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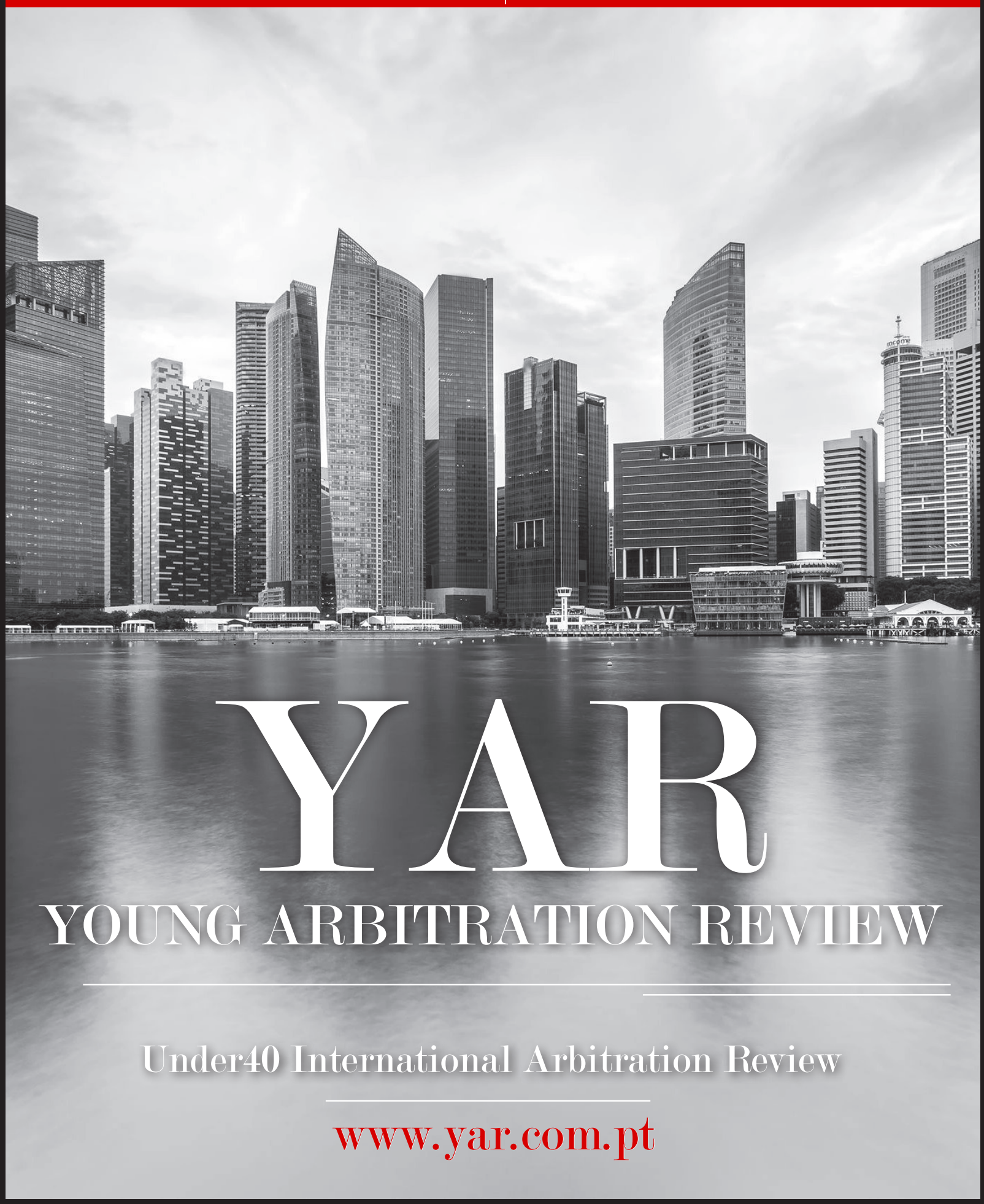

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CONFIDENTIALITY IN PORTUGUESE SPORTS ARBITRATION: WHAT LESSONS CAN WE LEARN FROM CAS?

