

REPUBLIC OF CAPE VERDE

DRAFT

OF

THE ARBITRATION LAW

LAW PROPOSAL N.º /2004

OF OF

Under the of subparagraph b), of article 156º of the Constitution, the Government presents to the National Assembly for approval, the following Arbitration Law Proposal.

The National Assembly decrees, under the terms of subparagraph d) of article 175º of the Constitution, the following:

CHAPTER I

Article 1º

Arbitration convention

- 1 – Any conflict may, by an arbitration convention, be submitted by the intervening parts, to the decision of arbiters.
- 2 – The arbitration convention may have as object, an actual conflict, even if it is affected to the judicial court, in which case it designated an arbitral compromise, or, eventual conflict emerging from a specific juridical contractual or extra-contractual relationship in which case it is designated **commitment** clause.
- 3 – Aside from the issues of a litigious nature in the strict sense, the parts may agree to consider any others, specifically those related to the need to precise, complete, update or even review the contracts or the juridical relationships that are at the root of the arbitration convention, as included in the concept of conflict.
- 4 – The State and other collective persons under public law may celebrate arbitration conventions, if so authorized by special law or if they have as object conflicts pertaining to private law relationships.

Article 2º

Exclusions

The following cannot be the object of arbitration:

- a) The conflicts pertaining to indispensable rights;
- b) Those that, by special law, are submitted exclusively to a judicial court or to necessary arbitration;
- c) The conflicts in which minors, the stakeholders are incapacitated or disabled under the terms of the civil law, even if they are legally represented.

Article 3°

Requisites of the convention

- 1 – An arbitration convention must be done in writing.
- 2 – An arbitration convention is considered done in writing if it is included in a document signed by the parts, or in an exchange of letters, telex, telegrams, **electronic mail** or other means of telecommunications, that leave written proof, whether these documents contain the convention directly, or they contain a clause referring to some document that contains a convention.
- 3 – The arbitral compromise must determine precisely the object of the conflict; the arbitration clause must specify the juridical relationship that pertains to the conflict.
- 4 – If the arbitral compromise contains an accession contract, its validity and interpretation are governed by the provisions of the legislation applicable to the referred contractual type.

Article 4°

Validity

- 1 – The signature of the arbitration convention implies the renunciation by the parts of the right to recur to a judicial court on the issues that are object of the convention.
- 2 – The renunciation does not impede the interposition of the cautionary providences, before or during the arbitral proceedings, as long as such measures are not incompatible with the former.
- 3 – The Court where the action on the issue object of the arbitration convention is filed, must remit the parts to arbitration as soon as it is informed of the existence of this clause, except if it considers the convention null.

Article 5°

Autonomy

The nullity of the contract in which an arbitration convention is inserted does not cause the nullity of the latter, except when it is demonstrated that the same would not have been concluded without the referred convention.

Article 6°

Revocation

1 – The arbitration convention can be revoked, up to the pronouncement of the arbitral decision, in writing that complies with the provisions of Article 3 dealing with the formalization of the convention, signed by both parts.

2 – If the revocation is effected only by one of the parts, the arbitration convention remains valid and effective, if after five days have passed over the date of notification of the revocation, the other part does not expressly accept the revocation.

Article 7°

Nullity of the convention

The arbitration convention celebrated in violation of the provisions of Article 1 number 4, Article 2 subparagraphs a), b) or c) and Article 3, is null.

Article 8°

Caducity of the convention

1 – The arbitral compromise expires and the arbitration clause becomes ineffective, regarding the conflict under consideration:

a) Some of the designated arbiters dies, excuses him/herself or renders him/herself permanently incapable to exercise the function or if the designation remains without effect, as long as he/she is not substituted under the terms of Article 19.

b) If the decision is not proffered in the established deadline in accordance with the provisions of number 2 of Article 24°

2 – Save for convention to the contrary, the death or extinction of the parts does not lead to the expiration of the arbitration convention nor does it extinguish the instance in the arbitral court.

Article 9°

Financial responsibilities of the process

The remuneration of the arbiters and the other parties intervening in the process, as well as its partition between the parts, must be fixed in the arbitration convention or in a subsequent document subscribed to by the parts, unless they result from the arbitration regulation of the entity chosen under the terms of 43°.

**CHAPTER II
OF THE ARBITERS AND THE ARBITRAL COURT**

Article 10°

Composition of the court

- 1 – The arbitral court may be constituted by a single arbiter or by several arbiters, in an odd number.
- 2 – If the number of members in the arbitral court is not fixed in the arbitration convention or in subsequent writing subscribed to by the parts, nor does it result from them, the court shall be composed by three arbiters.

