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The voice of the profession

Busy summer for sports lawyers

The expert witness controversy

Switzerland in focus

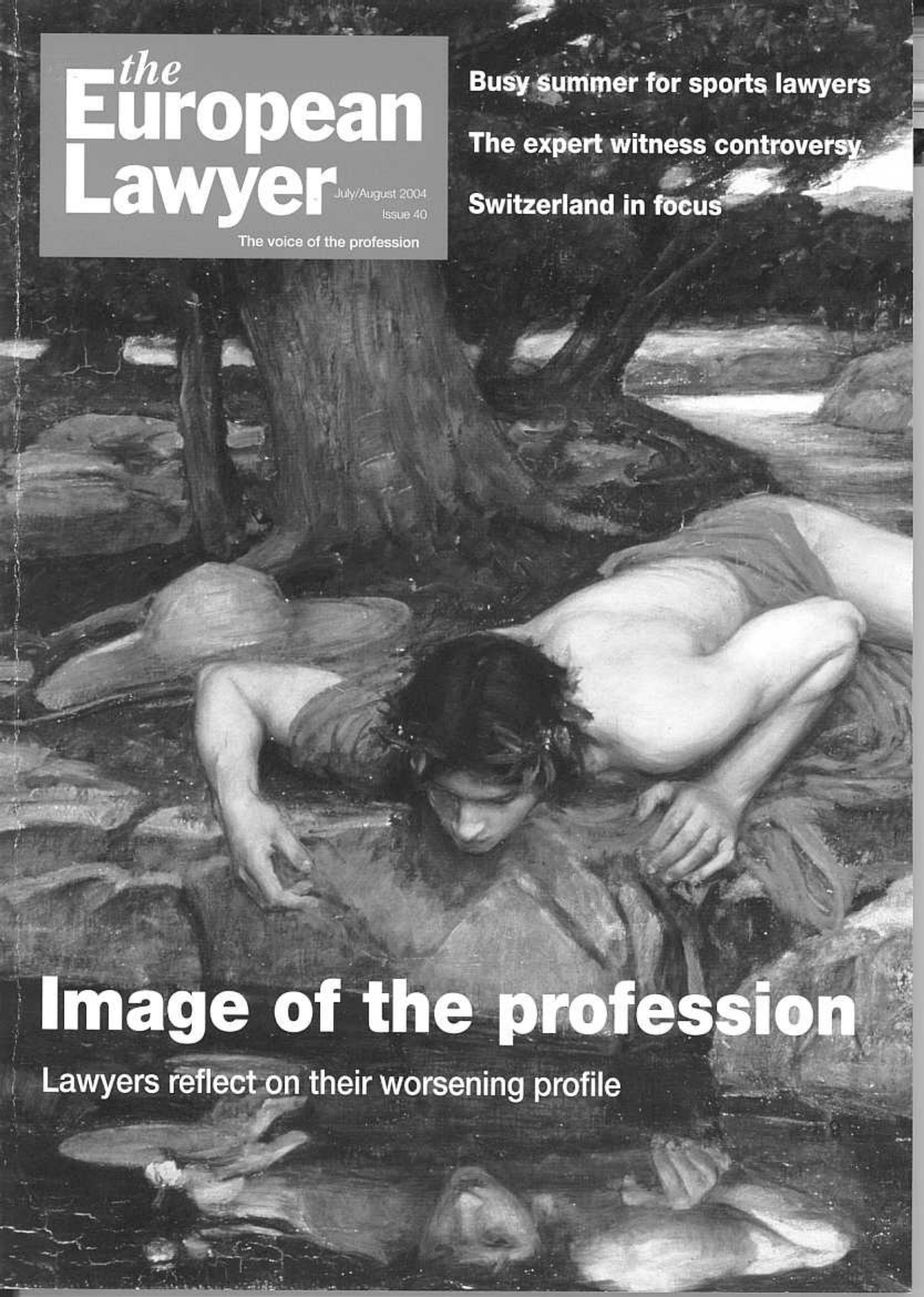

Image of the profession

Lawyers reflect on their worsening profile

Litigation and arbitration in Portugal

Portuguese judicial courts have been facing exceptional delays in the past ten years manly due to the exponential increase in the number of claims filed. Many changes in the procedurals have been recently introduced but their practical effects are yet to be seen. Although the judicial procedures have suffered great improvements, the shortage of immediate results has contributed to the growth of the arbitration/mediation field.

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I. LITIGATION OVERVIEW

The possibility of a double grade of appeal together with the very substantial increase of litigation in the past ten years led to an accumulation of cases in the Portuguese Courts that rendered them incapable of providing fast solutions for disputes, regardless of their nature or complexity.

Nevertheless, matters claiming a fast outcome may be solved by injunction orders and interim measures: these are handled as urgent proceedings and, though transitory, the decisions are determined by inference, with the purpose of preventing or stopping a specific law violation.