By Artur Flamínio da Silva and António Pedro Pinto Monteiro

1. Introduction

Confidentiality is usually portrayed as one of the main advantages of arbitration. Historically, it is one of the central reasons why so many parties turn to arbitration instead of court litigation[1].

In recent years, the importance of confidentiality in arbitration has started to be questioned. Due to reasons of transparency, many authors and case law have reiterated the idea that confidentiality is not an inherent feature of arbitration[2] and, more importantly, that in certain disputes there is a conflict between publicity and confidentiality that should not be underestimated.

This type of criticism has so far been made mainly where states and public entities are involved (such as in investor-state arbitrations[3]). Nonetheless, these are not the only cases in which the confidentiality of an arbitral proceeding might become an issue. Sports arbitration can also present some difficulties in this matter.

In this article we will briefly analyse the conflict between publicity and confidentiality in sports arbitration, particularly considering the regulation of the recent Portuguese Court of Arbitration for Sport[4].

2. Publicity vs. Confidentiality

"*Not only must Justice be done; it must also be seen to be done*". This well-known aphorism (from *R v Sussex Justices, Ex parte McCarthy*) is usually quoted to emphasise the importance of publicity in state court proceedings[5].

Given such importance, it is therefore not surprising that all major international declarations, conventions, etc., include publicity as part of the right to a fair trial. This can be seen, for instance: (i) in the Universal Declaration of Human Rights

(article 10), (ii) in the European Convention on Human Rights (article 6), and (iii) in the Charter of Fundamental Rights of the European Union (article 47).

However, despite its importance, publicity is not an absolute principle. In fact, it can present some problems that justify the existence of exceptions[6]. These difficulties are particularly felt in arbitration, where publicity may compromise one its major advantages: confidentiality.

As it is well-known, there are many situations in which confidentiality is essential to the parties, especially when they want to protect their trade secrets, business activities, know-how, sensitive information, etc.[7] Such concerns are quite understandable. Also, as many authors rightfully put it, public disclosure can sometimes encourage a "trial by press release" and may jeopardise negotiations between the parties[8].

Compared to court litigation, arbitration is usually a better answer to these concerns[9]. Given the contractual and private nature of arbitration, it is reasonable to consider that arbitration proceedings are generally confidential[10]. Some even posit that "an implicit duty to observe confidentiality flows from the arbitration agreement"[11]. It is therefore not surprising that confidentiality is the rule in several arbitration laws, like, for instance, the Portuguese Arbitration Law (despite the existence of exceptions)[12].

Nevertheless, it is important to note that this does not mean that arbitration is a synonym to confidentiality. This has become evident in the arbitral community, particularly since the famous *Esso Australia Resources Ltd. and others vs. The Honourable Sidney James Plowman and others* case, in 1995[13].

Although it is clear that confidentiality in arbitration does not violate due process (as the European Court of Human Rights has already observed[14]), there are situations where such confidentiality presents some problems. One of them occurs where states and public entities are involved (such as in investor-state arbitrations). The other one concerns sports arbitration, which we will see in the next chapter.

3. Confidentiality of arbitral awards in Sports Arbitration: the solution of CAS

Sports arbitration is commonly seen as more transparent when compared to other arbitral centres that settle disputes in commercial arbitration[15], although this was not always the rule. The rule of confidentiality (arbitral procedures, arbitrators and arbitral awards) was foreseen in the first regulation of the Court of Arbitration for Sport (CAS), and continued to be present in revised versions (it was actually taken for granted, being publicity an exception).

Nevertheless, this solution was disrupted after the 2013 Reform and the Claudia Pechstein dispute, leaving the possibility for one party to decide to turn the arbitral award public[16]. As it is well-known, after a long period during which confidentiality was the rule of arbitration procedures, and there was no general rule of publication of awards, article R59 of the CAS Code currently establishes that: "[t]he award, a summary and/or a press release setting forth the results of the proceedings shall be made public by CAS, unless both parties agree that they should remain confidential. In any event, the other elements of the case record shall remain confidential"[17].

