

# THE NEW CHALLENGES OF TAX ADVOCACY AND FISCAL ARBITRATION

OS NOVOS DESAFIOS DA ADVOCACIA TRIBUTÁRIA  
E A ARBITRAGEM FISCAL EM DESTAQUE

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## ABSTRACT

This article makes a study about the new challenges faced by tax law in the context of the changing demands for the reality of the 21st century. There is an exhaustion of the capacity of the Judiciary to meet the needs of society, especially with regard to conflicts of a fiscal nature. Thus, tax arbitration appears as an adequate mechanism, but it is questioned whether the legal profession is already prepared for this reality, as well as the role of the lawyer in this context. Another question to be faced is the possibility of implementing tax arbitration in the Brazilian legal system. Based on a deductive research method, with exploratory, bibliographic and qualitative techniques, it is concluded that the lack of effectiveness of the existing means for resolving conflicts, especially those of a tax nature, reveals great legal uncertainty, and the law must be prepared for this new reality that presents itself, in the performance of arbitration cases.

**Keywords:** Tax advocacy. tax arbitration. efficiency.

## RESUMO

*O presente artigo faz um estudo sobre os novos desafios enfrentados pela advocacia tributária no contexto das mudanças demandadas pela realidade do século XXI. Vivencia-se o esgotamento da capacidade do poder Judiciário em atender aos anseios da sociedade, em especial no que tange aos conflitos de natureza fiscal. Assim, a arbitragem fiscal surge como mecanismo adequado, porém questiona-se se a advocacia já está preparada para essa realidade, bem como o papel do advogado nesse contexto. Outro questionamento a ser enfrentado reside na possibilidade de implementação da arbitragem fiscal no ordenamento jurídico brasileiro. A partir de método de pesquisa dedutivo, com técnica exploratória, bibliográfica e qualitativa, conclui-se que a falta de efetividade dos meios existentes para a solução de conflitos, em especial os de natureza tributária, revela grande insegurança jurídica, devendo a advocacia estar preparada para essa nova realidade que se apresenta, na atuação de lides arbitrais.*

**Palavras-chave:** Advocacia tributária. arbitragem fiscal. eficiência.

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## 1. INTRODUCTION

The globalized world, the informational society and the advancement of technology present themselves as impacting factors for the structural modification of the oldest known professions, being the advocacy inserted in this context of paradigm rupture, 21st century.

We experience in Brazil, with special emphasis, an extremely conflicting society, that is, the most diverse legal relations that are established in the social environment tend to turn into disputes that end up reflecting in the significant maximization of the role of the Judiciary, who cannot perform his mister efficiently and quickly, for numerous reasons.

The fact is that the professional of the law, inserted in this context, goes for determinant moment of reinvention, facing new challenges, being the main one the break with pattern of acting fundamentally litigious, governed by the sole and exclusive conduct of the dispute already brought before the courts.

Among the most diverse legal relationships materialized in the social sphere, the present study highlights the tax legal relationship between State and taxpayer, by nature, conflictual and unequal.

From an exploratory, bibliographic and qualitative research, it is intended to outline the lack of effectiveness of the existing means for the solution of conflicts, in particular those of a tax nature, in a framework of great legal uncertainty and gradual and decisive departure from the ideal of justice embodied by the current constitutional text.

Advocating the need to move towards legislative regulation of arbitration in tax matters, by reducing the bureaucracy of the system as a whole, making it more efficient and legally secure, and the contribution to greater effectiveness in the receipt of the gigantic liability existing in relation to the collection of taxes, especially by the Federal Union, it is necessary to position the advocacy of this context of de-judicialization of conflicts, with the challenges of an early century that will be marked as responsible for the profound change in the perspective of acting of lawyers, whether private or public.

## 2. TAX LAW: NEW CHALLENGES OF THE 21ST CENTURY. XXI

The law as a whole and more specifically the tax has been undergoing significant changes in recent years, this due to numerous factors, among which highlight the exhaustion of the Judiciary's capacity to resolve tax disputes effectively. Thus, it is essential to go into the aspects that involve this paradigmatic change.

