NOBOA PAGÁN ABOGADOS
REGULATORY BRIEFING NEWSLETTER

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Note from the Editor. More on AR. Subject of the Month: Arbitration. By A. Noboa-Pagán.

As our first anniversary approaches, we have noticed the increasing interest by our readers in getting to know more about the diversity of subjects and legal events going on in the market regulation. In light of it, we have reconsidered extending the newsletter that is distributed month after month to a growing list of interested parties eager to receive our publication. So, in addition to the usual news and insights, AR will include slightly larger in-depth articles on issues related to the core issue in the newsletter.

In this particular edition of our newsletter, we have put together several articles on the multiples sides of **arbitration**: International Arbitration (new bill and reforms on DR-CAFTA), institutional arbitration (telecommunication services users, antidumping), private arbitration (e-commerce), those wherein the government is a party thereto, (agreements with foreign investors) or arbitrator (for conflicts between firms and consumers), at all times within the spectrum of issues related to the economic regulation.

We hope that you will all enjoy these changes. Write to us and let us know what you think. anoboa@noboapagan.com

Regulated Sectors. Exhaustion prior to the administrative appeal, for the establishment of the arbitration jurisdiction. State of Debate. A. Noboa-Pagán.

Often many of the agreements by and between the Dominican Government and foreign investment companies engaged in the business of work construction or service exploitation include subjective rights, which are later ignored or violated by actions on the part of the Administration. The inclusion in these agreements of international arbitration clauses extending to international arbitration locations the hearing of convention conflicts between the parties, in addition to choosing laws other than Dominican laws to govern the agreement or arbitration clause, has become a tradition. Concern is growing over the possibility of the investor and regulated firm to resort to the arbitration or administrative channels or the impact of its election in the light of the internal legal system and the laws governing arbitration.

Professor Agustín GORDILLO explains that, on one side, there are many treaties that admit the international arbitration for conflicts with the administration; however, there is a deeply rooted local normative tradition against arbitration. The tradition should no prevent the operation of the new institutional mechanisms of a higher normative rank, but it does.[1] Dominican Republic is a signatory to the New York Convention on International Arbitration. The regulating rank of the New York Convention is above that of Law No. 1464, which creates the Superior Administrative Court, as well as that of other adjective laws such as energy, securities market, e-commerce, and telecommunications laws that organize the gratuitous jurisdiction appeals (hierarchical and reconsideration appeals). Nonetheless, this does not mean that because it is an

[1] GORDILLO, Agustín, Chapter XVII, El Arbitraje Administrativo Nacional, Volume II, Pag. I, www.gordillo.com

international convention, the competencies set forth by such laws on the administrative, contentious, and judicial authorities to review the vitiated and injurious act of subjective rights stated in the agreement with the Dominican Government, have been extended to the arbitration jurisdiction, under the laws chosen by the parties in the agreement or arbitration clause if a law other than the Dominican law is chosen, the latter which often remains in effect for the main agreement or the rest of the agreement.

It is important the set the limits of the legal scope of the ratification of such treaty vis-à-vis the administrative and constitutional law governing the administrative act in the DR, whenever defects affecting the subjective rights in the agreement between the foreign investment company and the Dominican government exist. Furthermore, the fact that the arbitrational jurisdiction is intended to review the rights and duties of the parties to the agreement should be taken into serious consideration. Although the administrative branches generating the vitiated and injurious acts of laws are divisions of the Dominican Government, a contracting party to said agreements with arbitrational provision, that choose the New York Convention and laws other than Dominican laws to govern the arbitration, it would be worth laying out the reasons that would lead us to come to an appropriate conclusion as to the lack of power of the arbitration authority to directly revoke such action. Nonetheless, it does have the power to prosecute the Dominican Government against such action in accordance with arbitration laws, as it often occurs, for instance, with New York laws.

The Government has no objections when it itself is the arbitrator, whether for users and consumers, in tax or laborer-related matters, or others. Also, it will much less show any resistance when either a decree-law or the interested parties attribute the power to resolve a dispute between the parties to the Executive Branch, explains Professor GORDILLO. Evidently, the issue of concern here is not whether to impose or propose oneself in a friendly or compulsory manner as the arbitrator, but rather the possibility of resolving by arbitration any subject matters to which it is a party.[2]

Does the arbitration court have the authority to pursue action against the Dominican Government, a party to the conflict, over a matter for which the obligations have been established in the national legal system protecting the jurisdiction of a local authority to perform a damaging administrative act of the subjective rights? Do the judicial and administrative appeals constitute prior requirements that may be established by the arbitration court over the substance of the agreement? Or who has the power to review the act? Is it the administrative or contentious authorities in accordance with the national legal system or the arbitrational jurisdiction?

In Professor GORDILLO's view, the treaties for the protection of foreign investors (such as the New York Convention, in our opinion) are valid as far as submission to the international arbitration court is concerned, but some of them are subject to both the possible constructions of the **waiver of the arbitration recourse** *(a via elected, etc.)*, and the perennial

[2] GORDILLO, Ob. Cit., Pag. 4 and 5.

