and, on a subsidiary basis, to the arbitrators of the power – to determine the applicable procedural rules refers not only to the rules on the proceedings (*regras de procedimento*), but also extends to the rules on the procedural preconditions and the force of the arbitral award. In the first place, this faculty enjoyed by the parties (or power enjoyed by the

arbitrators) would have to be understood as limited to a **choice between systems** of positive law; it would be unacceptable if this were extended to the creation of *ad hoc* procedural rules, as the way forward would inevitably be blocked by the wall of **unavailable rights**. However, if the parties (or arbitrators) have made no such choice, the **procedural law of the arbitration venue** will always apply.

This second conclusion is in fact that usually reached when we pose the problem of determining the rules of arbitral procedure, in cases where the parties have neither chosen them nor (to the extent to which they can do so) established them on an *ad hoc* basis.

This is what follows from the main arbitration conventions in force:

- Article V.1.d. of the New York Convention of 10.6.58 enshrines, as grounds for refusal to recognize and enforce arbitral awards, the non-conformity of the constitution of the arbitral tribunal or the arbitration procedure to the law of the **country where the arbitration took place**, when the parties have not agreed on such rules;
- Although article IV.1.b.3 of the European Convention on International Commercial Arbitration of 21.4.61¹³, which grants the parties the right to determine the procedural rules to be followed by arbitrators in *ad hoc* arbitration, does not contain a

¹³ Portugal is not a party to this convention.

subsidiary rule, it is understood that the applicable law is **that of the arbitration venue**¹⁴;

- Article 2.1 of the Geneva Protocol of 1923 lays down that arbitration procedures are governed by agreement between the parties and by the legal rules of the **place where the arbitration proceedings take place**, which is understood in the sense of these only applying on a subsidiary basis, in the event of the parties making no provision^{15 16}.

It is therefore necessary to be cautious when, in procedural matters¹⁷, arguments are presented, in the name of progress in the principles of arbitral jurisprudence, in favour of recourse to **autonomous** concepts and principles of international arbitration. Personally, I believe that, in one way or another, the application of a national system of rules is **always** the solution, **in respect of all matters on which the parties have not directly reached agreement, to the extent permitted to them**, and that this system

¹⁴ SCHWAB-WALTER, *Schiedsgerichtsbarkeit*, München, 1990, pp. 421-422.

¹⁵ SCHWAB-WALTER, *cit.*, pp. 422-423. By place where the arbitration proceedings take place is understood the place where the arbitral tribunal functions.

¹⁶ See also the case of arbitral courts of the corporate type referred by MOURA VICENTE, *cit.*, p. 95 (2).

¹⁷ As for determining the applicable substantive rule, a minority current in legal scholarship argues in favour of recourse to an **autonomous system** for resolving conflicts of law in international commercial arbitration. This solution, defended by, amongst others, GOLDMAN, FOUCARD and LALIVE, necessarily ends up by calling on mere general principles of private international law, unable to resolve the multiple problems which are solved in the positive systems and contributing to a degree of **arbitrariness**. For this reason, the majority of legal scholars argue that the applicable system of conflict rules is that in force **in the State where the arbitration takes place**, on terms analogous to those prevailing in proceedings before the judicial courts. See MOURA VICENTE, *cit.*, pp. 85-94. The situation is obviously different in cases where the parties grant the arbitrators powers to decide *ex aequo et bono*.

is, in the field of arbitral procedure, that one which the parties or, on a subsidiary basis, the arbitrators have chosen ¹⁸ and, in the absence of such a choice, the one in force in the **State in which the arbitration takes place**. But, even if this were not the case in the field of the parties' available rights, it would have to be so in the field of the **unavailable procedural law**, which cannot be replaced by general principles not compatible with it. In the case in hand, as the parties did not choose a national system, we inevitably arrive at application of Portuguese procedural law, at least – I repeat – in the field of unavailable rights ¹⁹.

