Portugal

ALTERNATIVE DISPUTE RESOLUTION AS A MEANS OF IMPROVING THE DELIVERY OF JUSTICE AND REDUCING THE DELAYS IN CIVIL PROCEDURE

I

Question 1.

What alternative means are used in your legal system for resolving civil law disputes outside normal court procedures?

A) – Mediation (a process in which the parties engage a mediator or conciliator to encourage and assist them towards agreeing a solution).

B) – Arbitration (a process in which the parties engage a mediator or conciliator to encourage and assist them towards agreeing a solution).

C) – Non-binding arbitration (a process in which the parties obtain a decision on their dispute but which is non-binding and does not prevent litigation).

D) – Other methods (describe).

Answer:

In the Portuguese legal system the parties can agree to settle their claim out of court rather than litigate. According to the Portuguese civil law, the parties can choose one of the following alternatives means to resolve the dispute: the conciliation or the mediation or the arbitration.

The last is named voluntary if the parties, by their initiative, choose the mediators and agree that decision will bind both parties. The arbitration is called institutional if take place in one “Centro de Arbitragem” (Arbitration Centre) that are identities authorised by the Portuguese Ministry of Justice to practice the arbitration.

Question 2.

A) – Are any of the alternative means used in your country subject to special regulation by statutory provisions?

B) – Does a mediator or an arbiter require to have a particular qualification or to have undergone professional training?

C) – If a mediator requires to undergo training, who provides such training?
D) – Is there a professional organisation of mediators which lays down rules of professional conduct?

Answer:

a) – Yes, Portugal recently approved a special regulation by statutory provisions to regulate the arbitration and mediation.
b) – Yes, it is required that all the mediators have specific qualification and professional training. Especially if they are doing institutional arbitration or mediation in a “Centro de Arbitragem” or in a “Julgado de Paz” (Peace Court). The “Julgado de Paz” is a special court that the only competencies are the minor civil disputes, with celerity and less costs. In general, it cannot solve disputes of Family Law, Succession Law and Labour Law.
c) – The Arbitration or Conciliation Centres have that responsibility.
d) – Yes, every Arbitration Centre has specific deontological rules. Nevertheless, the legal frame of voluntary arbitration is the Law nº 31/96 of 29 August, (and successive actualisation’s, whose essential traces seat in the principle of the private autonomy and in the development of the institutionalised arbitration.

Question 3.

A) – Insofar as alternative dispute resolution procedures are available and are in use in your country, what are the principal areas of law (for example family law, building or construction law, medical negligence claims, consumer cases, etc), in which disputes are settled by the alternative procedures?
B) – Are there any types of civil law dispute, which cannot be resolved by such alternative means but must be decided by a court?

Answer:

a) – The Arbitration Centre have a widely competence. It can have generic competence or specialised competence in one area, such as: Consumer Law; Commercial ad Industrial Law; Building or/and Construction; Intellectual property; leasehold disputes; liberal professions and/or in the car sector. Please note that the institutional mediation incidences mainly in situations related with Family Law (such as parental dispute related with the regulation or alteration of parental rights and also to advice the parties in a parental dispute).
b) – Yes, disputes of Labour Law, Succession Law and Family Law (such as divorce; separation etc).

Question 4.

A) – Is any publicly funded system of mediation available in your country? In particular, is there any mediation service annexed or attached to the courts?
B) – If so, for what types of civil law dispute is publicly funded mediation available?

Answer:

a) – Yes, in the “Julgado de Paz” the first phase of mediation procedure is called the “pre-mediation”. In this stage the parties agree to solve the dispute with mediation. Afterwards, the mediator is chosen. Then, the mediator promotes the discussion until the agreement is obtain. This agreement is homologate by the Peace Judge and have the same valour as a sentence.

In the other hand, there is the public service of familiar mediation (only in Lisbon since November 1997, but with competence to limitrophe judicial districts), only to mediate the disputes about the parental rights. It works when requested by the parties, and has the advice of a professional mediator recognised by the “European Forum of Familiar Mediation”.

b) – All the ones that do not meet excluded in the point b) of the previous answer.

Question 5.

A) – To what extent, and by means, are the courts in your system able to encourage or to require parties to attempt mediation or some other of alternative dispute resolution either as a preliminary to commencing any litigation or in the course of ordinary court proceedings?

B) – Is the court administration able to assist litigants, or potential litigants, in using alternative dispute resolution procedures by, for example, explaining the various possibilities of alternative dispute resolution or providing information about mediators or arbiters?

Answer:

a) – In general the Portuguese Legal System do not impose or recommend the use of mediation (arbitration or conciliation). The exception is the divorce lawsuit. In divorce the law imposes a conference, preside by the judge, to see if the conciliation is possible. In all the other matters the judge can, by their one inicative, call a conference to mediate conciliation.

b) – No, in general the administrations in Portuguese Courts are not able to assist litigants, or potential litigants, with that information and guidance. The exception is, again, during the “conference of conciliation” in a process of divorce.

Question 6.

A) – Has the use of alternative dispute resolution procedures in your country been increasing in recent years?

B) – If so; -

i) – Are there any particular reasons for the increase in use of alternative dispute resolution procedures?
ii) - Has the increase in use sufficiently reduced the burden of work on the courts to allow the courts to improve the delivery of justice?

iii) – Has any alteration been made to rules of procedure or the practices of the courts in response to increase in the use of alternative dispute resolution?

Answer:

a) – Yes, the experience is positive and it will be extend to the others judicial districts.

b) – (i) – Yes. – The main reason is that the courts have to many processes to solve and they are not able to deliver a fast answer to all requests. Therefore, the people chose to use the alternative dispute resolution because the result is delivered faster.
   (ii) – No.
   (iii) – Yes, but in a small scale.

Question 7.

In your system does the court provide any procedures in which a judge acts as a mediator?

Answer:

The reply to this question already it was given the point’s a) ad b) of question 5.

Question 8.

Are there any proposals to change the law relating to alternative dispute resolution procedures?

Answer:

No. The only existent proposal is to extend the “Julgados de Paz” to the rest of the country.

II

Whish points would you wish to discuss in detail?

Answer:

“The opportunity of the judge as a mediator”
What subject do you suggest for the next meeting?

Answer:

“The necessity of simplification of the sentences in lawsuits of civil nature”

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