This solution can be justified by two main arguments. First of all, as it is well-known, Sports arbitration is somehow different when compared to international commercial arbitration, especially when we consider the structural imbalance between sports federation and athletes[18]. Secondly, it is possible to ascertain a global public interest[19] that relies in the fact that the CAS sometimes decides legal problems concerning public law disputes – as the Carlos Queiroz case shows – that are not identifiable with a pure dispute between two privates with no public interest[20]. On the contrary, there are recurrently fundamental rights of athletes involved in sports disputes[21].

4. The rule of confidentiality of arbitral awards in the Portuguese Court of Arbitration for Sport

The recent Portuguese Court of Arbitration for Sport is not a regularly voluntary arbitral tribunal created by the will of the parties. On the contrary, it is established by law in order to settle all the administrative law disputes that occur, for example, between the Portuguese sports federations regulated by the administrative law and athletes, clubs, etc [22], and is a voluntary jurisdiction in all other sports disputes[23].

Far from being consensual, the establishment of this arbitral tribunal had to face a constitutional review of this legal option in two awards of the Portuguese Constitutional Court[24]. The main problem was that the Portuguese Constitutional Court ruled that the mandatory arbitration of the Portuguese Court of Arbitration for Sport does not fulfil the requirements of article 20 of the Portuguese Constitution[25]. Therefore, in order to assure the constitutionality of any mandatory arbitration, a full review of the merits of the arbitral award by the state courts is required (full review that was not foreseen in the Decree no. 128 and in the Law no. 74/2013). Nevertheless, the Portuguese legislator insisted in creating a mandatory arbitration for administrative sports disputes, approving Law no. 33/2014 which contemplates some changes to the other two legal regimes. Although, these changes seemed to be compatible with the rule of the Portuguese Constitutional Court, the truth is, the issues surrounding the constitutionality of the legal establishment of the Portuguese Court of Arbitration for Sport are far from being solved[26].

One of the most criticized aspects[27] is the permissive legal determination – inspired by the CAS regulations before the 2013 reform – providing that: "[t]he Portuguese Court of Arbitration for Sport publishes on its webpage the award, a summary and/or a press release setting forth the results of the proceedings, unless one of the parties objects"[28]. This is quite controversial because it leaves in the hands of one party – for example, the sports federation, which exercises public authority – the decision to keep the arbitral award confidential or not. Particularly, is this solution compatible with the due

process established in article 20 of the Portuguese Constitution or even compatible with article 6 of the European Convention on Human Rights?

There are two main arguments that should be considered. First, mandatory arbitration has no contractual basis, in the sense that it is imposed by the law and parties have no major influence – as it is shown by the Portuguese Court of Arbitration case – in the structure of the arbitral tribunal. This should have influence when deciding on the compatibility of the referred norms. It is obvious that mandatory arbitration is not a renunciation to state courts and that it should not be dealt as a voluntary arbitral tribunal, and therefore should grant more procedural guarantees[29]. Second, as an example of a private party exercising public power, we can easily find public interest in having arbitral awards rendered by the Portuguese Arbitral Tribunal made public. This is particularly demonstrated by the fact that the object of these decisions are in most cases fundamental rights (for example, disciplinary decisions), which require a different type of sensibility to the question.

The answer to the questions presented above appears to point in a direction that is unfavourable to an interpretation seemingly sustaining the rule of confidentiality of the arbitral awards rendered by the Portuguese Court of Arbitration for Sport. But it is also evident that the Portuguese legislator (i) has completely disregarded the importance of introducing elements of transparency that are needed in Sports arbitration because of its particular characteristics; (ii) and that it did not considered the latest CAS regulatory reforms.