5. Merger of claims and causes of action

It is therefore inadmissible, in arbitrations taking place in Portuguese territory, to apply, as imperative, procedural principles not enshrined in Portuguese procedural law and which the parties, to the extent to which

¹⁸ The granting to the parties, in the first place, and subsequently to the arbitrators, of this possibility of choice is not exclusive to Portuguese arbitral law. The same rule exists, for instance, in the Rules of the European Court of Arbitration (article 11-1), in the Rules of the London Court of International Arbitration (article 14) and in the Arbitration Rules of the Milan Chamber of National and International Arbitration (article 15-1). Arbitration rules usually contain a rule on the choice of the applicable procedural rules, normally going this in such a way as makes it clear that they are referred **only to the rules on the proceedings**, even when arbitrators are granted the power to conduct the proceedings in keeping with their prudent discretion (article 15-1 of the UNCITRAL Rules).

¹⁹ Either by way of rules of the arbitration statute (section 2, above), or else by way of the rules of the procedural system directly or indirectly chosen, the mandatory rules cannot cease to apply, and always take a national system as their reference. The difference lies in the fact that, in the second hypothesis, this system might not be that of the arbitration venue. In any case, I only posit this second hypothesis in order to confirm the conclusions already reached (above, section 3), which I deem to be correct (see also below, section 6).

they are permitted to do so, did not even expressly stipulate. This is the case with the **principle of merger of claims**, which does not hold in the Portuguese legal system: in civil procedure, the plaintiff **may** accumulate against the defendant claims which are compatible with each other (article 470 CCP) or else bring subsidiary claims against him (article 469 CCP); the defendant **may**, in certain cases, bring a counterclaim against the plaintiff (article 274 CCP); but neither the plaintiff nor the defendant have the **duty** or the **burden** of doing so. Nothing to the contrary being established by Law 31/86, it would constitute a breach of the **right of access to Justice** to prevent a party from bringing, in subsequent proceedings (arbitral or judicial ²⁰), claims which it did not bring in the first (arbitral) proceedings, when nothing was agreed (by the parties) or established (by the arbitrators, in good time for the parties) to this effect. The same may be said of the **accumulation of causes of action** or the bringing of subsidiary causes of action ²¹: Portuguese civil procedure law does not require that they be concentrated in one set of proceedings; a party may therefore avail itself in subsequent proceedings of a cause of action not invoked in the original proceedings (article 498-1 CCP, *a contrario*). Nothing to the contrary being established in Law 31/86, here too the right of access to justice, solemnly enshrined in article 20 of the Constitution of

²⁰ When the award is deposited, the jurisdictional powers of the arbitrators are extinguished **in relation to the subject matter of the proceedings** (article 25 VAL); but this does not prevent a new arbitral tribunal from considering **other subject matters** covered by the arbitration agreement. If this lapses, on one of the grounds provided for in article 4 of the VAL, the judicial court reacquires the power to consider them.

²¹ Other than for objections: Portuguese civil procedure law acknowledges the principle of **merger of defence** (article 489 CCP). See above, section 3.

the Republic, does not allow exercise of this right to be impeded ²². Moreover, this principle of merger, if it existed, would have to be observed in the first arbitral proceedings: **it would not be up to the second arbitral tribunal to consider it as an (undeclared) procedural rule of the first arbitration**; nor could this be defended on the grounds of extension of the *res judicata*, on which article 26-1 of Law 31/86 says nothing which departs from the general rules.

Only the theory of the **abuse of law** could, in some highly exceptional cases, restrict the right of the plaintiff to bring proceedings against the same defendant, without **repeating** the cause. And this applies as much before arbitral jurisdictions as before state jurisdictions.

6. The ICC Rules and the local procedural law

Article 15 of the ICC RULES in no way undermines this understanding, insofar as it states that the provisions of the rules themselves shall apply to the arbitral proceedings and, in the case of omissions, the applicable rules shall be those which the **parties** or, on a subsidiary basis, the **arbitrators** determine, with reference or not to an internal procedural system applicable to the arbitration.

²² The cause of action should not be confused with the **arguments** or **reasons** invoked as grounds for the claim, as dealt with, apparently, in the award of the ICC in 1984 cited in section. 10 of Prof. PIERRE MAYER's Opinion. In state jurisdiction also, causes cannot be repeated in order to invoke new reasons or grounds for them. As we shall see more amply below, the cause of action is merely the **legal fact** on which the claim is based.