## 2.1 EXHAUSTION OF THE CAPACITY OF THE JUDICIARY TO RESOLVE TAX DISPUTES EFFECTIVELY

The complete exhaustion of the capacity of the Brazilian Judiciary to effectively resolve conflicts is a fact that has a definite impact on tax law, making the professionals who are involved need to think ahead, creating new expertise to fit into advocacy models that are more efficient and bring more desirable returns, both to the client and to the professional.

Identify the judiciary as being the only one capable of, through the process and the consequent terminative decisions, offering reliable and legitimate responses to the conflicts arising from the juridical relations impregnated in the daily life of the natural and juridical persons, is clear misconception. Likewise, the advocacy based on this model is bound to face serious difficulties. The institutional crisis experienced by the Judiciary Power in recent times cannot be disregarded. In this sense, this crisis mentioned, of effectiveness mainly, represents a certain weakness of the constitutional state system, but it is not possible to consider the existence of perfect models, being the capacity of the judiciary to make justice true test of stability (VECCHIO, 2020, p. 22).

The consolidation of the idea that “the longer the procedure, with the greater number of resources and opportunities for the parties to manifest, the fairer the final decision would be” (1999, p. 79) was responsible for the gradual increase in state litigiousness, which continues to progress effectively.

To face the scenario of expansion of litigiousness and consequent exhaustion of the Judiciary Branch, it is possible to cite some significant advances, such as the edition of Law 9.099/95 (Law of Special Courts), which provides for conciliation; Law 9.307/96, which deals with arbitration; Resolution 125/10 of the CNJ, regulating the National Judicial Policy of adequate treatment of conflicts of interest within the Judiciary Branch; Law 13.140/15, which provides for the composition of conflicts, including, within the scope of the Public Administration itself; and the 2015 Civil Procedure Code itself (Law 13.105/15 - CPC/15), which mentions arbitration, conciliation and mediation already in the initial chapter, which deals with the fundamental standards of civil procedure.

Even so, the congestion rate of the judiciary is still high to the point of compromising the quality of jurisdictional provision - 73% (seventy-three percent), according to the latest Justice Report in 2017: base year 2016, prepared by the CNJ (CNJ, 2017).

The issues are even more serious when they are based on the conflicts between the tax authorities and the taxpayer. Regarding tax conflicts, they usually reside in the different legal qualification given to the facts or even in the different interpretations given to a given legal provision, since tax law is governed by the principle of legality.

The “culture of litigation” is inserted within the perspective of the gradual loss of the capacity of consensual solution of the conflicts arising in society. If in the context of private relations, in which the autonomy of the will and the rule of property availability prevail, this scenario is evident, even more serious is the situation when the Public Administration is involved in the conflict, supporting more complex analyses such as that about the supremacy or unavailability of the public interest.

The overcoming of this “culture of litigation” necessarily involves the modification of the legal mentality of all those who are part of the legal system, including, and mainly, the lawyers, inserted in a primordial position regarding the encouragement of consensuality

It is in this space of growing consensus that arbitration appears as an appropriate means for the solution of disputes involving the Public Administration, emphasizing the idea of the multiport system. The reform itself in the civil procedural legislation that took place with the promulgation of the current Code of Civil Procedure marks the definitive evolution in the national understanding about the appropriate means for conflict resolution.

The citizen would have several alternatives available to resolve a conflict. The objective of the multiport system is to seek ways of resolving conflicts that replace the traditional judicial system of dispute resolution or that these new forms can coexist with the state judicial tutelage (BRANDÃO, 2014, p. 24).

It may be noted that, in the interest of the truth, the choice of alternative routes to the classical judicial process marks a real break to the historical cultural pattern, Therefore, it is fundamental that there is a massification of these ideas in order to achieve a high degree of search by means that can solve the disputes in a more appropriate and effective way.

The high congestion rate of the Judiciary Branch, together with its deficient structure, makes evident the serious crisis that plagues the bowels of the judicious bodies. What is most worrying is that the Public Administration, especially at the federal level, is most responsible for the high number of cases under way.

The change of this litigiousness paradigm does not mean disregarding the important role played by the Judiciary Power, which should guide its decisions always “in the practical and effective result in the resolution of the social conflict, and not only in the mere assertion of winner and loser, because this can cause the fomentation of litigiousness” (MACEI; VOSGERAU; ANDRETTA, 2020, p. 14), which in itself goes against those that the Federal Constitution itself has, by establishing as a fundamental objective of the Republic the construction of a free, just society of solidarity.