Nevertheless, the CAS solution is more accurate in the context of the need of a more transparent and demanding legal framework concerning a high level of guarantees of procedural fairness. It is easy to agree that the Portuguese lawmaker can not only learn from the CAS regulation in confidentiality matters, but also have a good starting point on the discussion involving the necessary debate regarding the need of publicity in Portuguese Sports arbitration.

5. Conclusion

Confidentiality in arbitration is a hot topic. The challenge involving the necessary publicity in some disputes is far from being resolved.

That being said, the most obvious conclusion is that confidentiality is no longer the only paradigm in arbitration, particularly in sports arbitration. There are many circumstances that are important to consider. The Portuguese legislator failed to realize this and, in our opinion, did not learn the right lessons from CAS on this subject.

1 See, for instance, Jens-Peter Lachmann, *Handbuch für die Schiedsgerichtspraxis*, 3rd edition, Verlag Dr. Otto Schmidt, Köln, 2008, pages 41-45, Pieter Sanders, "Trends in the field of international commercial arbitration", *in Recueil des cours de l'Académie de droit international de la Haye - Collected courses of the Hague Academy of International Law*, vol. 145, BrillOnline, Leiden, 1975, page 216, Nana Japaridze, "Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration", *in Hofstra Law Review,* vol. 36, no. 4, Hofstra University, New York, 2008, pages 1420-1424*,* Didier Matray / Gautier Matray, "La rédaction de la convention d'arbitrage", *in La convention d'arbitrage. Groupes de sociétés et groupes de contrats - Arbitrageovereenkomst. Vennootschapsgroepen en groepen overeenkomsten*, Actes du colloque du CEPANI du 19 novembre 2007, no. 9, Bruylant, Brussels, 2007, page 23, S. I. Strong, "Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?", *in Vanderbilt Journal of Transnational Law*, vol. 31, Vanderbilt University, Nashville, 1998, page 933, A. Ferrer Correia, "Da arbitragem comercial internacional", *in Temas de Direito Comercial e Direito Internacional Privado*, Almedina, Coimbra, 1989, pages 174-175, and José Miguel Júdice, "Anotação ao acórdão Esso Australia Resources Limited and others v. The Honourable Sidney James Plowman and others", *in 100 Anos de Arbitragem - os casos essenciais comentados*, Coleção PLMJ, no. 9, Coimbra Editora, Coimbra, 2015, page 157.

2 *Vide* Jan Paulsson / Nigel Rawding, "The Trouble with Confidentiality", *in Arbitration International*, vol. 11, no. 3, Kluwer Law International, Alphen aan den Rijn, 1995, page 303, Nigel Blackaby / Constantine Partasides / Alan Redfern / Martin Hunter, *Redfern and Hunter on International Arbitration*, 6th edition, Oxford University Press, Oxford, 2015, pages 30, 124, 134-135, and George Burn / Alison Pearsall, "Exceptions to Confidentiality in International Arbitration", *in Confidentiality in Arbitration: Commentaries on Rules, Statutes, Case Law and Practice*, ICC International Court of Arbitration Bulletin - Special Supplement, Paris, 2009, pages 23 ff.

3 *Cfr.* Nigel Blackaby / Constantine Partasides / Alan Redfern / Martin Hunter, *Redfern and Hunter on International Arbitration*, *cit.*, pages 130-133, and Alexander J. B□lohlávek, "Confidentiality and Publicity in Investment Arbitration, Public Interest and Scope of Powers Vested in Arbitral Tribunals", *in Czech Yearbook of International Law*, vol. II, Juris, New York, 2011, pages 23-45.

4 Concerning this matter, see particularly Artur Flamínio da Silva / António Pedro Pinto Monteiro, "Publicidade vs. confidencialidade na arbitragem desportiva transnacional", forthcoming *Revista de Direito Civil*, Almedina, Coimbra, 2016.

5 *R v Sussex Justices, Ex parte McCarthy* (King's Bench Division), 09/11/1923, *in All England Law Reports*, 233, 1 K. B., 1924, page 259. To be more precise, the exact words are: "(…) *it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done*".

