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Legal Framework for Arbitration in the Dominican Republic

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Arbitration has been legislatively active in the Dominican legal system since 1884; articles 1003 to 1028 of the Code of Civil Procedure governed civil ad-hoc arbitration from 1884 until 2008. Commercial arbitration was first regulated in 1978 with the modification of article 631 of the Code of Commerce. Moreover, the latest constitutional reform in the country included an express reference to arbitration; article 2290 of the Constitution adopted on 26 January 2010 expressly acknowledges international arbitration as a means of dispute resolution for international commerce. It marks the first time the Constitution has provided a specific disposition for arbitration.

The Dominican Republic issued its first regulation for institutional arbitration in 1987 with the enactment of Law No. 50-87 regarding the Chambers of Commerce (the Law for Institutional Arbitration).[1] This law constitutes the beginning of an incipient arbitration culture in the Dominican Republic as it created the Boards of Conciliation and Arbitration (BCAs) within the Chambers of Commerce. The BCAs were designed to administer disputes taken to arbitration and had the faculty to appoint arbitrators in disputes that arised between members of the corresponding Chamber of Commerce, or members and non-members, or members and the state. One of the most debated topics of the Law for Institutional Arbitration is the provision that arbitration awards issued by the arbitration panels administered by the BCAs constituted enforceable titles as they should not be submitted to the requirements for recognition and enforcement under the Code of Civil Procedure. This provision is still active and binding.

Although the Law for Institutional Arbitration served the purpose of initiating an arbitration practice in the Dominican Republic, it did not offer a complete legal framework as it failed to, among other provisions, provide for arbitration for non-member parties and international arbitration. Moreover, the Law for Institutional Arbitration did not regulate arbitration clauses and their autonomy, nor did it completely safeguarded the *Kompetenz-Kompetenz* principle.

With the execution of the Dominican Republic – Central America Free Trade Agreement (DR CAFTA), a more complete and cohesive regulation for commercial arbitration in the Dominican Republic was demanded. Henceforth, the first commercial arbitration law, No. 489-08 (the Law for Commercial Arbitration), was enacted in December of 2008. This new law abolished articles 1003 to 1028 of the Code of Civil Procedure, but it did not modify the Law for Institutional Arbitration. Furthermore, due to the 'gaps' left by the Law for Institutional Arbitration, in 2009 a new legislation (Law No. 181-09) modified the Law for Institutional Arbitration and reinforced the current legislation for institutional arbitration. The main novelties of this new legislation are that it allowed arbitration for non-members of the corresponding Chambers of Commerce, reinforced the *Kompetenz-Kompetenz* principle and provided a rapid system to challenge arbitration awards (which, for institutional arbitration, still constitute enforceable titles per se), while limiting the intervention of judicial courts.

To date, only two Chambers of Commerce – those of Santo Domingo and Santiago – have created Centres for Dispute Resolution (as the BCAs were renamed in Law No. 181-09) and both centres have their own set of rules for arbitration. Consequently, the Law for Institutional Arbitration provides for administrated arbitration, while the Law for Commercial Arbitration provides for ad-hoc arbitration, international arbitration and the general rules of arbitration.

In addition to the Law for Commercial Arbitration and the Law for Institutional Arbitration, which constitute the current, legal framework for arbitration in the Dominican Republic, several international multilateral treaties and bilateral investment treaties executed by the Dominican Republic contain specific provisions regarding arbitration between states and states and individuals. Furthermore, there are specific laws that contain provisions regarding arbitration in certain sectors, such as the Consumer Protection Law No. 358-05, which regulates consumer arbitration and prohibits clauses that submit conflicts exclusively to arbitration in pre-formulated standard contracts; also the Labour Code (which provides for ad hoc arbitration in labour disputes) and the Sports Law No. 356-05, which creates a Sports Arbitral Tribunal, among others.

In addition, the Dominican Republic has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) since 2001[2] and the Inter-American Convention on International Commercial Arbitration since 2007.[3] The latter two international treaties allow the Dominican Republic to enjoy a uniform arbitration legislation that is connected with the main arbitration legislation of the world, especially given the nature of the Law for Commercial Arbitration, which was inspired by the United Nations Commission on International Trade Law (UNCITRAL) Model Arbitration Law, although the Dominican government has yet to ratify the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

General principles of the Law for Commercial Arbitration

The Law for Commercial Arbitration is based on the Spanish arbitration Law No. 60/2003 and the UNCITRAL Model Arbitration Law, as revised in 2006. The law is divided into nine chapters. The first chapter refers to the general dispositions of the law, including scope of application, disputes subject to arbitration, definitions and rules of interpretation, as well as the representation of the state. The second chapter is dedicated to the arbitration agreement, its form, definition and autonomy. Chapters three, four and five refer to the arbitral tribunal, its composition, jurisdiction and the procedural aspects of arbitration. Chapters six, seven and eight provide for the awards, the finalisation of the procedural aspects, the challenge of the awards and the recognition and enforcement of the awards. Finally, chapter nine establishes certain transitory dispositions necessary for the enactment of the law.