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resistances from local officials to write themselves, the other way around, such **express waiver of the national jurisdiction** (…). It would be worth adding the empirical difficulties that officials will most likely pose to the process of becoming an arbitration court, case by case, with determined persistence, and hence the execution of the arbitration decision. All of this calls for an equal diligence on the part of the attorneys for the acting party in the arbitration process.[3] Our interest is to determine whether the lodging of administrative, contentious or constitutional appeals could be validly construed as a waiver of the arbitration remedy.

The Government admits the arbitration, it being a party, and not a judge to it, with regard to technical or fact matters, and not matters of law or other related matters. Though, there are not many, as noted. The regulations confer authority upon it, but the reality is adverse, indicates Professor GORDILLO, on the Argentinean State, which resembles the case of the Dominican State (…) The arbitration of the State as a party is more of an exception than a rule, and its generalization has not been successful, adds the author.[4] Contrary to our nation, Argentina's legal system has established criteria conclusive enough with respect to such exception to the general rule of attributing to subject matters which the government is a party to, solutions as of *national decisions* and only exceptionally through *arbitration decisions*.[5]

In general, explains the author, the legislation has begun to show some first signals of change, with positive indications in favor of the arbitration location. For instance, Argentinean law No. 24.488 over the ***jurisdiction immunity*** of foreign states before Argentinean courts, which according to the principle on reciprocity, applies to the Argentinean State itself.[6]

As for the case of the Dominican Republic, we would have to take into account both what the national system establishes in the laws governing the subject matter, and the New York Convention in order to determine whether the administrative and contentious jurisdictions enjoy an immunity of jurisdiction that would prevent the extension. Now then, we have to keep in mind that agreements often keep

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[3] GORDILLO, Ob. Cit., Pag. 6

[4] GORDILLO, Ob. Cit., Pag. 13.

[5] Thus art. 1 of Argentina's CPCCN provides as follows: "The competence attributed to national courts is not extendible. Without prejudice to provided in international treaties and article 12, subparagraph 4 of Law 48, the territorial competence in matters exclusively of a patrimonial nature, which may be extended in agreement with the parties, is exempted. If such matters are of an international nature, the extension may be admitted even in favor of foreign judges or arbitrators acting outside the Republic.[5] Additionally, says GORDILLO, the specific norms of the bilateral treaties for the protection of foreign investors which separate from this procedural text, have regulating preeminence over it.[5] In Argentina, both the MERCOSUR treaties of a bilateral nature, and others subscribed with European nations (Italy, Spain), the extension of the arbitration location has been admitted in cases wherein the Argentinean State is a party thereto.

[6] Article 2, subparagraph. h) of such Argentinean law provides that such alleged immunity jurisdiction may not be invoked: *"Whenever, upon having agreed in writing that any dispute related to a commercial transaction shall be submitted to arbitration, attempts to invoke the immunity of jurisdiction of the Argentinean courts are made with regard to a procedure in connection with the validity or construction of the arbitration convention, arbitration procedure or with respect to the annulment of the decision, unless the arbitration convention provides otherwise.",* Ibid.

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the Dominican law as that governing the agreement, and only arbitration is submitted to laws other than the Dominican laws.

The August 2, 1947 Law No. 1494, and any modifications thereto, even if it indicates the subject matters within the jurisdiction of TSA (for instance, *acts coming from the administration or autonomous agencies in exercise of any of their powers regulated under the laws, regulations, and decrees,* art. 1b, in the same manner a vitiated and injurious action of the subjective rights would be after having exhausted the administrative recourse) and those that are not, fails to provide an express restrictive construction of the arbitration jurisdiction such as the mentioned Argentinean legal text. And though the verbal mode used in the *in fine* part of art. 1 of law No. 1494 says *"it may file,"* it only indicates that the appeal is optional to the parties with a legitimate interest; the plain text does not indicate which subject matters could be extended to an arbitration location, and which could definitely not. All of this in spite of the fact that the TSA is responsible for major territorial issues with regard to real estate of public and private domain, such as the registration and transcription of mortgages and distribution of public waters

On the other hand, the sector's regulation (laws on securities market, and monetary, financial, energy, e-commerce, and telecommunications laws) that create the gratuitous jurisdictions fails to establish an expressly restrictive construction respect to the international arbitration jurisdiction. The silence of the national regulation on the subject matter of our interest calls for the review of the arbitration system in question, along with the Administrative Law system; that is, the express or implicit limitations established in the New York Convention, including the doctrinal and jurisprudential treatment given to the notion of ***jurisdiction immunity*** in Comparative Law.

The old trend (which to some extent, in our opinion, is honored under the New York Convention) finds its origin in the belief that the arbitration court has no *imperium,* a precondition for the *executio*.[7] There is an intriguing resemblance with two centenarian problems from the old administrative-contentious court: a) the exhaustion of the recourse (administrative on one hand or judicial– on the other) and b) the execution of a judgment, explains professor GORDILLO. As for the first aspect, the international treaties examined in GORDILLO's work are, in his opinion, sufficiently clear in that the entire process in connection with becoming an arbitration court, upon having exhausted the national judicial and administrative recourse, is a foreign one; that is, the establishment of the court is admitted, however, the internal review is disregarded.