6 If we take a close look at article 6 of the European Convention on Human Rights, for example, we will find that: "Judgment shall be pronounced publicly *but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice*".

7 See Serge Lazareff, "Confidentiality and Arbitration: Theoretical and Philosophical Reflections", *in Confidentiality in Arbitration: Commentaries on Rules, Statutes, Case Law and Practice*, ICC International Court of Arbitration Bulletin - Special Supplement, Paris, 2009, page 82, Nigel Blackaby / Constantine Partasides / Alan Redfern / Martin Hunter, *Redfern and Hunter on International Arbitration*, *cit.*, pages 30, 134-135, Marc Dal, "L'instruction de la cause et les tiers", *in L'arbitrage et les tiers - Arbitrage en derden*, Actes du colloque du CEPANI 40 du 28 novembre 2008, no. 10, Bruylant, Brussels, 2008, page 81, Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration*, Kluwer Law International, Alphen aan den Rijn, 2011, page xvi, Samuel Estreicher / Steven C. Bennett, "The Confidentiality of Arbitration Proceedings", *in New York Law Journal*, vol. 240, n.º 31 (13/08/2008), and António Menezes Cordeiro, *Tratado da Arbitragem. Comentário à Lei 63/2011, de 14 de dezembro*, Almedina, Coimbra, 2015, pages 304-305.

8 Gary B. Born, *International Commercial Arbitration*, vol. I, 2nd edition, Kluwer Law International, Alphen aan den Rijn, 2014, pages 89-90.

9 *Vide* Gary B. Born, *International Commercial Arbitration*, vol. I, *cit.*, pages 89-90.

10 See Serge Lazareff, "Confidentiality and Arbitration…", *cit.*, pages 81 ff., Richard Smellie, "Is arbitration confidential?", *in International Quarterly*, no. 5, 2013, page 6, and Laura A. Kaster, "Confidentiality in U.S. Arbitration", *in NYSBA - New York Dispute Resolution Lawyer*, vol. 5, no. 1, 2012, page 23.

11 Jean-François Poudret / Sébastien Besson, *Comparative Law of International Arbitration*, Sweet & Maxwell, London, 2007, page 317.

12 *Vide* Mariana França Gouveia, *Curso de Resolução Alternativa de Litígios*, 3rd edition, Almedina, Coimbra, 2014, page 203 (footnote no. 247). Regarding the exceptions contemplated in the Portuguese Arbitration Law, see particularly António Menezes Cordeiro, *Tratado da Arbitragem…*, *cit.*, pages 307-308.

13 Published in *Arbitration International*, vol. 11, no. 3, Kluwer Law International, Alphen aan den Rijn, 1995, pages 235-264. Regarding this and other cases, see Leon E. Trakman, "Confidentiality in International Commercial Arbitration", *in Arbitration International*, vol. 18, no. 1, Kluwer Law International, Alphen aan den Rijn, 2002, pages 1 ff., Nigel Blackaby / Constantine Partasides / Alan Redfern / Martin Hunter, *Redfern and Hunter on International Arbitration*, *cit.*, pages 127-128, José Cretella Neto, "Quão sigilosa é a arbitragem?", *in* Arnoldo Wald (organizador), *Arbitragem e Mediação*, vol. I (A Arbitragem. Introdução e Histórico), Editora Revista dos Tribunais, São Paulo, 2014, pages 135 ff., as well as Jan Paulsson, "The Decision of the High Court of Australia in Esso/BHP v. Plowman", and Hans Smit, "Confidentiality in Arbitration", both articles published in *Arbitration International*, vol. 11, no 3, Kluwer Law International, Alphen aan den Rijn, 1995, pages 231-234 and 337-340.

