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Mauro Alfredo Bernal Silva

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ARBITRATION IN SALVADORAN COMMERCIAL LEGISLATION

MAURO ALFREDO BERNAL SILVA*

I. NORMATIVE BACKGROUND

The Commercial Code of El Salvador, enacted in 1904, did not contain any provision for arbitration. The new Commercial Code ("Com. C."), in effect since April 1, 1971, regulates arbitration in partnerships (Articles 66 to 72) and commercial obligations and contracts (Articles 1004 to 1002). These provisions include procedural rules for arbitral proceedings.

The Law of Commercial Procedure ("L.C.P.") was enacted on June 14, 1973 and went into effect on January 1, 1974. Chapter III of the L.C.P. (Articles 12 to 20) governs the composition of the arbitral tribunal as well as the enforcement of arbitral awards.

II. ARBITRATION OF PARTNERSHIP DISPUTES

Pursuant to Article 66 of the Com. C., a partnership agreement must specify that conflicts arising among partners in interpreting the agreement or in the handling of partnership affairs will be settled by the courts or by arbitration. If such clause is not included in the partnership agreement, there is a presumption in favor of arbitration.

There are three ways of settling disputes among partners. The first method is by the courts of law, in which case, the procedure is governed by the L.C.P. The rules applicable to summary proceedings shall apply, unless special formalities are otherwise provided for in the partnership agreement. The second method is through voluntary arbitration wherein an arbitral clause is included in the partnership agreement. The arbitration agreement is likely to specify the number and the type of arbitrators to whom disputes will be submitted, the method of their appointment, the time period

* Member of the Salvadoran Bar Association; Professor of Law, Universidad Nueva San Salvador; Research Scholar, Salvadoran Law Commission Agency (C.O.R.E.L.E.S.A.L.). Translated by Alejandro M. Garro.

for rendering the arbitral award, and other details regarding the powers of the arbitrators. Finally, partnership disputes may be settled through arbitration by operation of law (*arbitraje presunto*). Where the agreement fails to specify the form to be used for solving conflicts among partners, any subsequent disputes will be submitted to arbitration by operation of law.

A. *Voluntary Arbitration*

Voluntary arbitration is subject to the following rules:

1) The partnership agreement must specify whether *de jure* arbitrators or *amiables compositeurs* will decide the dispute and the number of arbitrators for the tribunal.

2) If the partnership agreement fails to indicate the type or number of arbitrators, two *amiables compositeurs* shall decide the dispute.

3) The issues in dispute presented to arbitrators are ascertained through the statement of claim and defense.

4) The partners may designate arbitrators in the partnership agreement.

5) If arbitrators are not designated in the partnership agreement, but the type, number, and manner in which they are to be appointed have been specified in the agreement, the partners should proceed according to such agreement.

6) If the partnership agreement fails to indicate the type, number or manner of appointment of arbitrators, the partners must appoint the arbitrators within the period of time indicated by the judge, which period cannot be less than ten nor more than thirty days.

The appointments must be made unanimously by the partners, unless the partnership agreement establishes the majority's right to make agreements on behalf of the partnership.

7) If the partners fail to appoint the arbitrators within the time period indicated by the judge, the judge will make the appointment.

8) Immediately after being appointed and sworn in, and before taking any action, the arbitrators must appoint a third arbitrator, who will be in charge of settling any disagreement between the other two arbitrators. The arbitrators must also appoint a secre-

tary of the arbitral tribunal.

9) The award rendered by *de jure* arbitrators may be appealed only if the partnership agreement reserves the right to appeal.

10) The award rendered by *amiables compositeurs* is not appealable, but a writ of cassation (*recurso de casación*) is available pursuant to law.

11) If one of the partners lacks legal capacity, the arbitral award shall be submitted for approval by a commercial judge. If the arbitral award is not approved by the judge, the matter shall be settled by the judge acting *de novo*.

B. Arbitration by Operation of Law

Arbitration by operation of law is subject to the following rules:

1) There shall be two *amiables compositeurs*.

2) The issues in dispute shall be ascertained through the statement of claim and defense.

3) The partners appoint the arbitrators within the period of time indicated by the judge, which cannot be less than ten nor more than thirty days. The appointments must be made unanimously, unless the partnership agreement allows a majority to make decisions on behalf of the partnership.

4) If the partners fail to appoint the *amiables compositeurs* within the period of time indicated by the judge, the appointment must be made by the same judge.

5) Immediately after being appointed and sworn in, and before taking any action, the two arbitrators must appoint a third arbitrator to settle any disagreements which may arise between the other two arbitrators.

6) The award rendered by the *amiables compositeurs* cannot be appealed, but the writ of cassation is available.

7) If any of the partners lacks legal capacity, the award rendered by the *amiables compositeurs* must be submitted for approval to a competent commercial judge. If the judge does not approve the award, the matter shall be settled by the judge acting *de novo*.

Some disputes cannot be settled by arbitration because they affect not only the interests of the individual partners but also the

partnership and third parties. Thus, disputes concerning the dissolution and liquidation of the partnership, amendments to the partnership agreement, the exclusion and separation of partners and the legal structure of the partnership cannot be settled by arbitration. However, these issues may be submitted to arbitration if, after a dispute has arisen, the parties agree to compromise and submit such dispute to arbitration.