GORDILLO reiterates that for the merits of the conflict, the internal law will be applied, and in order to get to an arbitration, the national administrative or judicial recourse had to be first exhausted, while the *executio* shall be governed by the national law. Only the establishment and performance of the court have been temporarily internationalized. According to this construction, in the event of a dispute

[7] AGUILAR VALDEZ, Guillermo, *"Le regime juridique de la execution des sentences arbitrales etrangeres en Amerique Latine", en Chambre de Commerce Internacionale, L`execution de sentences arbitrales,* Paris, 1989, p. 105.

arising from a vitiated administrative act, the appeal processes provided in the indicated domestic laws would have to be exhausted. Therefore and to remain on the same storyline of Professor GORDILLO, a specific regulation of the New York Convention that could protect the foreign investor would have to be considered, on the author's understanding that such regulation of a higher legal hierarchy has priority over Law No. 1494 and the sector's law indicated, and carefully search in short whether the New York Convention eliminates possible jurisdiction or venue immunities reserved to the administrative, contentious, and constitutional authorities of the national legal system.

Article V of the Convention provides that only the recognition and execution of a sentence on the party against which it has been invoked could be denied, provided such party proves before the competent authority in the country where it is being required, the recognition and action, among other aspects: Paragraph 2, subsection a) in that same article provides that recognition and execution of an arbitration award may be also denied if the competent authority in the country requiring the recognition and execution proves b) that according to the such nation's law, the object of the disagreement is not susceptible of solution by way of arbitration;

Based on the above-described provision, the possibility that the regulation of a superior rank will extend the power granted in the national legal system (Law 1494 and sectorial laws) to the administrative and contentious seats is ruled out, at least expressly. Take into account that the New York Convention, unlike the Argentinean conventions cited by GORDILLO, is of an extensive multilateral nature. It would be hard to include specifications of this kind in a treaty where so many states are signatories to. It is easier to find extensions to the arbitration jurisdiction in treaties where fewer states converge. For example, let's say that such extension is consented to in the DR-CAFTA with regard to a lot of trade-related matters, which may be submitted to the dispute resolution mechanism of the FTA, instead of the national justice systems of the member countries involved in the disputes. (Case of the *annulment and impairment* addressed in this newsletter).

In their joint work on *International Commercial Arbitration*[8] FOUCHARD, GAILLARD and GOLDMAN explain the consequences of the arbitration agreement autonomy, something of interest for the case analysis: The autonomy of the arbitration agreement (referring to the arbitration clause) of the rest of the agreement is a legal concept rather than a factual determination. Therefore, the acceptance of the arbitration agreement does not mean that it can be separated from the agreement of the main contract. (…) The consequences of the autonomy carry certain relevance. There are direct and indirect consequences. The autonomy of the arbitration agreement of the main contract as a result of direct consequences, one of which occurs in the case of the analysis: The arbitration agreement may be governed by a law other than the law of the master agreement.

[8] FOUCHARD, GAILLARD, GOLDMAN, International Commercial Arbitration, Edited by Emmanuel Gaillard and John Savage, Kluwer Law Internacional, The Hague, Boston, London, 1999, Pag. 209.

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This concept has been construed by the French through the *method of substantive law,* in the sense of providing the arbitration agreement with the autonomy respect to any domestic law. However, in the opinion of the mentioned authors, the contract viewed as such may turn into a contract without a law (*contrat san loi).* Anyhow, our interest at this time is the *method of choice of law,* as it is the one adopted by the New York Convention in its article V(1)(a) which provides that the arbitration award may be rejected if *"it fails to be valid under the laws of the nation wherein the award was prepared."* One of the problems in the adoption of this method consists in determining whether the arbitration law is strictly assumed for procedural purposes or to the contrary, it shall be understood also as far as substantive goes. The above-referred treaty writers are of the opinion that the arbitration law, reviewed as of this method, should be taken into account as far as procedural and substantive matters go, given that the arbitration agreement–even if it is in the form of a clause- is essentially an agreement, both as to the object and procedure.[9]

In the case of examination, this means that the law of the State of New York not only governs the arbitration from a procedural perspective, but also as to any aspects of the merits discussed by the parties. Whenever the arbitration agreement adopts the format of a clause in a main agreement that contains the choice of another law applicable to the rest of the agreement, as in the case of the laws under examination, said authors explain that there may be misunderstanding respect to the applicable law. In this regard, reference is made to the fact that *related factors* between legal systems, an issue of interest for the examination of the subject matters at the arbitration court, may exist. They cite various authors, who are of the opinion that very often the law applicable to the main agreement directs to the law of the arbitration agreement. Also, in the method of the choice of law– as in the New York Convention – it is common for the related factors to become overcome by the law on the establishment of arbitration.[10]

We are of the opinion that the petition for revocation of an administrative action from SIV, INDOTEL or SIE on the part of a the regulated firm does not constitute a waiver of the arbitration procedures, but rather involves the use of a *related factor* of the domestic law that shall set the standard for the arbitration court to examine the economic claims, which in accordance with the law of the State of New York, for instance, and the duties assumed by the Dominican Government in the agreement, the company shall have the right to sue in that forum. We believe that such appreciation carries something even more important, which is that in the event the vitiated administrative act is ratified by Dominican administrative and judicial authorities, in spite of the fact that it is reasonably voidable, the arbitration court, although it shall not have the authority to revoke such act which shall become definitive and final, may terminate the

[9] FOUCHARD, GAILLARD, GOLDMAN, Ob. Cit., Pag. 221.