14 In the famous *Nordström-Janzon and Nordström-Lehtinen v. the Netherlands* case (file no. 28101/95, 27/11/1996, available at http://www.echr.coe.int/Pages/home.aspx?p=home), the European Commission of Human Rights considered that: "(…) the grounds on which arbitral awards may be challenged before national courts differ among the Contracting States and (…) it cannot be required under the Convention that national courts must ensure that arbitral proceedings have been in conformity with Article 6 (Art. 6) of the Convention. *In some respects – in particular as regards publicity – it is clear that arbitral proceedings are often not even intended to be in conformity with Article 6 (Art. 6), and the arbitration agreement entails a renunciation of the full application of that Article*. The Commission therefore considers that an arbitral award does not necessarily have to be quashed because the parties have not enjoyed all the guarantees of Article 6 (Art. 6), but each Contracting State may in principle decide itself on which grounds an arbitral award should be quashed". See also Georgios Petrochilos, *Procedural Law in International Arbitration*, Oxford Private International Law Series, Oxford University Press, Oxford, 2004, page 150, Pierre Lambert, "L'arbitrage et l'article 6, 1º de la Convention européenne des droits de l'homme", *in L'arbitrage et la Convention européenne des droits de l'homme*, Droit et Justice, no. 31, Nemesis / Bruylant, Brussels, 2001, pages 16-17, Juan Carlos Landrove, "European Convention on Human Rights' Impact on Consensual Arbitration. An État des Lieux of Strasbourg Case-Law and of a Problematic Swiss Law Feature", *in Human Rights at the Center - Les droits de l'Homme au Centre*, Schulthess, Zurich, 2006, page 85, Alexis Mourre, "Le droit français de l'arbitrage international face à la Convention européenne des droits de l'homme", *in Les Cahiers de l'Arbitrage*, numéro spécial, édition Juillet 2002, Gazette du Palais, Paris, 2002, page 28, Matti S. Kurkela / Santtu Turunen, *Due Process in International Commercial Arbitration*, 2nd edition, University of Helsinki Conflict Management Institute (COMI), Oxford University Press, New York, 2010, page 2, and, specifically concerning the Nordström-Janzon case, Manuel Cavaleiro Brandão / Pedro Ferreira de Sousa, "Anotação à decisão do Tribunal Europeu dos Direitos do Homem de 27 de novembro de 1996 (Nordström v The Netherlands)", *in 100 Anos de Arbitragem - os casos essenciais comentados*, Coleção PLMJ, no. 9, Coimbra Editora, Coimbra, 2015, pages 187-204.

15 See, for example, Heiner Kahlert, *Vertraulichkeit im Schiedsverfahren*, Mohr Siebeck, Tübingen, 2015, page 367.

16 On this particular subject, see Artur Flamínio da Silva / António Pedro Pinto Monteiro, "Publicidade vs. confidencialidade na arbitragem desportiva transnacional", *cit.*

17 Nevertheless, this rule is only limited to the awards rendered by the Appeal Division. An appeal is admissible "against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body" (see article R47 CAS Code).

18 Regarding the structural imbalance in Sport, see Artur Flamínio da Silva, "As posições jurídicas de desigualdade no Desporto e a jurisprudência da decisão do Tribunal Regional de Munique I (37.ª Câmara de Civil) de 26 de Fevereiro de 2014: um rude golpe para o futuro da arbitragem desportiva?", *in Desporto & Direito*, no. 32 (2014), pages 172 ff., and Artur Flamínio da Silva, "A violação da ordem pública, as posições de desigualdade estrutural no Desporto e a provável necessidade de reforma do Tribunal Arbitral do Desporto: reflexões sobre o caso Claudia Pechstein e a decisão do Oberlandesgericht de Munique de 15 de Janeiro de 2015", forthcoming *Revista de Arbitragem e Mediação*. Concerning the analogue structural imbalance in investment arbitration, see Stephan W. Schill, "Internationales Investitionsschutzrecht und Vergleichendes Öffentliches Recht: Grundlagen und Methode eines öffentlich-rechtlichen Leitbildes für die Investitionsschiedsgerichtsbarkeit", *in ZaöRV*, no. 71 (2011), pages 247 ff.