Moreover, it is possible to notice that the concentration of power in the hands of the judiciary is not, in its essence, positive for society. On the subject, Martonio Mont'Alverne Barreto Lima and Evaldo Ferreira Acioly Filho (2019, p. 96) state:

This concentration of power in the hands of the judiciary is dangerous, because from the analysis of Brazilian political history one perceives an attempt to concentrate and fortify the controller and interpreter since the time of the Empire. I am talking about the Moderating Power that, like the Judiciary, posed as a neutral third, when, in fact, it hid its conservative character. However, when the powers of judges who are not normally elected are extended, the constitutional jurisdiction also has a conservative aspect, since the judiciary has a monopoly on the morality and public order of a State, determining what a constitution is or is not. This monopoly also diverges from popular sovereignty, because a state power - Judiciary - is limited, excluding popular participation, breaking with the democratic aspect of the constitution.

Thus, it is necessary that the lawyer is placed in front of this scenario that presents itself. The 21st-century lawyer is not, and could not be, the lawyer with the litigation mentality.

## 2.2 PREVENTIVE, OUT-OF-COURT OR BUSINESS ADVOCACY

The historical and relevant activity of advocacy, in Brazil regulated by Law n. 8.906/94 (Statute of the OAB), as well as by the General Regulation, Code of Ethics and Discipline and Provisions of the Federal Council, needs to be rethought. As a matter of fact, in recent years this process of reflection and debate on the real role of the lawyer comes without deepening and it is already possible to identify a stage of profound changes.

In spite of the predominantly private activity, there is no way to refute the important role that the lawyer assumes before society, since it is through it that he in relation to the Judiciary Power is materialized. In addition, the Federal Constitution itself, in its art. 133, tries to raise the advocacy to a level not belonging to any other liberal profession, once consider the lawyer as being indispensable to the administration of Justice.

Alongside the prerogatives, lawyers also have well-placed responsibilities, such as the tireless defense of the Constitution, the democratic rule of law, human rights and social justice. In these terms, Art. 44, I of the Statute of the Brazilian Bar Association is recommended.

The procedural legislation in force in the country assigns to the lawyer, as a rule, the exclusivity in what concerns the postulatory capacity, that is, only the lawyer, regularly enrolled in the tables of the Bar of Brazil, after passing in examination of technical aptitude, may stand trial. Thus, the domain of the ability to postulate is inherent to the activity itself, and, as a rule, this occurs within the scope of the existence of a conflict between two or more parties, a conflict that will be brought to the Judiciary for there to be adequate judicial provision.

It is almost naturally verifiable the closeness that the legal activity possesses with the constant management of conflicts, in which although this management is historically summed up to the defense in court with a view to achieving a judicial decision that favors the constituent.

Despite this contextualization, it is necessary to understand that in the 21st century there is no longer the same space for the professional lawyer who simply postulates in court, that is, the one who litigates. Historically the "good lawyer" was the one considered "good fight", idea that has been gradually emptied, as people now seek professional who can solve the concrete problem without the judicialization of the issue, preferably. The lawyer, in the current society, is concerned to find rational solutions to conflicts even before they reach the Judiciary, and this is exactly where the emphasis is placed on negotiating, extrajudicial or preventive advocacy.

On this preventive role of law, Paulo Lôbo (2009, p. 20) states that "one of the great evils of legal training in Brazil is the predominant destination of legal courses to litigation". Such a conclusion seems quite logical, since the collapsing Judiciary Power shows itself to be completely depleted and unable to deliver agile and efficient responses to society. In this perspective, the author adds that:

[...] the most dynamic area of the legal professions today is extrajudicial action, in several dimensions. We can view them in two ways: as preventive activities and as extrajudicial conflict resolution activities. In the first case, one tries to avoid them. no second, seek different means of judicial process to resolve conflicts already installed or with potential litigation; this is the field of mediations, of individual or collective negotiations, da arbitragem [...]

There is no way to glimpse reality other than the one pictured above. The big question seems to be to locate the practice of law in this scenario of paradigm shift. In this regard, Paulo Lôbo (2009, p. 20) continues:

[...] the lawyer is a specialized professional, whose advice or advice is essential, regardless of legal commandment, by the increasing demand for their services coming from people, companies, entities, social groups and popular movements. This vast professional field requires skills that legal courses should consider, because the trend is the increasing deregulation of their activities.