[10] FOUCHARD, GAILLARD, GOLDMAN, Ob. Cit., Pag. 222 and 223

arbitrariness of the Dominican administrative and judicial authorities, and consign rights to the material remedy in favor of the company, particularly if it can prove that not only the agreement's rights had been violated, but also the regulatory regime in force in the Dominican Republic.

Finally, it is important to point out what these authors think on the immunity of jurisdiction, although we have already said that in the Dominican Law under examination in this hypothetical analysis, there is no declaration of immunity expressly reserved. To their understanding, from the very moment a state subscribes an arbitration clause, it waives the right to it.[11] As in the hypothesis of the case under study, there is no express immunity in the Dominican law, the Dominican Government had the liberty to accept the arbitration jurisdiction to resolve any conflict regarding the construction of the agreement. However, this does not mean that the filing of administrative appeals involved the ignorance to the equivalent waiver by the company, as it is evident that the company is only petitioning to such instances the reconsideration or revocation of a violation of the national regulating system, which includes among others, a constitutional principle on reasonability, while maintaining the right to ask for the arbitration jurisdiction, the inconsistency of that or other actions by the Dominican Government face to its contracting obligations. The elected rule cannot be claimed as a recourse or pending suit, as it is simply about different violations, some in connection with the legal and constitutional system, and others with the agreement's law.

In spite of the scenario provided by the Arbitration Law, it is appropriate to complete the analysis from the perspective of the act analyzed from a viewpoint of the Theory of the Administrative Act of Public Law. As seen, the Dominican Law is not specifically restrictive as that of Argentina's with regard to specific administrative matters. In order to come to a careful conclusion, we need to review those aspects delimiting its nature, as well as the construction provided by the national and international jurisprudence on the legal effects thereof.

The first thing noted by Agustín GORDILLO on this issue is that the administration must be given time to organize its recourses and methods to be able to assume with some degree of normality its defense in an arbitration court, or otherwise, its material defenselessness, though the result of its own negligence, it shall be its strength, not its weakness. (…) That is why he points out that it is in the own interest of litigators to collaborate in the objective and effective performance of the State. He adds that if the cases are won, it will not be because of the factual inability to defend itself effectively from the administration (in which case it will be a pyrrhic victory), but that the arbitration court has seen better reasons or rights in the position of the acting party. In an emerging country, this is a cost that must contribute to support all parties. If it were a developed nation, there would be no need to resort to arbitration, as courts would suffice. The grounds and starting points are highly diverse, therefore, they need to be noted, and

[11] FOUCHARD, GAILLARD, GOLDMAND, Ob. Cit., Pag. 388

action must be taken accordingly. The materialization of a good systematic defense of the rights and interests of the Government in this type of proceedings must be ensured, otherwise, it will become a bad loser, with the power to hinder the execution of the adverse judgment. It could become a bad loser anyways; however, if it does have a credible cause to be a bad loser, hat would be even worse.[12]

In his work on *Acto Administrativo*, Professor GORDILLO explains that *the administrative act is the center of an effective legal protection or "the revisory jurisdiction of the act."* He says that we got from the French-origin Ibero-American administrative law that the comptroller of the administrative activity had as the central point the administrative act, as the star of the process. It was the so-called *"revisory nature"* of the administrative act which had the administrative procedural justice; however, at present that is being overcome. Many solutions change when leaving aside straightforwardly the allegedly revisory nature of the administrative justice: the exhaustion of the recourse goes from being a rule to becoming an exception. The principle, in the CCAPBA, is now the non-exhaustion. In contemporary constitutional systems like ours, he says referring to his country and the Inter-American and international system of human rights, ***an effective judicial protection*** is the center of the control system. Within this, the individual's procedural intentions, not the challenged act, constitute the center of the analysis. The latter goes indeed to a chiaroscuro place, away the main scene. Such new vision is embodied in Buenos Aires contentious code when it states: *"In the new system, it is the procedural intention with its admitted variables and not the administrative act that denies the rights, the object of the process."*

Undoubtedly, the Dominican constitutional system is part of an International Ibero-American system of human rights, and hence it is admissible to admit that within this context, the administrative act in question is not the central point of the protection, but rather the procedural intentions of the regulated firm, with the variables admitted by the Dominican legal system.

The invocation of the *legal security* in favor of the rights and guarantees of individual is rare; it is more common to see that happening in favor of the administrative act. The security is for the official, for the State as a reason of State.[13] This would occur for instance if the arbitration jurisdiction attempted to seek the suspension of the vitiated act. Some authors estimate that such way of thinking in "unreasonably individualistic." The various different phenomena of society, such as the liberalization of economy, opening of the markets, new international legal system and the constitutional system, aim at a less individualistic conception whenever the legal security favors the State. An underlying concern exists as to whether the arbitration recourse is a variable accepted by our legal system to overcome any allegation protecting the legal security that favors the Dominican State, which is the result of the administrative act that became final or that

[12] GORDILLO, Ob. Cit., Pag. 24

[13] GORDILLO, Ob. Cit., Pag. 12

could become final, whenever all recourses have been exhausted.