19 Regarding this problem, see Miguel Prata Roque, *A Dimensão Transnacional do Direito Administrativo*, AAFDL, Lisbon, 2014, pages 858 ff.

20 On the relationship between public and private interest of confidentiality in arbitration, see Heiner Kahlert, *Vertraulichkeit im Schiedsverfahren*, *cit.*, pages 51 ff., and Artur Flamínio da Silva / António Pedro Pinto Monteiro, "Publicidade vs. confidencialidade na arbitragem desportiva transnacional", *cit*. Regarding the Carlos Queiroz case, see Alessandro Basilico, "Global Review of national decision: The Case of Carlos Queiroz v. Autoridade Antidopagem de Portugal", *in Global Administrative Law: The Casebook*, Sabino Cassese et alii (Ed.), 3.ª Edição, IRPA-IILJ, s.l., 2012, pages 39 ff.

21 Concerning the fundamental rights involved in sport, see Sebastian Schulz, *Grundrechtkollisionen im Berufssport*, Nomos, Baden-Baden, 2011, pages 70 ff.

22 About the submission of the portugueses sports federation to the Administrative Law, see, for example, Pedro Gonçalves, *Entidades Privadas com Poderes Públicos*, Almedina, Coimbra, 2005, pages 835 ff.

23 For a general overview of the Portuguese Court of Arbitration for Sport, *vide* Artur Flamínio da Silva / Daniela Mirante, *O Regime Jurídico do Tribunal Arbitral do Desporto*, Petrony, Lisbon, 2016. Regarding the constitutional concerns of the legal establishment of the Portuguese Court of Arbitration for Sport, see Artur Flamínio da Silva, "A arbitragem desportiva em Portugal …", *cit*, pages 61 ff.; see, also, Artur Flamínio da Silva, "O novo regime jurídico da resolução de conflitos desportivos no direito administrativo: sobre a arbitragem necessária e a mediação no tribunal arbitral do desporto", *in Arbitragem e Direito Público*, Carla Amado Gomes / Domigos Soares Farinho / Ricardo Pedro (org.), AAFDL, Lisbon, 2015, pages 395 ff.

24 See decisions 230/2013 and 781/2013.

25 Article 20 (especially number 1 and 4) of the Portuguese Constitution provides that "[e]veryone is guaranteed access to the law and the courts in order to defend those of his rights and interests that are protected by law (…)" and that "[e]veryone has the right to secure a decision in any suit in which he is intervening (…) by means of fair process" [the translation of the Portuguese Constitution can be found in (http://www.en.parlamento.pt/Legislation/CRP/Constitution7th.pdf)].

26 For example, in the decision no. 123/2015 the Portuguese Constitutional Court ruled that it can be contrary to article 20 of the Portuguese Constitution that interim measures are exclusively granted by an arbitral tribunal established by law (as it is in the Portuguese Court of Arbitration for Sport) and not by a state court. Regarding this decision, see Artur Flamínio da Silva, "Revisitando a constitucionalidade da arbitragem necessária em Portugal: reflexões sobre o Ac. n.º 123/2015 do Tribunal Constitucional", *in Revista de Arbitragem e Mediação*, no. 47 (2015), pages 365 ff.

27 See, for example, Ana Celeste Carvalho, "Justiça Federativa e o Tribunal Arbitral do Desporto", *in IV Congresso de Direito do Desporto*, Ricardo Costa e Nuno Barbosa (coord.), Almedina, Coimbra, 2015, page 50.

28 See article 50, no. 3, Law no. 74/2013 (with the amendments of Law no. 33/2014).

29 *Vide* Artur Flamínio da Silva, "A arbitragem desportiva em Portugal …", *cit*, page 82, assuming that mandatory arbitration is – regarding the Portuguese Constitution – a "downgrade of guarantee" that assist to the parties.

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