This context makes that professional lawyers need to complement their training with specific knowledge that enables them to act on these new fronts, first avoiding that conflicts occur and, being impossible the prevention, finding ways to resolve these disputes outside the traditional judicial framework.

At this point, it is questioned, for example, if the law is prepared and adequately qualified to act with negotiation, mediation and arbitration. The safest answer tends to be negative.

There is no way to talk about seeking adequate means to resolve conflicts, especially those of a fiscal nature, if all those who act in the management of these conflicts are not qualified for the new procedural trends. What is defended in this work is the implementation of arbitration in tax matters, as will be further deepened, but this reality implies a new advocacy, which effectively knows how to act outside the judicial field of conflict resolution.

### 2.3. FINDING ADEQUATE MEANS TO RESOLVE TAX DISPUTES

Ultimately and simply, the lawyer who instigates the litigation and in that one working aspect is doomed to create a hostile and repulsive environment towards his own clients, since no one can effectively win by prosecuting the judiciary for years and years, without an effective and adequate solution.

In the context of the exhaustion of the judiciary, there is a movement of significant legislative reforms, implementing consensual means of conflict resolution, with the ability to offer society new, sometimes much more effective, forms, to get as close as possible to what is meant about the pacification of conflicts (SILVA; SANTOS; SILVA, 2020).

By examining the picture of state inefficiency portrayed with emphasis on the solutions offered by the judiciary when trying to resolve conflicts in the tax sphere, it is noted that the use of other appropriate mechanisms to respond to this type of demand is not only necessary, but should be pursued by legal operators, provided that its possibility of harmonious coexistence with the established Brazilian legal system is duly substantiated.

Paulo Eduardo Alves da Silva (2012, p. 45) explains that:

Each society designs the framework of conflict resolution methods according to its expectations of what is or is not formal, what is or is not safe, what is or is not violent, and, above all, what is or is not fair. And in the last century, contemporary societies have demonstrated a state of crisis with their concepts of form, security, violence and justice. Of course, this compromises the hegemony of jurisdiction and of the judicial process and opens the way for the resurgence of alternative methods of settlement of controversies.

More than an alternative to the traditional jurisdictional surrender enforced by the Judiciary Power, the search for mechanisms that prove to be adequate to the specificities of the controversies arising in contemporaneity is shown to be a necessity, as well as the necessary adaptation of all who surround this reality.

It is based that “the search for a parallel system to collaborate with the official model is not only timely, but essential” (PINHO; PAUMGARTTEN, 2016, p. 27) mainly because the expansion of the number of methods made available to the parties implies a greater probability of achieving a result appropriate to the type of conflict that needs to be resolved, bringing interesting results, including in the economic field, both the parties and the lawyers involved.

Among the main appropriate mechanisms in the legal field are mediation, conciliation and arbitration, the first two being identified as consensual methods in the self-compositional form, while arbitration is characterised by heterocomposition, consensual.

Although there is a long way to go, data from the International Chamber of Commerce (CCI) point out that, in 2016, the country was considered the 5th (fifth) in the world that most uses arbitration for conflict resolution, behind countries like the United States of America and France<sup>3</sup>.

Another important fact is that provided by the Arbitration and Mediation Center of the Brazil Canada Chamber of Commerce (CAM-CCBC), a pioneer in Brazil in the field of arbitration, citing that statistics point out that there has been a gradual increase in the number of arbitrations performed, especially from 2013 onwards.

Everything advocated here is in line with the constitutional principle of efficiency in public administration, which at the same time presupposes state modernization, including with regard to the regulation and implementation of adequate means for resolving disputes, especially those of a tax nature (OLIVEIRA; OLIVEIRA; CARMO, 2019).

What is advocated here is in the field of the need for adaptation and adequacy of advocacy to this new scenario that is presented, otherwise these appropriate methods of conflict resolution, especially in the fiscal area, will remain only as formal parameters, without any degree of effectiveness.

### 3 TAX ARBITRATION: A NEW PERSPECTIVE

Tax arbitration presents itself as an interesting possibility within the perspective of an adequate solution of tax conflicts, reason why it is necessary to deepen the studies on some fundamental aspects that permeate the institute.