Article 11°

Competence of the court

Only the arbitral courts constituted under the terms of this Law are competent to decide conflicts submitted to arbitration.

Article 12°

Designation of the arbiters

- 1 – The parts must, in the arbitration convention or in subsequent written document signed by them, designate the arbiter or arbiters that will constitute the court, or fix the mode by which they are to be chosen.
- 2 – If the parts do not designate the arbiter or arbiters, nor fix the mode by which they are chosen, and there is no agreement between them regarding this designation, each one shall indicate an arbiter, and the arbiters thus designated shall choose the arbiter that will complete the constitution of the tribunal.

Article 13°

Arbiters: requisites

The arbiters must be singular persons and plainly capable of fulfilling the requisites stipulated by the parts, or, by the arbitration entities indicated by them.

Article 14°

Freedom to accept; excuse

1 – No one can be obligated to function as an arbiter, but if the responsibility is accepted, it shall be legitimately excused based on supervening cause that makes it impossible for the designated person to exercise the function.

2 – The responsibility is considered accepted whenever the designated person reveals the intention to act as an arbiter or does not declare, in writing addressed to any of the parts, within the ten days subsequent to the communication of the designation, that he/she does not wish to exercise the function.

3 – Having accepted the responsibility, if the arbiter unjustifiably excuses him/herself from the exercise of his/her function he/she shall respond for the damages he/she may have caused.

Article 15°

Impediments and refusals

1 – The impediments and excuses regime, established in the civil process law for the judges, is applicable to the arbiters not appointed by agreement between the parts.

2 – Whosoever has exercised the mediation activity in any issue related to the object of the conflict, cannot be indicated as arbiter, save by express acceptance of the parts.

3 – The part cannot refuse the arbiter designated by him/her, save in the event of occurrence of a supervening cause of impediment or excuse, under the terms of the preceding number.

4 – It behooves the president of the arbitral court the decisions on impediments and refusals.

Article 16°

Constitution of the court

- 1 – The part that proposes to present a case in the arbitral court must notify the opposite part of this fact.
- 2 – The notification is made by registered letter with return receipt or by other communication means that permit proof of the notification and of its reception.
- 3 – The notification must indicate the arbitration convention and indicate precisely the object of conflict, if it is not already determined in the convention.
- 4 – If it incumbent on the parts to designate one or more arbiters, the notification shall contain the designation of the arbiter or arbiters by the part that proposes to institute the action, as well as the invitation addressed to the other part to designate the arbiter or arbiters incumbent upon him/her to indicate.
- 5 – In the cases in which the arbiter must be designated by agreement of the two parts, the notification shall contain the indication of the arbiter proposed and the indication to the other part to accept the designation.
- 6 – If it behooves a third party to designate one or more arbiters and such designation has not yet been made, the third party shall be notified to do so and inform both parts accordingly.

Article 17

Nomination of the arbiters and determination of the object of the conflict by a judicial court

- 1 – In all the cases in which the nomination of an arbiter or arbiters in conformity with the provisions of the preceding articles is missing, the nomination falls on the president of the district court with jurisdiction over the place fixed for the arbitration or, if the place has not been fixed, that of the district court of the requestor's domicile.
- 2 – The nomination may be requested, after one month has elapsed over the date of the notification foreseen in number 1 of Article 17, in the case contemplated in numbers 4 and 5 of this article, within one month counting from the nomination of the last of the arbiters in the case referred to in Article 12, n. ° 2.
- 3 – The nominations made under the terms of the preceding numbers are not susceptible of impugnation.

4 – If within the deadline referred to in n. ° 2 the parts do not reach agreement on the determination of the object of the conflict, it shall behoove the court to decide. This decision may be appealed with aggravation, to be heard immediately.

5 – If the arbitration convention is manifestly null the court must declare that there is no need to nominate the arbiters or to determine the object of the conflict.

Article 18°

Substitution of the arbiters

If any of the arbiters dies, excuses him/herself or becomes permanently unable to exercise the functions or if the designation becomes ineffective, substitution of the same shall proceed according to the rules applicable to the nomination or designation, with the necessary adaptations

Article 19°

President of the arbitral court

1 – Being the court constituted by more than one arbiter, they will choose a president among themselves, unless the parts have agreed to another solution, in writing, up to the acceptance of the first arbiter.

2 – Should the designation of the president not be possible under the terms of the preceding number, the choice shall be made by the president district's court.

3 – It behooves the president of the arbitral court to prepare the process, direct the instruction, conduct the audiences work and establish the sequence of the debates, save for conventions to the contrary.