Herein, we will identify the relevant principles of arbitration included in the Law for Commercial Arbitration, especially the ones that support the application and understanding of the *Kompetenz-Kompetenz* principle in commercial arbitration, in the

understanding that such principle constitutes the central figure in any efficient arbitration system.

Under the Law for Commercial Arbitration, the agreement to arbitrate must be in writing, reflected in an arbitration clause or in a separate and independent agreement. This independent agreement can be prior to the conflict or once the conflict arises. Article 10 of the Law for Commercial Arbitration sets forth that 'in writing' can also be reflected by e-mails, faxes, telegrams, letters or any other means of telecommunication that proves the existence of the agreement and is accessible for ulterior consultation. All these provisions are consistent with the New York Convention. Furthermore, the Law for Commercial Arbitration provides that an agreement to arbitrate will be considered valid if consigned in any written pleadings where the existence of the agreement is affirmed by one party and not denied by the other party. Finally, the Law for Commercial Arbitration provides that in international arbitration the agreement to arbitrate will be considered valid if said agreement complies with the requirements established by the law of choice of the parties. Consequently, these provisions of the Law for Commercial Arbitration reaffirm the pacta sunt servanda principle included in article 1134 of the Civil Code, a principle that respects the decision of the parties to submit their disputes to arbitration, since mutual consent is one of the key elements of our civil law system.

The Dominican legal system provides for the severability of the provisions of an agreement. However, in order to emphasise on the importance of the autonomy and severability of the arbitration clause, the Law for Commercial Arbitration also includes provisions regarding autonomy and severability of the arbitration agreement. In this regard, article 11 provides for the autonomy and severability of the arbitration clause by affirming that the agreement to arbitrate is considered an independent agreement and consequently the potential inexistence, partial or total invalidity of an agreement that contains an arbitration clause does not necessarily imply the inexistence, inefficiency or invalidity of said arbitration clause. Nonetheless, this autonomy and severability is not applicable when a competent authority (a judicial court or any other competent tribunal) has annulled the agreement that contains the arbitration clause, and said decision has become enforceable and acquired the authority of a final order not open to recourse.

Even though the Law for Commercial Arbitration, the Law for Institutional Arbitration or any of the international treaties on commercial arbitration executed by the Dominican Republic do not expressly provide for the inclusion of non-signatory parties to the arbitration agreement in an arbitration process (third-party arbitration), from article 10 of the Law for Commercial Arbitration and article 11 of the New York Convention, both of which provide for the possibility for arbitration agreements not to be included in a contract nor in an independent legal instrument, it could be alleged that the execution of the arbitration agreement by the parties is not obligatory. Moreover, in arbitration, the general principle is the rule of consent, hence the consent of the parties is vital and can be expressed by different means. As a consequence, third-party arbitration is not prohibited, so it is possible for a party that did not execute an arbitration clause to intervene or become a party in any arbitration proceeding, if any of the ordinary causes set forth in the Civil Code arise, regarding the effects of contracts to third parties as an exception of the relative, bilateral effects of all contracts. The execution of the arbitration agreement is ad probationem, not ad validitem.

Considering the parties' freedom to contract and decide the rules applicable to their transaction, and being the dispute resolution mechanism one of the areas the parties can freely decide upon, it is important to take into account that the Law for Commercial Arbitration sets forth certain restrictions to the freedom of submitting certain disputes to arbitration. In this regard, article 3 clearly provides that conflicts involving civil status and family law matters, matters that concern the public order and any conflicts not susceptible of settlement may not be subject to arbitration.

The Kompetenz-Kompetenz principle

Before the enactment of the Law for Commercial Arbitration, the Supreme Court of Justice had acknowledged the *Kompetenz-Kompetenz* principle by means of a court order rendered on 13 December 2006 (*La Bratex Dominicana v VF Playwear Dominicana*), although in this order the court failed to refer to the New York Convention, which, once ratified by the Dominican Congress, was binding to all courts of law. As it is known, the New York Convention provides the *Kompetenz-Kompetenz* principle. In this case, the court acknowledged that ordinary courts lack competence to hear the merits of any dispute in which the parties had previously executed an arbitration agreement, therefore courts had the procedural obligation to remit the matter to the corresponding arbitration panel. After the enactment of the Law for Commercial Arbitration, the *Kompetenz-Kompetenz* principle was officially inserted into the Dominican legal system, as with all countries with older arbitration cultures.

The obligation of judicial courts to comply with the agreement of the parties is the fundamental basis for the effectiveness of arbitration. Such obligation is the primary focus of the *Kompetenz-Kompetenz* principle. Hence, the Law for Commercial Arbitration (article 12) provides clear dispositions regarding the *Kompetenz-Kompetenz* principle, as it provides a strict prohibition for the parties subject to an arbitration clause to empower ordinary courts – in reference to the negative effect of arbitration clauses, in the sense that parties aren't allowed to resolve their disputes before ordinary courts, unless both parties agree to cease and desist from the arbitration clause. However, the obligation of judicial courts to declare their lack of competence due to the existence of an arbitration clause included in the Law for Commercial Arbitration is slightly undermined by a provision that establishes that in order for an ordinary tribunal to declare its lack of jurisdiction, one of the parties must present a plea in such regard. Under the Law for Commercial Arbitration, the tribunal is not obliged to declare its incompetence ex officio. The matter becomes controversial when the defendant fails to appear at court and a default judgment is rendered. Evidently, if the defendant fails to appear at court it would not be allowed to request the lack of competence of the ordinary court based on the arbitration clause. The law at hand does not provide in this scenario, as the only means by which a court may declare its lack of jurisdiction based on an arbitration clause is in the event that the defendant appears at court and presents a motion for lack of jurisdiction.