3 Information available at: <https://www.jota.info/justica/brasil-e-o-5o-pais-que-mais-utiliza-arbitragem-nomundo-19092017>.

### 3.1. SOME ASSUMPTIONS ABOUT ARBITRATION

Arbitration can be fully validated as a legal technology capable of solving some problems faced, primarily in tax matters, collaborating decisively to solve several problems of effectiveness experienced today. However, for this to be effective, it is necessary to establish a new legal culture about the dispute, involving all the actors who work in the solution of conflicts.

It is evident that the classic view of litigious process is due to the fact that the adequate and just resolution of the disputed object is a function predominantly exercised by the organs of the Judiciary, with the clear objective of social pacification, that is, this state power has safeguarded the exclusive exercise of judicial protection.

Despite the existence of this classic vision of exclusivity of jurisdictional guardianship, the existence of a feeling of renewal in Brazilian procedural law is currently perceived. For Jonathan Vita (2006, p. 205), we are experiencing this renewal wave, in which the search for other appropriate means to resolve conflicts flows in the increasingly effective valorization of mechanisms such as conciliation, mediation and arbitration. It seems obvious that advocacy cannot and should not be alien to this real paradigm shift.

As mentioned, within this perspective of renewal comes the arbitration, considered heterocompositive means of conflict resolution, since there is between the parties the uniformization of a consensual understanding, subjecting both to the solution presented by a third (arbitrator or arbitration court) which is outside the context of the Judiciary Branch, it is lawful to speak of a clear waiver of state jurisdiction when accepting an arbitration clause.

The arbitration procedure presupposes the existence of available rights, which is a point of dispute when it comes to arbitration in tax matters. The fact is that, if there is the availability in relation to the state jurisdiction, which occurs through the arbitral commitment, the Judiciary Power will not be able to intervene, except at a time after the arbitral award, in case of any defect that completely annuls the procedure itself, and not the substance of the decision in the arbitral award.

The conceptual treatment given to arbitration by the doctrine, in general, can be systematized by the words of Francisco José Cahali (2015, p. 117), for whom arbitration is placed, alongside the state jurisdiction, as a heterocompositive conflict resolution mechanism, where the parties concerned, having full and agreed capacity, establish that a third party, or even a collegiate party, shall have the power to resolve the dispute. It is important to note, in this context, that the settlement of the conflict takes place through the arbitration ruling, which will have the same effectiveness as a judicial ruling.

There are those who advocate the thesis that in arbitration there is a kind of "privatization of justice", which in fact is not acceptable. In this respect, Beraldo (2014, p. 25), understands that arbitration cannot be seen as the "judicious rise of neoliberalism triumphant", thus refuting the idea of "privatization of justice" simply because it has been the object of wide expansion in other countries for decades.

It is possible to cite numerous benefits of the use of arbitration, in particular the production of effectively technical decisions. This aspect should be highly valued when talking about tax arbitration, since tax disputes often boil down to disagreement on some eminently



technical aspect between tax and taxpayer, such as the classification of products for the purpose of taxation.

When faced with complex demands, involving technical issues over which the Judiciary Power does not have full control, it is possible to understand how far the classical jurisdictional process proves to be exhausted, unable to provide solutions with the minimum of effectiveness sought by the court

On the legal nature of arbitration, Carmona (1993, p. 25) states that: "there seems to be a universal tendency to broaden the concept of jurisdiction, as it increases the degree of participation and popular interest in the administration of justice, revealing one of the fundamental scopes of jurisdiction, the political". The need for this expansion is evident, thus giving priority to the teleological element of jurisdictional activity.

In spite of the autonomy of the will as a fundamental norm, there is in the foreign legal systems the provision of situations in which the submission to arbitration is mandatory, as occurs in the Constitution of the Portuguese Republic, which expressly mentions the "arbitral courts" in his art. 209<sup>4</sup>. Another example cited by the indoctrinator is Costa Rica, where there is an obligation to participate in the arbitration in matters related to social security.

The idea of autonomy of the will as a "propelling spring" of arbitration in all its aspects is consolidated, revealing from the faculty that the parties have in a given business involving available property rights to adopt this optional path of conflict resolution, until the arbitral procedure is developed when, for example, arbitrators are appointed and chosen. The fact is that it is perfectly possible to extract from Law 9,307/96 several articles that indicate the close relationship of arbitration with the autonomy of the will, which will be analyzed in a more detailed way.