Article 20°

Ethical duties of the arbiters

1 – The arbiter cannot:

- a) Represent the interests of either of the parts;
- b) Receive or obtain, before, after or during the arbitration, any remuneration, premium or patrimonial advantage from persons with direct or indirect interest in the arbitration.

2 – The arbiter must:

- a) Proceed with impartiality, independence, **secrecy** and good faith;
- b) Treat the parts, their representatives and witnesses with diligence and courtesy;

- c) decide in accordance with substantive law and with equity, exclusively on the basis of the elements of the conflict, even when designated by one of the parts;
 - d) avail the time necessary for the arbitration process to run with celerity;
 - e) respect and impose the rules of the proceeding, ensuring that the arbitration is conducted with diligence, avoiding any untoward action;
 - f) accept his/her nomination only if he/she fulfill the conditions to act in conformity with the fundamental principles of this law.
- 3 - The arbiters are responsible for the damages they cause, by dishonest or fraudulent conduct or by violation of the law, in the exercise of their functions.

CHAPTER III OF THE OPERATION OF THE ARBITRATION

Article 21

Rules of the process

- 1 – In the arbitration convention or in subsequent writing, up to the acceptance of the first last arbiter, the parts may agree on the rules of the process to be observed in the arbitration, as well as on the place from which the court will operate.
- 2 – The agreement of the parts on the matter referred to in the preceding matter may result from the choice of an arbitration regulation emanating from one of the entities referred to in Article 43 or yet of the choice of one of these entities to organize the arbitration.
- 3 – If the parts do not agree on the rules of the process to be observed in the arbitration and on the place from which the arbitral court will operate, it behooves the arbiters to make this choice.

Article 22°

Fundamental principles to be observed in the process

On any case, the arbitration process procedures should abide by the following fundamental principles:

- a) The parts shall be treated with absolute equality;
- b) The demanded shall be summoned to defend him/herself;
- c) In all the phases of the process strict observance of the principle of the contradictory shall be observed;

d) Both parts must be heard, verbally or in writing, before a final decision is proffered.

Article 23°

Representation of the parts

The parts may designate someone to represent or assist them in court.

Article 24°

Proof

1 – Any proof admitted by law may be produced before the arbitral court.

2 – When the proof to be produced depends on the will of one of the parts, or, of a third party and the same refuse the necessary collaboration, the interested party may, once the authorization is obtained from the arbitral court, solicit to the judicial court that the proof be produced before it, and the results should be remitted to that first court.

Article 25°

Cautionary measures

Save for stipulation to the contrary by the parts, the arbitral court can, at the request of one of the parts, order that any of them take the provisional measures it considers necessary in relation to the object of the conflict, even to request the posting of a guarantee.

CHAPTER IV

OF THE ARBITRAL DECISION

Article 26

Time limit for the decision

1 – The parts may fix the time limit for the arbitral court's decision or the mode for establishing that time limit, in the arbitration convention or in subsequent writing, up to time of acceptance of the first arbiter.

2 – The time limit for the decision shall be six months, if not otherwise agreed upon by the parts, under the terms of the preceding number.

3 – The time limit referred to in n. ° 1 and 2 is counted from the date of the designation of the last arbiter, save convention to the contrary.

4 – By written agreement of the parts, the time limit for the decision may be prorogued up to twice its initial duration.

5 – The arbiters who unjustifiably oppose to proffering a decision within the fixed time limit shall respond for the damages caused.

Article 27°

Deliberation

1 – Being the court composed of more than one member, the decision is taken by majority vote, in a deliberation in which all the arbiters must participate, save if the parts, in the arbitration convention or in subsequent written agreement celebrated up to the time of acceptance of the first arbiter, demand a qualified majority.

2 – The parts may further convention that, if the necessary majority is not formed, the decision be made singularly by the president or that the issue be considered decided in the direction of the president's vote.

3 – In the event that the necessary majority is not formed simply because of divergence as to the money amount of the condemnation, the issue is considered decided in the direction of the president's vote, save for a different convention between the parts.

Article 28

Decision on self-competence

1 – The arbitral court may pronounce its own competence, even if, to that end it becomes necessary to review the existence, the validity or the effectiveness of the arbitration convention or of the contract in which the same is inserted, or the applicability of the referred convention.

2 – The incompetence of the arbitral court can only be argued up to presentation of the defense at the bottom-line of the case, or jointly with it.

3 – The decision by which the arbitral court declares itself competent can be reviewed by the judicial court only after the bottom-line decision has been proffered and by the means specified in articles 33 and 38.

Article 29°

Applicable law; recourse to equity

The arbiters judge according to the constituted law unless the parts, in the arbitration convention or in subsequent document subscribed to up to the acceptance of the first arbiter, authorizes them to judge according to equity.