This provision, dating, as article 11, from 1985, replaced the former article 16, under which, in cases where the rules made no provision, the procedural law chosen by the parties should apply or, if they made no such choice, the legal rules of the State where the arbitration took place.

The substitution of the old article is justified by the new understanding of the role of the parties and the granting of a role to the arbitrators in determining the rules applicable to arbitration, which could subsequently be created *ad hoc*, permitting “a **considerable degree** of detachment from the local procedural law”²³. But this detachment is not so justified when the jurisdiction of the arbitration venue has a **modern arbitration law**²⁴ and is always limited by the **mandatory legal framework** of such jurisdiction, with respect for the way in which the

²³ CRAIG – PARK – PAULSSON, **International Chamber of Commerce Arbitration**, Oceana Publications/USA, 2000, p. 296. The arbitrators’ freedom of action in the creation of procedural rules could lead them to exclude expressly the application of local procedural rules (concerning evidence, for instance) or to institute a “step by step approach” within the terms of reference (*idem*, pp. 300-301); this final procedure is, moreover, preferable to being tied to a catalogue of procedural questions which the course of proceedings may show to be insufficient (POUDRET-BESSON, **Droit comparé de l’arbitrage international**, Bruxelles, 2002, pp. 490-491). For an overview of the evolution in arbitral case law, from the first discussion of whether the parties could chose a procedural system different from that of the arbitration venue up to the admission of the creation of *ad hoc* procedural rules and the stipulation of the sufficiency of the institutionalized rules of an arbitration organization, see MAURO RUBINO SAMMARTANO, **International Arbitration Law and Practice**, The Hague – London – Boston, Kluwer Law International, 2001, pp. 475 – 501.

²⁴ CRAIG – PARK – PAULSSON, *cit.*, p. 299. This is the case of the Portuguese law.

respective State exercises the **power of regulating and controlling arbitration** conducted in its territory²⁵.

It is denied that the choice of an arbitration venue, especially when made by the Cour Internationale d'Arbitrage, **implies** the intention of the parties to apply the respective procedural law to the arbitral proceedings²⁶. But it is affirmed that this does not excuse the arbitrators from making “every effort” to hand down **decisions enforceable in accordance with local law**²⁷.

The parties’ and arbitrators’ freedom of choice is always affirmed in relation to the **rules on the proceedings** and the examples given are also always of proceeding activity. The use of the term *procédure* in the French text²⁸ and the term *proceedings* (without any more general reference to *procedural law*) in the English text of article 15 of the ICC RULES leads, in fact, to the conclusion that, as in article 15 VAL, only the rules on the proceedings, or the **forward progress of the process**²⁹, may be determined by the parties and, if they fail to do so, by the arbitrators. In addition to these, there are those which govern the arbitration as such, i.e.

²⁵ CRAIG – PARK – PAULSSON, *cit.*, pp. 296 and 499; MAURO RUBINO SAMMARTANO, *cit.*, pp. 485-486 (to this extent, it is not possible to speak of “totally nationless” arbitral proceedings), 488 and 500.

²⁶ CRAIG – PARK – PAULSSON, *cit.*, pp. 297-298.

²⁷ CRAIG – PARK – PAULSSON, *cit.*, p. 298; MAURO RUBINO SAMMARTANO, *cit.*, pp. 498-499.

²⁸ “Règles applicables à la **procédure**”. See the definition in **Dictionnaire de la Justice** of *Presses Universitaires de France* (under the directorship of Loïc Cadiet), Paris, 2004, p. 1082: “La procédure est cette **marche en avant**, cette **succession d’actes** faits dans les délais requis, qui permet d’aller de l’action en justice au jugement”.

²⁹ POUDRET – BESSON, *cit.*, p. 484: “The set of rules which govern the forward progress of the process before the arbitrators”.

those especially enshrined in **internal arbitration laws** and, as these don't constitute complete laws, those which make up the **frame of reference for the respective mandatory rules** ³⁰.

As we have seen, **these include those which govern the preconditions and the scope of effectiveness of the arbitral award on the merits** ³¹.