### 3.2. NEED TO OVERCOME PARADIGMS

Based on some premises, it is necessary to advance the discussions on the possibility of using arbitration to resolve conflicts involving the interests of the Public Administration, from the very interpretation of Law 13.129/15, which amended Larb so that it would be possible to defend the use of this appropriate means of resolving tax conflicts.

In Brazil there is great resistance to tax arbitration, even though it is possible to verify that the institute is widely disseminated in several countries, such as in Portugal, for example. Hugo de Brito Machado (2008, p. 130) defends the impossibility of the arbitral solution to tax deals from the defense that the right to collect taxes, inherent to the Public Treasury, would be unavailable. It is clear that the point of discussion revolves around the (in) availability of the law to legitimize the use of the arbitration procedure. Despite this, the institute is not new.

4 "Art. 209 Categories of courts 1. In addition to the Constitutional Court, there are the following categories of courts: a) the Supreme Court of Justice and the first and second instance judicial courts; b) The Supreme Administrative Court and other administrative and fiscal courts; c) The Court of Auditors. 2. There may be maritime tribunals, arbitral tribunals and courts of peace. 3. The law shall determine the cases in which and the ways in which the courts referred to in the preceding paragraphs may be set up, separately or jointly, in conflict courts. 4. Without prejudice to the provisions on military courts, the existence of courts with exclusive jurisdiction for the prosecution of certain categories of crime shall be prohibited."

The New Consolidation of the Customs and Rent Bureau Laws, approved on April 13, 1894, already provided for the institution of arbitration in tax matters, mainly for the judgment of topics relevant to customs areas (SEIXAS FILHO, 2008, p. 221).

In the context of the tax legal relationship the main state need is the satisfaction of the tax credit, since only in this way will the State have the financial capacity to accomplish what is proposed, in accordance with the fundamental objectives set out in CF/88<sup>5</sup> in its art. 3rd. This provision is the cornerstone of all tax activity of the State and must be viewed with such a view to taxation assuming its real social function.

For the purpose of defending tax liability, two are the important elements that can be extracted from these basic premises related to the tax legal relationship. The first is the pecuniary character of the tribute, from the very legal concept of tribute brought in art. 3o do (CTN)<sup>6</sup> (BRASIL, 1966), for whom tribute is compulsory pecuniary benefit, therefore eminently patrimonial. The second is the fact that the collection takes place through an administrative activity fully linked, which does not preclude the possibility of the Government to submit to arbitration the controversies that have arisen, seeking a solution different from the classical state jurisdiction.

According to Casella and Escobar (2016, p. 746), the international doctrine divides the categories of tax arbitration as: Tax disputes arising from business relations; Agreements to avoid double taxation; Tax disputes between a foreign investor and the invested country. The authors understand that such division takes into account only the merit and scope of the controversies. Thus, they propose a classification that is considered to be extremely relevant to what is proposed here, taking into account the time of the dispute, the merit and its scope, which is: a) Regarding the time: it would be divided into preliminary and preventive to the collection of the tax credit; or subsequent to the creation of the tax credit; b) Regarding the merit: it is divided in direct - analyzing directly the tax issues; or indirect - when the arbitral reports arise a new tax legal fact (generating fact); c) As to the scope: it is divided into internal - when it occurs within the internal Federative structure or between Administration and national taxpayers; state international - involving agreements to avoid double taxation; or mixed international - when involving a state and one among foreign private.

The authors' proposal summarizes the forms that tax arbitration can present, both in the international and internal. It is interesting to observe in this classification the possibility of arbitration having space before the definitive constitution of the tax credit, through the launch, which, according to Priscila Mendonça (2014, p. 115) would promote a growing dialogue between the tax authorities and the taxpayer.

This is a relevant position in that the high litigiousness impregnated in the tax legal relationship makes Fisco and taxpayer increasingly dialogue less, that is, the relationship is permeated on the one hand by authoritarianism and on the other by the incessant flight of taxation.

