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THE USE OF ARBITRATION IN CUBA: INTERNATIONAL SOLUTIONS FOR THE RESOLUTION OF LOCAL PROBLEMS

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I. INTRODUCTION

Arbitration is an institution that has experienced little development in Latin America. One exception is Cuba, where arbitration proceedings are frequently utilized. This is principally due to the influence of Soviet law,[1] which the Cuban system closely parallels. Without discussing politics, it is worthwhile analyzing how arbitration is structured in Cuba, what the results have been, and whether other Latin American countries might benefit in part from the Cuban experience.

Before undertaking a comparative analysis of Cuban law, one should remember some of the important differences between the legal system of Cuba and those of the other Latin American countries. With respect to arbitration, the most important difference is that the Cuban state exercises a monopoly over commercial and industrial activity. As a result, the firms involved in litigation are state controlled rather than privately owned. Furthermore, since the state also exercises a monopoly over foreign trade,[2] the international commercial arbitration awards rendered in Cuba are decided under rules that are highly similar to those used in Eastern Europe.[3]

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1. Soviet law influences not only Cuba, but also all the Eastern European countries as well. *See infra* note 3 and accompanying text.

2. Article 18 of the Cuban constitution provides that foreign awards are exclusively within the domain of the state.

3. The Cuban system of international commercial arbitration was established through Law 1303, *reprinted in* Official Gazette (*Gaceta Oficial*), June 3, 1976. The Republic of Cuba's Chamber of Commerce issued the Law and Regulation of the International Trade Arbitration Court. The original text in Spanish also appears at IV-B INTERNATIONAL COMMERCIAL ARBITRATION 11 (C. Schmitthoff ed.). For a comparative study of the Soviet and Cuban systems of international commercial arbitration, see Dahl & Garro, *Cuba's System of International Commercial Arbitration: A Convergence of Soviet and Latin American Trends*, 15 LAW. AM. 441 (1984), *reprinted in* 7 MOD. LEGAL SYS. CYCLOPEDIA 66 (1985).

II. A System of State, Domestic or Administrative Arbitration

The closest predecessor to the current system of arbitration was instituted in 1962, with the formation of Arbitral Commissions. The purpose of this system was to resolve conflicts that arose between state controlled companies. At the end of its first year, this initiative was considered a serious failure. Its ineffectiveness was principally due to the inability to make participation in arbitral proceedings compulsory and various obstacles to the enforcement of the awards.

The roots of the current system are found in Decree Law 10 of 1977,[4] which authorized the Council of Ministers to institute a system of state arbitration. The function of this system is to resolve all disputes between state-controlled companies over property ownership.

Decree 23 of 1978, issued by the Council of Ministers, finally instituted the State Arbitration Agency, which began operating in early 1980. This agency functions through the following three branches:

1) *National State Arbitration Agency.* This branch has plenary supervisory authority and deals with the most important cases. The most current jurisdictional changes have attempted to enlarge the jurisdiction of the following two branches.

2) *Special Arbitration Agency.* This body includes some twenty different arbitration systems established to preside over certain ministries and companies that, due to their importance and unique characteristics, require special treatment. For example, the ministries of the Armed Forces, Sugar, Transportation, etc., have their own arbitration systems. Therefore, if a dispute arises between two companies belonging to the Ministry of Transportation it would be resolved by the Ministry of Transportation Tribunal, which applies its own rules.

3) *State Regional Arbitration Agency.* The law provides that the jurisdiction of this branch is residual. Its caseload is comprised of those cases over which neither of the other two branches exercises jurisdiction. Each of the Cuban provinces has a court for this agency; each court typically operates with three arbitrators.

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4. *See* Legislación Economica (1984).

The rules of procedure for the National State Arbitration Agency are found in Decree 89, issued by the Council of Ministers in May of 1981.[5] The Decree's most important provisions are the following:

a) the complaint must be submitted in writing and must contain a detailed description of the facts upon which it is based (art. 74);

b) the presiding arbitrator is to review the complaint, making certain that it complies with all requirements. If defects exist the claimant may correct them within three days (art. 76);

c) once the complaint has been formally accepted, the defendant must be notified within three days. The defendant then has seven days to respond (art. 77);

d) evidence may be extensive and is informal in nature (with the exception of the requirement that only original documents may be presented) with the arbitrator exercising broad discretion to evaluate and reject the evidence. The rules provide for visual inspections by the arbitrators (arts. 85 to 105); and

e) although there is no specific rule that provides for a maximum or fixed time period during which an arbitration must be concluded, in practice, it is unusual for a case to extend beyond two months.

A. Unique Aspects of Cuban Law on Arbitration

Any countries attempting to find solutions in the Cuban arbitration system must make allowances for certain unique aspects of that system that can not be exported to countries with free market economies. The following are the most important of these aspects.

1. Planning

The Cuban economy is rigidly controlled.[6] When state controlled companies enter into arbitration proceedings, the tribunal's main concern is to execute the economic plan. The plan has the

5. Decree 89/1981, by the Council of Ministers regarding the State Arbitration Rules of Procedure. *Id.*

6. Just as in the Soviet Union, planning is highly emphasized in Cuba. Article 109 of the Cuban constitution provides that the central plan for socio-economic development controls the nation's economic life.

force of law, and any company that departs from it must accept the consequences. Planning has a broad and marked impact on Cuban property law[7] and is the source of the following practices.