7. The three requirements of repetition

Lis pendens and *res judicata* both require repetition of the cause (article 497-1 CCP), which is based on a threefold correspondence: **the subjects, the claim and the cause of action must all be identical** (article

³⁰ See the distinction made in POUDRET – BESSON, *cit.*, pp. 483-84, between the rules applicable to the arbitral proceedings (the rules governing the forward movement of the process) and the likewise procedural rules which govern the arbitration as such: the autonomy of the parties is limited to the former: as to the latter, the parties can do no more than choose the arbitration venue and thereby, **indirectly**, opt for the arbitration law in force in such venue, observing the limits on the autonomy which this grants them. See also para. 6 of the commonly cited arbitral award of the ICC of 16.7.86 (case 5029): “The currently prevailing interpretation of the ICC Rules is also that the mandatory provisions of the arbitration law of the arbitration venue govern the arbitration (...), even if other procedural rules are chosen by the parties or by the arbitrator”.

³¹ This is also the case of the principle of *jura novit curia*, according to the Swiss Federal Court. The fact that breach of this does not constitute grounds for annulling the arbitral award (POUDRET – BESSON, *cit.*, pp. 510-511) does not mean that the arbitral tribunal, provided it does not function *ex aequo et bono*, should not observe it (the arbitrators should consider on their own initiative the questions of law, by imposition of article 664 CCP, notwithstanding that they may only do so after hearing the parties, in accordance with the principle of contradiction – “*princípio do contraditório*” –, which article 3-3 CCP also imposes), without prejudice to the parties being able to agree, in the arbitral proceedings, to the solution of pre-judicial questions of law (LEBRE DE FREITAS, **Algumas implicações da natureza da convenção de arbitragem**, *cit.*, pp. 860-864).

498-1 CCP). Given that the claim, necessarily substantiated by a cause of action, constitutes the subject matter of the proceedings, we may say, in other words, that the cause is repeated when there is a fresh action between the parties with the same subject matter, i.e. with the same claim based on the same cause of action.

So, and according to what was previously said, the decision pronounced by arbitrators within Portuguese territory doesn't prevent the claimant to bring further claims against the same respondent which he could have already submitted to the first arbitration: for example, given that the effect of *res judicata* is contained within the scope of the subject matter of the proceedings in which the award is handed down, and that this subject was modelled by the claimant, according to the *princípio do dispositivo*, the decision to order the debtor to pay principal without interest does not, save in the event of remission of the debt (article 863 CC), prevent the creditor, which has not claimed them, from doing so subsequently³². As the creditor is not burdened to claim interest when he claims the principal (above, II.5)³³, the right to such interest persists and may be exercised in fresh

³² Only in the event of acquittal from the claim for payment of capital would this be impossible, due to **implication** of *res judicata*: it would make no sense to be acquitted from the obligation to pay capital and then to have to pay the interest.

³³ This understanding is consensual in Portuguese legal scholarship and procedural case law. The freedom to claim, in a fresh action, that which was not claimed in the first (above, II.5) only does not exist when, exceptionally, the type of the new action has a limited purpose (e.g. an action for rendering of accounts) or when the claim refers to a **non-separate part of the homogenous object of a right** and the court decides to **acquit** or to order payment of **less** than what was claimed (if the creditor of 100, due all for the same cause, claims only 60 and the court considers that nothing is due or only 30 is due, it is not possible thereafter to claim the remaining 40; but, if the defendant is ordered to pay the 60, the claimant may subsequently claim the other 40). CASTRO MENDES provides a very clear explanation in this respect in **Limites**

proceedings. We might consider, moreover, that, when it is constituted, interest credit **exists independently** of the principal credit, and each may suffer particular vicissitudes which might not affect the other (article 561 CC).

The failure to claim interest, in conjunction with the principal credit, does not, in itself, imply any **waiver**, nor does a subsequent claim for the interest amount to *venire contra factum proprium*.

The same will apply for the cause of action.