The process is organised in two main stages, a written phase where pleading are exchanged (theoretically one from each party but often the Claimant is entitled to file a reply). Both parties should in principle present all their arguments in this stage, as well as all documentary evidence. In the end of that stage a preliminary hearing is held in order either to decide the case (if the Judge considers that he already had all relevant information) or to establish the list of facts that can be considered as agreed by the parties in the pleadings and the facts that remain under dispute. Upon the conclusion of this hearing a new phase commences, where additional evidence shall be produced, witnesses heard and a trial held. Except for very specific situations witnesses are not allowed to file written statements and parties are not allowed to offer their own statutory representatives as witnesses.

The Court will then render a decision on the facts, where he will state which of the facts contained in the list prepared at the preliminary hearing are considered proved and which are not. Parties will have the opportunity to file an allegation on the applicable law and thereafter the Judge will issue his final decision.

II. ARBITRATION OVERVIEW

Arbitration is generally accepted by Portuguese Law as a means for settlement of any litigation, whether it be of commercial nature or not. The only matters left out respect to the so-called unavailable rights, as well as to those cases that the law refers directly to Judicial Courts.

The law also allows the existence, through legal approval, of institutions authorised to conduct arbitrations whose main advantage is the avoidance of some dilatory measures that are made possible by the terms that regulate the ad-hoc arbitration.

Given the ever increasing complexity of litigations, the lack of means on the part of the Judicial Courts to decide conscientiously, and the consequently slower and slower pace of law, the recourse to arbitration appears more and more as a solution to be pondered by the parties to a contract.

Portuguese law distinguishes the arbitration convention between an "arbitration compromise" (when the this convention is entered into by the parties in a moment when the litigation already exists) and an "arbitration compromise" (when the clause is adopted before the happening of a litigation).

The most relevant difference is that in the case of arbitration compromise it is not sufficient to refer to the previous relation from which the litigation emerges, but the parties must define precisely the object of litigation.

The arbitration clause must be established in writing. However, the Law accepts it to be contained in a letter, fax or other writing, or even in a separate document the parties refer to.

The clause may just prescribe the arbitration as a means for settlement of litigations or, on the contrary, stipulate the number of arbitrators, indicate their names, the terms of their resolving, the procedural rules applicable, the place of arbitration, the time for delivering an award, etc..

The party wishing to start arbitration must inform the other party by registered letter return receipt requested. Such letter must define the object of litigation and indicate the arbitrator or arbitrators. No pleadings are supposed to be filed at this stage, although nothing prevents the parties from doing that.

The law does not establish any limit to the number of arbitrators, only requiring it to be uneven. The parties may legitimately entrust a third entity with the task of appointing the third arbitrator. In most cases, a party indicates its arbitrator and suggests the name of the third arbitrator, inviting the other party to accept him.

The Counter-Party shall have 30 days to answer and to indicate amendments to the object of litigation (counter claim) and its arbitrator. If no agreement is reached regarding the name of the remaining arbitrator, each party may request a Court of Appeal to appoint it. Such appointment shall be binding.

The Tribunal is deemed to be set up at the moment when the last arbitrator is appointed, which should only happen upon the definition of the scope of the dispute.

The law establishes a 6 months' term for the award to be delivered, but the

parties may establish a different term or extend this term up to twice its length. If an award fails to be delivered within the established term, the arbitration clause is forfeited and it will be necessary to resort to Judicial Courts.

The parties may agree on the rules of process to apply in arbitration; if they fail to do so, it will be for the Tribunal to choose. The law only imposes absolute respect of the right of defence and the right to adversary proceedings (where a party is afforded an opportunity to contest the request or statement brought by the other party), and also establishes that all means of evidence will be admitted, as long as admitted by the Civil Procedure Law.

After an award has been delivered, it must be notified to the parties and subsequently deposited before the Court of First Instance of the County of arbitration, and the President must notify the parties accordingly.

Such deposit may be exempted by agreement of the parties or, if some institutionalised arbitration rules have been adopted, if such rules provide for a different form of deposit. The award delivered and deposited will be worth as a sentence of a Court of First Instance.

The law establishes a distinction between challenging the award and appealing from it: The first is always possible, even if the parties have renounced the appeal. The grounds are very limited and respect to the impossibility of settling the dispute through arbitration, incompetence of the Court, disrespect of the parties' procedural rights, lack of signature by the arbitrators or absence of foundation or, last, disrespect of the fixed object of litigation.

For challenging an award, a separate claim must be filed with the Judicial Courts within a month from the date of notification to the parties. This suit does not suspend a possible enforcement of the arbitral award.

In its turn, an appeal from the arbitral award will only be admitted if the parties have not renounced it (which shall have to be expressly stated). An arbitral award is considered to be final from the moment it can no longer be subject to appeal.

The law allows the parties to agree on settling the question through recourse to equity. Such agreement implies necessarily a waiver of the possibility of appealing.

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