Let's keep in mind that theoretically the administrative act is endowed with a *presumption of legitimacy*, although it is necessary to point out that there is some questioning about such nature in the doctrine. The presumption of legitimacy is thus a tolerance to the operation of the voidable act, based on the possibility that the act will be finally cleared. With that the prior fulfillment of same, resulting from its presumption of legitimacy, remains covered up. [14] The Dominican legislation under review makes such express clarifications; however, we reiterate that the establishment of the enforceability of the resolutions from the various administrative authorities in spite of the recourse (for instance decisions from the executive committees of the SIE and INDOTEL) turns the legal situation into an act presumably legitimate, until proven otherwise. Consequently, as explained by LINARES, vitiated administrative acts can have if not validity by specific normal subsumption, validity by qualification; and in this regard, they have a precarious effectiveness as long as it is not revoked by the author him/herself or the judges.[15]

From the foregoing, a second aspect regarding the presumption of legitimacy may be inferred: In order to demerit it, it has to be petitioned, either before the administration itself, its hierarchical superior, or subsequently, before the contentious-administrative court. Also the administration may officially revoke the decision. The hierarchical higher authority provides a one-year term to do this. However, the opinion of Agustín GORDILLO, who is also in the French and Brazilian legal decisions, is that in the event the act has been signed, consented to, and generated subjective rights currently enforced, only the subsistence and pending effects could be prevented through a judicial declaration.[16] That is the reason why BENVENUTTI refers to presumptions of legitimacy and enforceability as "fully atechnical expressions".[17]

Therefore, we conclude that both, the law and Dominican jurisprudence are consistent with the administrative doctrine that suggests the need of exhaustion (or beginning of exhaustion) prior to the administrative appeal, at least to avoid that the act, which legitimacy is presumed, becoming final, and thus prevent the Dominican Government from contending on the grounds of related factor before the arbitration court, the existence of rights acquired in the light of the Dominican law, due to lack of performance on the part of the investor in the agreement's law, but administered in the Dominican law.

It would be interesting to find out what sort of treatment this issue will get in the bill being discussed by distinguished Dominican and Spanish jurists, with the auspices of PARME, for the reform of the contentious-administrative jurisdiction.

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[14] GORDILLO, Ob. Cit., Pag. V-12 and 13

[15] LINARES, Cosa Juzgada Administrativa, Buenos Aires, Kraft, 1946, Pag. 29.

[16] GORDILLO, Agustín, Ob. Cit., Pag. V-23

[17] BENVENUTTI, Feliciano, *Appunti di diritto amministrativo,* Papua, Cedam, 1959, p. 147 and ss.

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Telecommunications. Submission of Bill for the modification of Law 153-98. By A. Cruz-Carrasco.

On June 8, 2005, the chairman of the Supreme Court of Justice, Jorge Subero-Isa, JD, submitted to the Republic's Senate, a bill modifying article 79[18] of the Telecommunications Act, seeking to have appeals for the resolution of controversies and protection of users of this service, which at present is a duty of such judiciary committee, become heard by the Tax Contentious Court.

The intent of such modification is to help telecommunications users be able to file claims in a more inexpensive and expeditious way.

Contrary to what Subero-Isa thinks, in our opinion the Tax Contentious Court would not be the most appropriate jurisdiction upon which such authority should be conferred, given that article 141 of the Tax Code provides that such court shall be the competent jurisdiction for the hearing and ruling of: **1)** matters in connection with enforcement, expiration, lapse, rescission, construction, and effect of agreements granting benefits, incentives, or full or partial exemptions with regard to taxes currently in force in the country in general, whether national or municipal, assessments, special contributions, or any other denominations, or which in one way or the other, would release from fulfillment of substantive tax obligations either as taxpayers or liable parties, or from fulfilling the formal duties with regard to the application of laws or resolutions of tax related matters in connection with national or municipal taxes; **2)** repeated actions or improper or excess payment of taxes, in general, and; **3)** actions against the resolution rejecting the exceptions filed before the Administrative Executor within the procedure of compulsory collection of the tax debt."

As evidenced, the arbitration decisions homologated by the INDOTEL's Board of Directors have no place whatsoever within such limitative enumeration.

In our opinion, the Administrative Contentious court is the competent court to hear such appeals, while the appealed homologated decision is issued by arbitrators appointed by a decentralized body from the Public Administration and over a public service.

International Trade. Panama: Tax Categorization for certain milk products in detriment of benefits granted by Mexico. By J. Velázquez-Morales.

Last March, the Mexican delegation submitted to the Panamanian delegation and the Chairman of the Dispute Resolution Committee (*Órgano de Solución de Diferencia (OSD*)) a request to hold a review, in accordance with provided in Section 4º of the ESD, and paragraph 1º article 23 of the 1994 GATT.

This request was based on the measure adopted by Panama in the Cabinet Decree No. 20 of July 2002, which creates new fractions for domestic tariffs. With the intent to eliminate the lien on modified milk, assumed in accordance with the *Schedule of Concessions under the Protection of the WTO,* thus creating in turn, two new fractions regarding baby formula, applying cero rate on one hand, and a 65 percent rate on the rest.