According to the **principle of substantiation**, all claims are based on a cause of action³⁴; this is the case in both arbitral and judicial jurisdictions³⁵.

objectivos do caso julgado material em processo civil, Lisbon, 1968, pp. 263-278. See also LEBRE DE FREITAS, **Código de Processo Civil anotado**, cit., p. 320. Interest and principal do not form a homogeneous whole. Nor, in the case in hand, do the various sums whose reimbursement is claimed be homogeneous, notwithstanding that each of them is in itself homogeneous. We may identify homogeneity in the 100 € which A lends B, but not in the object of two loans of 50 € which one makes the other, and the repayment of which he seeks in the same action, whilst separating the two acts which gave rise to them. No loss accrues to the defendant as a result of this: if, in the event of the plaintiff not having claimed all he could have done, the defendant does not want to be subject to fresh proceedings, what he has to do is requesting, **in a counterclaim**, that the court pronounces on the part not claimed (namely, requesting a judicial declaration that it is not due, which Portuguese procedural law allows him to do: this is an **action for mere negative assessment**, as provided for in article 4-2-a CCP).

³⁴ LEBRE DE FREITAS, **Introdução** cit., pp. 53-54.

³⁵ LEBRE DE FREITAS, **Algumas implicações da natureza da convenção de arbitragem** cit., pp. 855-856.

The cause of action consists of the **facts constituting** the legal situation asserted by the plaintiff as the material content of the claim it brings to the court. In simple terms, article 498-4 CCP defines this as the **legal fact** from which the claim brought proceeds. But the cause of action is **normally complex**, and this is always the case when there are several facts which have to be verified in order for the requirements of the applicable rule of substantive law to be met, bringing about the effect sought by the plaintiff in bringing his claim ³⁶. Moreover, although it takes as its reference the rules of substantive law which the plaintiff invokes, the cause of action is not the sum of the **abstract facts** configured in law, but rather the sum of the **concrete facts** invoked by the plaintiff, such as may, according to him, produce the legal effect sought ³⁷. It is because there are complex causes of action that article 264-1 CCP speaks of the “**facts** which make up the cause of action” and article 467-1-d CCP speaks of “setting out the **facts**”.

An example of a complex cause of action is the concrete case of liability. In extracontractual liability, it is constituted by the **facts which make up** unlawful breach of another party’s right or interest, the fault, the damage and the causal link. In contractual liability, it is constituted by the

³⁶ ADRIANO VAZ SERRA, **Anotação ao acórdão de 15.10.71**, Revista de Legislação e Jurisprudência, 105, p. 220.

³⁷ JOSÉ ALBERTO DOS REIS, **Código de Processo Civil anotado**, Coimbra, 1981 (reprint), III, pp. 123, 125, 127 and 132; LEBRE DE FREITAS etc., **Código de processo Civil anotado**, cit., p. 325 (the legal classification is not an element identifying the cause of action or *res judicata*); judgement of the Supreme Court of Justice of 24.5.83, **Boletim do Ministério da Justiça**, 327, p. 653. In a recent work it is affirmed that Portuguese legal scholarship is **unanimous** in respect of this concept of the relevant cause of action for the objection of *res judicata* (MARIANA FRANÇA GOUVEIA, **A causa de pedir na acção declarativa**, Coimbra, 2004, p. 431).

facts which make up the contract, the non-performance of a duty deriving from it ³⁸, the damage and the causal link. Any of these factual elements (including those of the damage) are themselves normally complex. Once the preconditions for the existence of one or other type of liability are found to exist, there is the duty to compensate, constituted, in the latter case, between the defaulting debtor and the creditor holding the right to non-rendered performance of a duty.

The cause of action – we repeat – should not be confused with the legal requirement: it is rather the collection of **concrete** facts which meet the **abstract** requirement of the law. In the same way as each purchase and sale of a single piece of property constitutes a different cause of action from the request for delivery of the sold property, although they both meet the requirement of the same legal rule which assigns to the contract of purchase and sale the effect of constituting this obligation, the damage deriving from the payment of sum x by **A³⁹ to B**, in compliance with a contract concluded between the two, is part of a cause of action different from the damage deriving from reimbursement by **A to C**, on the terms established in a contract between the two, of sum x which **C paid to B**, in performance of a contract concluded with this.

³⁸ Non-performance of a duty - as was in fact stressed in the judgement of the Supreme Court of Justice cited in the preceding note – cannot constitute the cause of action; the cause of action is the concrete fact, invoked by the plaintiff, which in his view amounted to non-performance.