Furthermore, the law at hand provides that once the arbitral tribunal is appointed it can continue with proceedings and issue an award notwithstanding any open judicial process. Additionally, the law establishes the faculty of the arbitral tribunal of deciding on its own jurisdiction, including the exceptions regarding the existence or validity of the arbitration agreement or any other issues that may prevent the arbitral tribunal to enter into the merits of the dispute.

Another controversial topic of the Law for Commercial Arbitration is that it provides that the order rendered by an ordinary court that decides on a motion for lack of jurisdiction based on an arbitration clause can't be challenged by any of the parties. The purpose of this provision is to impede the extension of proceedings within ordinary courts and allow the parties to continue litigating before the corresponding arbitration tribunal, therefore the content and consequences of the prohibition of appellation appear to be

'pro arbitration'. Nonetheless, the law does not distinguish the case when the ordinary court accepts or dismisses the motion for lack of jurisdiction. Apparently, the law presumed that all motions of this nature would be accepted by the courts of law. As a consequence, if a judge denies a motion for lack of jurisdiction the Law for Commercial Arbitration appears to prohibit the parties, especially the defendant, to challenge this decision so as to allow an appellate court to correct the situation and remit the parties to arbitration. However, to date this issue has yet to be presented before a Dominican tribunal, hence no precedent exists on the matter.

Enforcement and challenge of arbitration awards

As per the provisions of the Law for Institutional Arbitration, arbitral awards rendered by the Centres for Dispute Resolution of the corresponding Chambers of Commerce are enforceable without the intervention of ordinary tribunals. On the other hand, ordinary awards (those of ad-hoc arbitration) do not constitute enforceable titles and consequently require the recognition and enforcement authorisation issued by ordinary courts. As with the majority of laws for arbitration, the Law for Commercial Arbitration delegates certain functions to ordinary courts, besides deciding on the recognition and enforcement of arbitral awards. In this regard, the Court of First Instance (Trial Court) is competent to decide or aid in the following cases:

- the appointment of arbitrators, when applicable;
- assistance to the arbitral tribunal in obtaining evidence, including audition of witnesses;
- the adoption of interim measures; and
- the forced enforcement of arbitral awards.

The Court of Appeals is competent to decide on the annulment of an arbitral award and on the challenge of arbitrators or complete arbitral tribunals. As for foreign arbitral awards, the Civil and Commercial Chamber of the First Instance Court of the National District is the competent judicial authority to decide on the recognition of foreign awards.

Notwithstanding the above, and subject to the non-waiver of the parties of the possibility to challenge the award, in order for any party to request the annulment of an arbitral award, said party must initiate a petition of annulment before the Court of Appeals within the month of the notification of the award and prove one of the following situations:

(i) that one of the parties to the arbitral agreement was affected by an incapacity at the moment of entering into the agreement, or that the agreement to arbitrate was invalid under the law of the arbitration;
(ii) a violation of the right of defence of one of the parties due to non-compliance with due process;
(iii) that the arbitrator or arbitral tribunal decided ultra petita;
(iv) that the designation of the arbitrators or the arbitral procedure was not executed in accordance with the agreement of the parties (except if the agreement of the parties was contrary to obligatory dispositions of the Law for Commercial Arbitration) or in the absence of agreement of the parties on these issues, that they were executed in disregard of the Law for Commercial Arbitration;
(v) decisions on matters not susceptible to arbitration; and
(vi) that the arbitral award is contrary to public order.

However, the Law for Commercial Arbitration also provides that the Court of Appeals can appreciate ex officio the situations established in (ii), (v) and (vi), above, and that, when possible, any decisions of an award not affected by the situations described in (iii) and (v) continue to be valid.

To obtain the recognition of a foreign award, the requesting party must submit the original arbitral award and an original version of the arbitration agreement or the agreement that contains the arbitration clause to the competent court with a written motion of recognition. If any party wishes to dispute the administrative court order, it shall initiate a proceeding before the competent Court of Appeals. The Law for Commercial Arbitration allows the denegation of recognition or execution of foreign arbitral awards for practically the same grounds set forth for the annulment of awards established above. All decisions regarding the judicial designation of arbitrators or the recognition of foreign awards will be rendered in an ex parte or administrative capacity through court orders, which allows for expedite proceeding.

Notes

1 Law No. 50-87, regarding Official Chambers of Commerce, dated as of 4 June 1987.
2 Resolution No. 178-01, issued by the Dominican Congress on 27 March 2001 and enacted on 10 October 2001.
3 Resolution No. 432-07, issued by the Dominican Congress on 10 April 2007 and enacted on 17 December 2007.

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