Such a situation in the light of Mexican considerations may come into conflict with the

[18] "Art. 79.- Resolution of disputes and protection to user: The regulation shall establish the mechanism for the resolution of controversies and user protection before bar members, to which the parties shall resort. The arbitration decisions homologated by the regulating body shall not be subjected to, in order to be enforceable, the requirements established in Articles 1020 and 1021 of the Civil Procedure Code, and shall only be appealed before the Supreme Court of Justice".

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obligation prescribed with the Marrakech Agreement and exhibits thereof. It also involves an incompatibility with the provisions on agriculture in Section II of the GATT and; sections XXVIII and I of the GATT, in connection with the unilateral modification of the Schedule of Concessions on the consummation of changes in the tariff policy.

A measure that involves the invalidation or impairment, *in the sense of paragraph 1º b. of article XXIII of the 1994 GATT on the tariff concessions granted by Panama to Mexico (5% tariff), of the benefits directly or indirectly* connected to it.

Foreign Investment. The Case of Maffezini v. Spain. By A. Cruz-Carrasco.

The Bilateral Investment Treaties subscribed by Argentina anticipate two mechanisms for the resolution of controversies between investors and the recipient country. The first mechanism shall serve in the event an agreement cannot be reached during the period of friendly talks, in which case the investor must resort to the courts of the nation receiving the investment and, in the event no award is issued within 18 days, then an international arbitration may be opted for.

The second mechanism stems from the modification of the first one, that is, as of the convention subscribed with France on July 3, 1991, granting investors the possibility to submit directly the controversy to international arbitration with no need to use the local procedures beforehand. Consequently, as of such moment, the friendly make-up is foreseen in a compulsory way –normally for a fixed six-month period, and once such period elapses, the investor gets the option between the international arbitration under the rules of CIADI[19] or the formation of an *ad hoc* court, under the rules of CNUDMI[20] in general.

In this context, the decision adopted by an arbitration court with regard to an action promoted by Emilio Maffezini against Spain draws particular interest both because of the application of the provision of the most favored Nation with regard to CIADI's jurisdiction and for being the first controversy brought up by an Argentinean investor against a nation like Spain, which in recent years has turned into a capital exporter.

The arbitration proceedings began with the complaint by Mr. Sr. Maffezini of the existence of a controversy due to the treatment he received from his investment in a company engaged in the manufacture and distribution of chemical products in the region of Galicia. In his petition, he invoked the provisions in the Argentina-Spain Bilateral Investment Treaties and –through the application of the provision of the most favored Nation contained in Argentina-Spain Bilateral Investment Treaty, the provisions of the Chile-Spain Treaty.

Spain objected CIADI's jurisdiction and the authority of the arbitration court, on the following grounds: **i)** Article X of the Argentina-Spain convention required the exhaustion of certain internal recourses in Spain, which the party failed to comply with and that, **ii)** the plaintiff failed to file the case with the Spanish courts prior to submitting it to international arbitration as required under Article X of said instrument.

At the time of making a decision over its jurisdiction, the arbitration court considered that Article X of the Argentina-Spain Treaty does not require the exhaustion of internal recourses. It

[19] International Center for Investment-related Resolution of Disputes.
[20] United Nations Committee for International Commercial Law.

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only requires that such recourses be used and that the controversy subsists after 18 months and, that the filing of such controversy with local courts would under no circumstance obstruct the possibility of plaintiff to resort later on to the arbitration court.

However, in view of the invocation of the provision of the most favored Nation existing in Article IV of the Argentina-Spain convention, an examination was conducted of the provisions of the Bilateral Treaty demanding the submission of the controversy to the local jurisdiction over an 18-month term, as a result of the complaint by the plaintiff that no similar provision existed in the Chile-Spain Bilateral Investment Treaty, and that, as a result of this, Chilean investors get a more favorable treatment compared to the Argentineans in the same country and that the provision of the most favored Nation contained in the Argentina-Spain Treaty gave the option to submit the controversy to arbitration without having to resort previously to the Spanish courts.

On such basis, the court concluded that Mr. Maffezini was entitled to submit the controversy to arbitration with no need to file it priorly with the Spanish courts, while the requirement to resort beforehand to them as provided in the Argentina-Spain Bilateral Investment Treaty did not respond to a basic aspect of the public policy considered in the context of the treaty, the negotiations thereof, other legal mechanisms, or the subsequent practice by the parties.

International Arbitration. Bill on International Commercial Arbitration. By: J. Velázquez-Morales.

There is a law initiative undertaken by the Secretariat of Industry and Commerce on International Commercial Arbitration. The text under examination contains a procedure for the passive resolution of any future conflict arising within the framework of any *ex ante* contractual or no contractual negotiation, for which the parties agree to submit.

The project is divided into 7 chapters: *General Provisions; Arbitration Agreement; Make-up of the Arbitration Board; Competence of the Arbitration Board; Substantiation of Arbitration Proceedings; Issuance of the Award and Termination of Proceedings; Challenging of Award; and finally, Recognition and Execution of the Awards.*

From its content, we wish to highlight the following interesting points:

Article 1º defines arbitration as "*arbitration irrespective of whether or not it is a permanent arbitration institution the one to exercise it*." Furthermore, it provides that any time the parties have the right to designate one single arbitrator; they may also indicate the institution chosen by them. Now then, whenever it refers to an actual or possible agreement or any other form of understanding by and between, all the provisions in the Arbitration Regulation shall be deemed included in such agreement.