5 "Art. 3º They are fundamental objectives of the Federative Republic of Brazil: I - to build a free, fair and solidary society; II - to guarantee national development; III - to eradicate poverty and marginalization and to reduce social and regional inequalities; IV - promote the good of all, without prejudices of origin, race, sex, color, age and any other forms of discrimination."

6 "Art. 3º Tax is any compulsory pecuniary benefit, in currency or whose value can be expressed in it, that does not constitute a sanction of unlawful act, established by law and charged through administrative activity fully linked."

The question seems to be the breaking of paradigms so that this heterocompositive means of conflict resolution can be implemented in Brazil, what is defended in this thesis as being something impacting to collaborate with the overcoming of the serious economic crisis that plagues the country in recent years, predominantly fiscal base.

In general, the discussions about the possibility or not of the use of arbitration in tax disputes rest on the question of the interpretation about the availability or not of the tax credit, which will be analyzed in detail below. It is worth noting that this credit is the one resulting from the tax legal relationship and represents the subjective right of the State to collect the proceeds of tax taxation.

Even in the face of unfavorable arguments, it is believed that the use of this means to resolve tax conflicts is a real necessity. Portuguese professor Diogo Leite de Campos (2005, p. 50) argues:

The fair interrelationship between the citizen and the State at the level of taxes, with the "free" and spontaneous assumption by that of its tax obligations - as a principle and starting point - involves the free assumption of the regulation of conflicts between creditor and debtor. It passes, in other words, by the faculty of recourse to arbitration. With all the advantages it brings with regard to the certainty and security of law. In particular: the choice of the judges by the parties, from among the most knowledgeable on the subject; increased thoroughness and depth of the decisions; more careful "personalisation" of the decision in terms of further consideration of the facts and the law, without regard to the deforming jurisprudences of the specific case; greater predictability of the justice of the decision - hence waiver of unfeasible claims; etc.

It should be noted that the advantages of tax arbitration rest on aspects related to the certainty and security of the law itself, two fundamental aspects for the construction of a more rational and fair national tax system.

It is important to highlight that the Bill 4.257, of August 6, 2019 (BRAZIL, 2019), of Senator Antonio Anastasia (PSDB - MG), proposing the modification of the Law on Tax Executions (Law 6.830, of September 22, 1980) and establishing two extremely important legal figures: administrative tax execution and tax arbitration.

According to Saulo Gonçalves Santos and Rômulo Guilherme Leitão (2019, p. 471), "with the expansion of alternative dispute resolution mechanisms, a multiport system of dispute management is materialized" the participation of the Public Administration in arbitration proceedings is imperative.

Thus, defends Camila Siqueira Xavier, that "the arbitration signed through the arbitration commitment represents an appropriate method for the resolution of tax charges (complementary to judicial litigation and administrative litigation)", thus considering a "third way of challenging the tax credit already constituted, besides bringing effectiveness in the prevention of disputes, through the arbitration clause previously signed" (2019, p. 32).

In fact, tax arbitration has the important function of presenting itself as a suitable and complementary way to resolve certain fiscal conflicts, operating a kind of deregulation of demands, reason why the project should be debated in the National Congress with the urgency that the theme demands, since possible contributions to solve the fiscal crisis of the State is a major issue in the national development agenda.

## 4. THE ROLE OF COUNSEL IN ARBITRATION PROCEEDINGS

As already mentioned, the law is going through a historic moment of profound transformations, driven by the exhaustion of the judiciary and the need to assume a leading role in a system of prevention of litigation, or even find an appropriate solution so that disputes can be effectively resolved.

Among the appropriate dispute settlement mechanisms, arbitration is an important instrument. This raises doubts about the ways in which lawyers can place themselves as professionals whose participation is essential for an effective result.

Initially, it should be mentioned that the Arbitration Law itself (Law n. 9.307/96) (BRAZIL, 1996) makes it optional to Poststulation before an arbitration process through a lawyer, as it provides:

Art. 21. The arbitration shall be in accordance with the procedure established by the parties to the arbitration agreement, which may refer to the rules of an institutional arbitration body or specialised entity, and may be delegated to the arbitrator himself or to the arbitral tribunal, regulate the procedure.

§ 1 If there is no stipulation concerning the procedure, it shall be for the arbitrator or the arbitral tribunal to discipline him.