Article 30°

Elements of the decision

- 1 – The final decision of the arbitral court is reduced to writing and it will contain:
 - a) The identification of the parts;
 - b) The reference to the arbitration convention;
 - c) The object of the conflict;
 - d) The identification of the arbiters;
 - e) The place of the arbitration and the location and date in which the decision was proffered;
 - f) The arbiters' signature;
 - g) The indication of the arbiters that could not or did not wish to sign.
- 2 - The decision should contain a number of signatures equal to at least the majority of the arbiters and include the vanquished votes, duly identified.
- 3 – The decision must be fundamented.
- 4 – The decision shall contain the fixation and partition by the parts of the financial responsibilities resulting from the process.

Article 31°

Notification and deposit of the decision

- 1 – The president of the court shall notify each of the parts of the decision, by remitting a copy of it by registered mail.
- 2 – The original of the decision is deposited in the administration office of the judicial court of the local of arbitration, unless in the arbitration convention or in subsequent writing the parts have dispensed with such deposit or that, in the institutionalized arbitrations, the respective regulation foresees another modality of deposit.
- 3 – The president of the arbitral court shall notify the parts of the deposit of the decision.

Article 32

Extinction of the power of the arbiters

The jurisdictional power of the arbiters ends with the notification of the deposit of the decision that ended the conflict or, when such deposit is dispensed, with the notification of the decision to the parts.

Article 33

Judged case and executive force

1 – Once the arbitral decision is notified to the parts, and if such is the case, the arbitral decision is deposited in the judicial court under the terms of Article 30, the case is considered concluded as soon as it is not susceptible of annulment.

2 – The arbitral decision has the same executive force as a sentence from the judicial of 1st instance.

CHAPTER V

Impugnation of the arbitral decision

Article 34

Annulment of the decision

1 – The arbitral sentence can be annulled only by the judicial court fundamented in one of the following:

- a) The conflict is not susceptible of a solution by arbitration;
- b) The sentence was proffered by an incompetent or an irregularly constituted court;
- c) Violation of the principles referred to in Article 22 occurred in the process, with decisive influence in the resolution of the conflict;
- d) There was a violation of Article 29 n. ° 1, subparagraph f), 2 and 3;
- e) The court acquired knowledge of issues it was not supposed to know, or did not pronounce on issues it should have reviewed.

2 – The fundament of the annulment foreseen in subparagraph b) of the preceding number cannot be invoked by the part who had knowledge of it in the course of the arbitration and that, being able to do so, did not allege it opportunely.

Article 35°

Right to request annulment; time limit

- 1 – The right to request annulment of the arbiters' decision is not renounceable.
- 2 – The annulment action can be attempted within one month counting from the notification of the arbitral decision, in the Supreme Court of Justice.

CHAPTER VI

EXECUTION OF THE ARBITRAL DECISION

Article 36°

Execution of the decision

The execution of the arbitral decision occurs in the court of the 1st instance, under the terms of the civil process law.

Article 37

Opposition to the execution

The course of the deadline to attempt the annulment action does not impede its fundamentals to be invoked as a way to oppose the execution of the arbitral decision.

CHAPTER VII

OF INTERNATIONAL ARBITRATION

Article 38

Concept of international arbitration

- 1 – The arbitration assumes an international character when some of the following circumstances occur with it:
 - a) That, at the moment of celebrating the arbitral compromise, the parts have domiciles in different states;
 - b) That the juridical relationship that gives rise to the conflict affects international trade principles.

Article 39°

Applicable law

1 – The parts may choose the substantive law to be applied by the arbiters, if they have not authorized the arbiters to judge according to equity.

2 – In the absence of a choice, the court applies the law that is more appropriate to the conflict.

Article 40°

Appeals

In the event of an international arbitration, the court's decision cannot be appealed, save if the parts have agreed to the possibility of appeal and regulated its terms.

Article 41°

Friendly composition

If the parts entrust it with this function, the court may decide the conflict by appeal to the composition of the parts on the basis of the equilibrium of the interests at play.

CHAPTER VIII

FINAL DISPOSITIONS

Article 42°

Ambit of application in space

This law applies to the arbitrations that occur in the national territory.

Article 43°

Institutionalized arbitration

The Government shall define, by decree-law, the regime for the delegation of competences to specific entities to perform voluntary institutionalized arbitrations, with specification, in each case, of the general or specialized character of such arbitrations, as

well as the review rules and eventual revocation of the authorizations granted, when so justified.

Article 44°

Effective date

This law goes into effect 90 days after its publication.

Viewed and approved in the Council of Ministers, on of of 2000

The Prime Minister

José Maria Pereira Neves