Article 2 in connection with the Arbitration's unenforceability restricts the possibility of reaching a compromise with regard to contestations that are not susceptible of ending up in a settlement. The principle of the *passive agreement between the parties* in matters of arbitration is acknowledged and recognized in such article.

In accordance with Chapter Three, Articles 10 and 11, the number of arbitrators is determined by the parties, and in the absence of an agreement between them, the number of arbitrators shall be three. In any three-arbitrator board, each party shall appoint one arbitrator, and the two appointed arbitrators shall designate the third arbitrator. In the event, either party fails to designate its arbitrator, or the designated

arbitrators failed to reach an agreement on the third arbitrator, the designation shall be made by a chosen Board or Institution upon request by either party, provided the express election exists.[21]

With regard to the Jurisdiction of the Arbitration Board,[22] the project suggests that the decision of the Arbitration Board on the agreement's voidance in itself shall not entail *ipso jure* the invalidation of the arbitration clause. On the other hand, the board shall be able to, at the request of either party, order upon any of the parties, the adoption of provisional precautionary measures, whether prior to the proceedings or over the course of the arbitration, whenever it deems it appropriate respect to the subject matter of the litigation.[23]

Section fifth "Substantiation of Arbitration Proceedings," article 27 authorizes the arbitration board or any of the parties with the board's approval, to request the assistance of a competent court to validate or disregard the proofs submitted. Such court shall have the right to meet such request within the scope of its competence and according to any applicable rules.

With respect to the "Issuance of the Award and Termination of the Proceedings," the Arbitration Board shall decide the dispute in accordance with the legal rules chosen by the parties applicable to the merits of the case. In the event no prior provision exists, the Board shall decide according to the rules it deems applicable. Whenever expressly authorized by the parties, it shall be decided *aequo et bono or as a friendly arbitrator*.

If over the course of the process a settlement resolving the dispute comes up, the Arbitration Board shall terminate it, granting the parties the opportunity to ask for evidence of the settlement by way of an arbitration award, provided it does not oppose it, and it is of the same nature and effect as any other award issued on the merits of the dispute.

Once the award has been issued and notified to the parties, the parties shall have a period of time to petition for any corrections on the basis of an error of calculation, copy or typography, or any other similar error. Moreover, if so agreed, the parties shall be able to ask the court to do an interpretation on a specific point or section of the award. In like manner, they shall be able to petition to the court the issuance of an additional award respect to claims formulated during the proceedings, but omitted in it.[24]

Finally, with respect to the recognition of the award,[25] regardless of the country where such award is issued, it shall be recognized as a binding decision and, upon a submission of a petition to the Chairman of the appropriate First Instance Court, the award shall be enforced in accordance with these provisions,[26] and with the reasons to refuse recognition or execution. For

[21] The same treatment shall be employed in the event of an arbitration with a single arbitrator. On the other hand, in any decision regarding the designation of one arbitrator by such bodies, the conditions required to fulfill such duty, ensuring objectivity and autonomy shall be taken into account.
"It is understood that the agreement is deemed to be in writing whenever such statement is in the form of a document executed by the parties, or through an exchange of letters, faxes, wires, e-mails, or any other telecommunication means evidencing proof of the agreement (…) paragraph 2 of article 10.

[22] Article 16 paragraph 1.

[23] Articles 9 and 17.

[24] "All these powers of the parties shall be granted any time the Board deems that the request is reasonable." Article 33. Correction and Interpretation of the Award and Additional Award.

[25] Chapter VIII. Articles 35-36.

[26] Article 35, Paragraph 2. "The party invoking its execution shall present the original award duly authenticated, or a copy thereof duly certified (…). In the event it is not written in Spanish, a certified translation of the document must be submitted.

instance, that either party to the agreement is subject to incapacity by virtue of the applicable law; or that the agreement is not valid under the laws to which it was submitted, or either party was not notified of the arbitrator's designation and initiative of the arbitration procedure, or it failed to conform to the agreement previously entered into by the parties or, the laws of the countries where the arbitration took place; or if according to such law, it is not susceptible of resolution by way of an arbitration, or in cases where execution is contrary to public order, among others.

E-Commerce. Cybersquatting: Alternate Conflict Resolution. By A. Cruz-Carrasco.

Cybersquatting is the practice of registering a trademark as a domain name with the intent to obtain a financial benefit from such registration through its sale, generally to the owner of the trademark.[27]

At present, the scope of the domain names with respect to the intellectual property rights, specifically in the area of distinctive signs, have made a great development in the resolution of controversies.

This idea comes from the Internet Corporation for Assigned Names and Numbers ("ICANN") due to the increasing number of cases of Cybersquatting. The corporation determined that it was essential to create an alternate system for the resolution of any dispute that could arise between marks or other registered distinctive signs and domain names, coming to the conclusion that the best alternative was to create a policy that would undertake particularly and specifically the issue of controversies between domain names and distinctive signs. Hence in 1998, ICANN creates the Uniform Domain Name Dispute Resolution Policy ("UDRP") to be applied by *Network Solutions, Inc.*[28] and which became later adopted by the Mediation and Arbitration Center of WIPO.