§ 2º The principles of the adversarial, of the equality of the parties, of the impartiality of the arbitrator and of his free will always be respected in the arbitration procedure.

§ 3º The parties may apply through a lawyer, always respecting the power to designate who represents or assists in the arbitration proceedings.

§ It will be up to the arbitrator or to the arbitral tribunal, at the beginning of the procedure, to attempt the conciliation of the parties, applying, as far as possible, Art. 28 of this Law.

In spite of this power being clearly observed, there is no need to think about excluding the professional lawyer from the process of constitution and development of the arbitral solution.

It is necessary to remember that arbitration is a heterocompositive solution of conflicts, but of clear consensus basis, in which the choice takes place through the Arbitration Convention, whether judicial or extrajudicial. In both situations, the participation of the lawyer is fundamental, even because no one will venture legally without the advice and accompaniment of a trained professional.

The absence of lawyers in the arbitration solution may even remove the possibility of transforming the speed and efficiency of the out-of-court solution into a problem that may in the future fall back into the traditional state jurisdictional activity. That is, it is a price for which the parties are certainly not willing to pay.

It should be noted that in the arbitration process the lawyer appears as a truly indispensable figure, but a professional who has new parameters of professional performance, dispensing with the aggressiveness often required in traditional processes and understanding that there is tacit renunciation of the instruments of procrastination that are carried out when acting before the Judicial Power. In arbitration, what both parties want is for the conflict to be resolved as efficiently and quickly as possible, with lawyers imbued with this objective.

The first fear in the advocacy resulting from the dissemination of arbitration as an appropriate means of resolving disputes was the exclusion of professionals enrolled in the Bar Association of Brazil, this before the alleged faculty indicated by the Arbitration Law.

In fact, what we see at the moment is the opening of new possibilities of professional activity, within the perspective of gradual selective abandonment of old practices in law. The professional puts himself at a decisive moment when he needs to adapt to a very clear reality: the litigation traditionally placed in the orbit of the Judiciary Power is no longer interesting to all the actors involved.

In addition, it should be borne in mind that arbitration itself goes through an expansion process in Brazil. As stated above, it is essential that it be incorporated, for example, into the tax dispute settlement system. Thus, in the orbit of tax law, a new space of action will arise for those who show themselves open to this new reality, which will undoubtedly come.

Tax arbitration in Brazil seems to be on the verge of legislative regulation and for this reason it will need a change of attitude the conception by the professionals of the law that militate in this very specific area. In this perspective, the lawyer should place himself as a great facilitator, giving the necessary security so that the parties to the conflict can seek out-of-court solutions, whether consensual or not.

Public law itself has been undergoing, in a very short time, a profound change in the form of action, this with the incorporation of the mechanisms of consensual dispute resolution, as well as the extrajudicial forms already implemented in the public administration.

Thus, there is no doubt about the importance and indispensability of the participation of the lawyer in the construction of arbitration as an appropriate mechanism for resolving conflicts, in which the rapid and effective solution of disputes is sought.

## 5. CONCLUSION

From all that has been studied throughout the present work, it is possible to conclude that the globalized world, the informational society and the advancement of technology are based on an environment that calls for the reinvention of some professions, with advocacy being an integral part of this context.

In the 21st century, the challenges imposed on lawyers, especially in the tax field, are many, especially in the context of the complete exhaustion of the capacity of the judiciary to efficiently resolve the conflicts brought to the classic idea of state jurisdiction.

In this context, it is necessary that the professional of the law realizes the need of gradual abandonment to the exclusive ideal of litigiousness, advancing on a debate related to the consultative and preventive advocacy, to the issues of consensual solution of the conflicts, or even out-of-court mechanisms, such as arbitration.

It is concluded by the full possibility of legislative regulation of tax arbitration in Brazil, breaking classic paradigms about the supremacy of the public interest and unavailability of tax credit.

Thus, a perspective of action arises for the lawyer who militates in this field, and it should be emphasized the importance of the participation of this professional in the arbitration procedure, thus not having the risk of undervaluing the advocacy.

Finally, it is concluded that perhaps the great challenge of advocacy in the 21st century is to incorporate the importance and indispensability of the participation of skilled professionals in the construction of arbitration as an appropriate conflict resolution mechanism, in the search for a speedy and effective settlement of disputes, especially those of a fiscal nature.

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