2. Pre-contractual Arbitration

Normally this expression would appear to be absurd. If no contract yet exists, there would be no rights or liabilities; therefore, there would be nothing to arbitrate. In Cuba, however, pre-contractual arbitration exists. The economic plan implies an obligation to contract. For example, a factory has the duty to sell the quantity and quality of merchandise assigned to it by the plan. Another company is obligated to buy the merchandise that the plan assigns to it and then to sell the merchandise. If a company refuses either to sell or buy, the other parties to the transaction may commence an arbitration proceeding against the breaching party, which is naturally labeled pre-contractual arbitration. The tribunal may decide that the defendant has no right to refuse to contract, and may order it to sign a contract within a certain period.[8]

3. Compensation for Damages

Certain legal systems tolerate a breach of contract provided compensation for damages caused by the breach is paid. For example, the Anglo-American system allows for this option, which is recognized as buying oneself out of a contract.

The economic plan precludes any remedy other than the strict performance of the contract. Because the contract is based on the plan, tolerating any breach of the contract would be anarchic and criminal. One of the consequences of this relationship between the plan and the contract is that the arbitral tribunal will order the noncomplying party to perform the contract and to pay the damages caused by its breach. The Cuban perception is that, just like each link in a chain, each company must carry out the mission assigned to it by the plan. To permit a breach by one company would weaken the system as a whole, inasmuch as the effects would be

7. The Central Planning Board is the highest ranking agency classified as a State Commission with the function of supervising the implementation of state policy related to planning.

8. Within the Cuban system, prices and product quality are politically determined. Therefore, companies do not negotiate price or quality but rather issues such as time of delivery, transport, *etc.*

transferred from one company to another (from the producer to the wholesaler, from the wholesaler to the retailer, etc.).

B. Advantages of the Cuban System

Cuba has two basic arbitration systems.[9] One is international commercial arbitration, and the other is domestic arbitration (which has been given priority in this discussion).[10]

The advantages of international arbitration most frequently cited are: greater procedural speed; lower costs; increased protection for confidential business information by excluding the public from the proceedings and not revealing the nature of the awards; and the ease of recovering upon judgments through international conventions.[11] When comparing the alternatives of litigation and arbitration, the advantages of arbitration appear genuine and practical. Moreover, these advantages are significant enough to benefit countries with systems that differ from the Cuban regime.

Domestic arbitration also has considerable advantages over judicial proceedings. The same advantages that apply to the international system also apply domestically, namely greater speed, reduced costs, and increased confidentiality. One additional advantage of domestic arbitration is that the tribunal is in an excellent position to detect errors and recurring difficulties in the system, as well as to determine to whom they may be attributed. In Cuba, for example, the National State Arbitration Agency has a research and development section. This section is specifically engaged in detecting and reporting structural deficiencies, recurring problems, as well as in proposing solutions to avoid their repetition.[12]

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9. It is solely the personal opinion of the author that Cuba would be much better off today with a different political and legal system than that which it presently maintains. Nevertheless, this does not change the fact that in certain isolated fields the Cuban system may provide solutions for other countries. For example, the expanded use of arbitration offers interesting possibilities for applications in other countries.

10. Both systems, as stated earlier, are influenced by the Soviet Union. Domestic arbitration, also known as administrative arbitration, is called "Gosarbitrazh" in Russian. For an English translation of the Soviet domestic arbitration law (the predecessor to its Cuban counterpart), see W. BUTLER, BASIC DOCUMENTS ON THE SOVIET LEGAL SYSTEM 216 (1983).

11. The most important convention of this type is the New York Convention of 1958 dealing with recognition and execution of foreign arbitral awards. Cuba is one of the many signatory countries to this convention.

12. The research and development section of the National State Arbitration Agency has an educational arm employing some fifteen persons. It is easy to understand how the judici-

III. Conclusion

The foregoing discussion briefly describes the domestic aspects of the Cuban arbitration system without venturing into the international sphere.[13] Generally, it would appear that the institution of arbitration has produced positive results, and avoided the more obvious inconveniences inherent in litigation such as unnecessary delays and enormous expense. Especially noteworthy is that the arbitration system is operated through the regional administrative courts represented by the State Arbitration Agency. At a time when Costa Rica is debating possible reforms in its arbitration system[14] it would seem appropriate to inquire if the Cuban system may be of some applicability to Costa Rican law.

Perhaps the Cuban experience in institutionalized administrative arbitration may offer a source of productive ideas. The proposed Costa Rican Code of Procedure states that "The State, its institutions, and municipalities may also submit to the judgment of arbitrators or experts . . . ."[15] As such, the idea of administrative arbitration, as a general rule, would not only build upon the established order, but also would be the logical continuation of the reform project.

In the event a study is undertaken, the unique aspects of Cuban law, that is, those aspects that do not readily lend themselves to exportation, must be considered in detail and with care.

In summary, an impartial study of the Cuban arbitral system could offer some interesting applications for Costa Rica and other Latin American countries. This is as desirable as a Cuban effort to find fresh ideas in the Costa Rican system. In time, this inquiry would undoubtedly provide a fertile source of ideas and experiences from which other nations could benefit.

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ary, overwhelmed with its assignments, has neither the means nor the expertise to evaluate, report on, and suggest ways of correcting these pervasive problems which exist in public administration. Not even in countries where there is a special code of laws for administrative law actions, such as in Argentina, do these tribunals accomplish anything more than the strict resolution of the cases assigned to them.

13. For sources on international commercial arbitration in Cuba, see *supra* note 3 and the accompanying text.

14. *See Costa Rica, Proyecto de Código Civil*, 1 Revista Española de Arbitraje 207, 214 (1984) (reprinting the proposed new articles 512 & 529 of Title VIII, Proceso Arbitral).

15. C.R. Cód. Proc. Civ., art. 511.