³⁹ Or by a department of A, albeit formally possessing legal personality, to be disregarded or lifted.

It should be noted that we are here dealing with the **essential** or **principal facts** of the cause, and not with the facts called **probative** or **instrumental**. These do not even need to be alleged and, as they are not directly crucial for the decision, merely have the function of making it possible to arrive at proof of the principal facts, these directly meeting the requirement of the legal rule which, according to the claimant, is applicable⁴⁰.

⁴⁰ LEBRE DE FREITAS, *Introdução* cit., p. 135. As we may read in the passage stating the grounds in the judgement of the Coimbra Appeal Court of 23.10.90, *Colectânea de Jurisprudência*, 1990, IV, p. 78, only the essential facts are of interest to the cause of action (and to objections), not the instrumental facts, which are only of interest in order to demonstrate the reality of the essential facts. In this case, the claimant, having been the victim of a road accident, sought to prove in a new action the facts which made up the causal link (imputation of the injuries he presented to the accident), **already alleged, but not proven**, in the first action, on the grounds that he had undergone medical examinations which made it possible now to reach this conclusion; he alleged, in addition, that the injuries he described in the previous action had **worsened**. The principal facts of the cause were **exactly the same**; only the means of proof were different, and also, to a slight extent, the consequences of the **injuries which, in the previous action, had not been proven to be due to the accident**. The situation therefore bears no similarity to the case in hand in this opinion. The summary of the judgement is, moreover, elucidative: “It having been alleged in the first action that, as a consequence of the accident, the plaintiff suffered certain injuries which were not proven to be a consequence of the accident, it is not possible to invoke the same injuries in a new action to obtain relief, on the basis of new evidence to be produced which connects the injuries with the accident” (there is no reference in the summary – nor was there any need for any – to the worsening of the injuries). The essential or principal fact, **whatever concrete form it takes, directly** meets the requirement of the legal rule which is asserted as being applicable. Accordingly, the allegation made being deemed to model the cause of action, the lack of proof of the **alleged fact** is essential and, without **alteration** of the cause of action, it cannot be replaced with the proof of another fact **not alleged**, which supposedly meets, as an alternative, the requirement of the rule; it can instead be replaced with the proof of **probative** facts which make it possible to conclude that the essential alleged fact actually occurred.

CONCLUSIONS

1. Arbitrations which take place in Portuguese territory are subject to the special mandatory rules of Law 31/86, of 29 August, and also to the general mandatory rules of Portuguese procedural law, which together constitute the arbitration statute.
2. The parties and, on a subsidiary basis, the arbitrators are only permitted to agree on the rules on the arbitration proceedings, and may not do this in respect of other procedural rules of a mandatory nature.
3. The general mandatory rules applicable to arbitration include those which govern the procedural preconditions and those which, in procedural law, define the scope of effectiveness of the jurisdictional decision, which, in all matters not specifically regulated in the voluntary arbitration law, apply to the arbitration proceedings in the same way as to judicial proceedings.
4. It should however be borne in mind that the interpretation and definition of the effectiveness of the award are subject to rules of substantive law and that the main effect of *res judicata*, from which its procedural effects derive, consists of fixing the legal situations of the parties, on the level of substantive law.

5. In international arbitration these substantive aspects are subject to the law applicable to the merits of the cause, as determined by the parties or, on a subsidiary basis, by the conflict rules in force in the State where the tribunal arbitrates the dispute.
6. Likewise, questions on proceedings which are not resolved by the designation of the procedural rules by the parties or, on a subsidiary basis, by the arbitrators, are resolved in accordance with the procedural law of the arbitration venue, without prejudice to the possibility of the arbitrators deciding on a “step by step approach”, which might allow them to create the applicable procedural rules, as required by the evolving needs of the proceedings.
7. We therefore need, as for arbitrations which take place in Portuguese territory, to establish whether the parties, the claim and the cause of action all coincide, as Portuguese procedural laws allows the accumulation of claims or causes of action, but does not establish, for the claimant (or counterclaimant), the principle of merger (save in respect of legal reasons or arguments).