Finally and for illustrative purposes, we cite the *anticybersquatting* follow-up and control performed by the Colombian NIC,[29] which in its registration policies on domain names in the **.CO** level, besides ensuring that no homonymous domain names are registered, it conducts a study on the registrability of the domain name to the point that sometimes, prior to granting a final registration, it requires from the applicant the application or certificate of mark registration evidencing him/her as the legitimate owner of the domain name to be registered.

Such a policy demonstrates that registrars, in addition to going after the procurement of economic interests with the registration of domain names, must in the same manner act in favor of collective interests.

Consumer. Arbitration as a protection of consumers' rights. By J. Velázquez-Morales.

Consumer's Arbitration is a system of voluntary adhesion to which both companies and consumer associations resort manifest their willingness to subject for the resolution of any conflict that may arise between them. Therefore, once this system is assumed voluntarily, the litigants settle their controversies by way of a quick process, at a reasonable price, and a resolution that becomes binding and enforceable.[30]

[27] KILIAN, Monica. ***CYBERSQUATTING AND TRADEMARK INFRINGEMENT***. *Murdoch University Electronic Journal of Law,* Vol. 7, No. 3 (Sept. 2000).

[28] Company that until this year had exclusive control over the registration of generic domain names.

[29] *Network Information Center* – Centers engaged in the registration of domain names of nations or ccTLD's – *Country Code Top-Level Domain.*

[30] Lorenzetti, Ricardo Luis. Eleventh Chapter. *Consumidores.* Fourth Part *"El arbitraje de consumo"* pag. 516.

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Having established the guidelines of this out-of-court institution, we may now denote the vacuum existing in our "*General Bill on the Protection of Consumer's or User's Rights"* as to this matter.

Such initiative, specifically in Chapter XIII on Settlement, a procedure for the out-of-court resolution of controversies, full of requirements that far from being an effective alternative in favor of consumer, makes it inoperative.

In that regard, we may observe that such paragraph establishes an expedite settlement process, which in the event of inability by the parties to reach an agreement, offers the possibility of a conventional arbitration, provided that such non-trial of Pro-consumer is not about infringements affecting the public interest. Such arbitration is optional of the parties and in the event this recourse is not used, the Head Office of Proconsumer (*Dirección Ejecutiva de Pro Consumidor*) shall continue the process administratively.

Internationally, for instance in Spain, the Law on Consumer Protection establishes in Article 31, an *arbitration system of consumption* that, with no special formality, addresses and resolves with a binding and enforceable authority, the claims and complaints of users or consumers in connection with the companies' performance. Upon submission of the dispute matters, an agency unrelated to the justice administration is commissioned in order to issue a resolution settling the conflict.

Our criterion is that before a legislation for consumer protection is approved, the international doctrines and legislations must be examined in order to adopt a more effective and convenient model in the alternate resolution of conflict with regard to this subject matter.

Free Trade. *Annulment or Impairment*: New legal frontier of the economic reasonability of the FTA. By A. Noboa-Pagán.

The chapter pertaining to *Dispute Resolution* of the FTA, at present pending approval from DR and US congresses, includes the resolution of conflicts in connection with *annulment or impairment*. This means that the Member State may bring action against another, any time a measure or a project measure, coming from a second Member State, even if it does not have a literal restriction with regard to the agreement's text, results in the annulment or cut of benefits that it reasonably expected to receive.

There is an exhibit that includes the subject matters which national measures could become the object of examination by the controversy resolution mechanism of the FTA for the such reasons: national deal, market access, rules and procedures of origin, customs administration, and trade facilitation, technical obstacles to trade, public contracting, cross-border service trading, and intellectual property rights.

We want to emphasize that the Dominican Government shall extend these provisions towards the system of a regional agreement, its full sovereignty respect to the examination of the reasonability of laws and other administrative measures or projects thereof, a scope that belonged originally to the examination by the court, constitutional guarantee as the last *ratio*.

According to the treaty's text, conflicts are to be discussed at the forum chosen by the claiming party. The election of arbitrators shall be made from a list of candidates proposed by Member States.

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Novelties. Seminar on "Competition and New Markets. Talk on a New Regulation for the Dominican Republic" by **ANJE.**

This coming July 13, ANJE will hold a seminar on **"Competition and New Markets: Discussion of a New Regulation for the Dominican Republic" to be presented by Ignacio De León, Pedro Ramírez-Pequeño, Jochi Vicente,** and **Angélica Noboa-Pagán,** JD, in the Anacaona Hall of the Jaragua Hotel. For registration call the offices of ANJE at 809 472 0444.

At such meeting, Ms. Noboa-Pagán will give a talk titled: ***"Effects of a legislation of competition on commercial transactions and the market."***

Text Editors: Arlene Cruz/ Jesenia Velázquez
Publisher/Chief Editor: Angélica Noboa-Pagán
NOBOA PAGÁN – Abogados
Av. Los Próceres, Plaza Diamond, Arroyo Hondo
Phone (809) 334.5717 • Fax (809) 334.5716
For previous newsletter editions visit our web site at
www.noboapagan.com