III. ARBITRATION OF COMMERCIAL TRANSACTIONS

A. *Enforcement of Arbitral Clauses in Commercial Transactions*

Article 1004 of the Com. C. validates arbitral clauses in commercial contracts where the parties bind themselves to submit to arbitration eventual disputes arising out of the contract. There is no specific form for the arbitral clause. It is not necessary that the arbitral clause be notarized, and clauses entered into by an exchange of letters, telegrams or telephone are enforceable.

Generally, the arbitral clause is embodied in the main contract. However, it may be executed in a separate agreement in which the parties stipulate that they have previously entered into a contract and that they shall submit to arbitration any dispute arising from the contract.

B. *Requirement of a "Compromiso" in Non-Commercial Arbitration*

Salvadoran legislation distinguishes between arbitration in civil and commercial matters. Whereas commercial arbitration may be agreed upon by virtue of an arbitral clause (*cláusula compromisoria*), arbitration in non-commercial matters requires the parties to enter into a *compromiso*.

The *compromiso* is a formal contract in which the parties agree to:

- 1) not resort to the courts for a decision on any pending dispute they may have;
- 2) submit the dispute to the decision of one or more arbitrators;
- 3) stipulate the procedure to be followed by the arbitral tribunal;

- 4) stipulate the sanctions to be applied if one of the parties to the contract fails to comply with the provisions of the *compromiso*;
 - 5) appoint the arbitrators that make up the arbitral tribunal;
 - 6) determine the place in which the arbitration will be held;
- and
- 7) set the maximum time period for rendering of the arbitral award.

Not all of the above stipulations are essential for the validity of the *compromiso*, but their inclusion is useful to facilitate the arbitral proceedings. Some stipulations may be excluded from the *compromiso*, in which case, they are supplied by law. Thus, if the parties fail to indicate the time period for rendering the arbitral award, Article 66 of the Code of Civil Procedure ("C.P.C.") provides that in an *amiable composition*, it shall be forty days. Pursuant to Article 434 of the C.P.C., a judge in *de jure* arbitration must render the award twelve days after the parties' final motion.

According to Article 61 of the C.P.C., the *compromiso* must be notarized, although in exceptional cases, a private writing is accepted. In order for the *compromiso* to be valid, it must contain clauses specifying the subject matter of the dispute, the appointment of the arbitrators, and the powers that are granted to the arbitral tribunal. The absence of any of the above stipulations voids the arbitral compromise pursuant to Article 61 of the C.P.C. The arbitrators may declare which of the parties shall pay the costs of the proceedings, even though such a declaration has not been requested. (Art. 69 of the C.P.C.).

The parties cannot waive the right to seek a writ of cassation after the award has been rendered. The writ of cassation (*recurso de casación*) is a means to challenge the application of the law made by the arbitral tribunal and does not affect the findings of fact. The writ of cassation is intended to safeguard the strict observance of the rules of law. The parties may waive their right to appeal. In order to appeal decisions by *de jure* arbitrators, the right to appeal must have been reserved in the *compromiso*.

C. Conduct of the Arbitral Proceedings

In the arbitration of commercial transactions, it is not necessary to enter into a *compromiso*; it suffices that the parties execute an arbitral clause in the main contract or in a separate agreement.

If the essential contents of the *compromiso* consist of determining the issues submitted to the arbitrators, appointing the arbitrators, and specifying the powers of the arbitral tribunal, how are those elements determined in commercial arbitration under an arbitral clause which fails to indicate such specifics?

First, the statement of claim filed by the party requesting arbitration and the other party's statement of defense (if this proposes any new points) determine the issues in dispute. Second, the appointment of the arbitrators must be done in the manner agreed upon by the parties in the arbitral clause. This clause may provide that the arbitrators shall be appointed by a third person or by an arbitral institution. If the parties have indicated neither the manner of appointing the arbitrators nor the number of arbitrators to be appointed, each party shall appoint one arbitrator, and those arbitrators then choose a third arbitrator to resolve issues in which they disagree. If the parties fail to proceed with the appointment of the arbitrators, any one of the parties may ask the judge to set a time limit in which the other party may make its appointment. If no appointment is made within the time limit, the judge shall make the appointment.

Certain rules must be observed by the arbitrators:

1) The arbitral clause must state the number of arbitrators. Otherwise, each party must appoint one arbitrator.

2) The issues to be decided shall be determined pursuant to the statements of claim and defense.

3) The arbitrators shall decide the case as *amiables compositeurs*, unless the arbitral clause provides that they shall decide as *de jure* arbitrators.

4) The arbitrators must be appointed in the manner agreed upon by the parties in the arbitral clause, which may delegate the appointment to a third person or legal entity.

5) In the event that several individuals represent the same interests, all of them must appoint one arbitrator. Any of the parties may ask the judge to set a time limit in which another party may appoint an arbitrator.

6) If the parties do not make the appointment, it will be made by the competent commercial judge.

7) Before taking any action and after having been sworn in, the arbitrators shall appoint a third individual to resolve the issues

in which they disagree.

8) The arbitrators may, at their discretion, indicate the location where the arbitral proceedings shall be conducted.

9) The arbitral tribunal shall function only if all the arbitrators are in attendance. If any one of the arbitrators is absent for more than eight consecutive days without just cause, this will be taken as a resignation and a substitute arbitrator must be appointed.

10) The rulings of the arbitrators must be agreed upon by a majority of votes and must decide all the issues submitted by the parties. The award must be in writing and rendered within the time limit indicated by the parties' agreement.

11) Commercial arbitration shall not proceed when one of the parties lacks legal capacity at the time the arbitral clause is sought to be enforced.

12) The arbitral award may be set aside on any of the following grounds:

- a) nullity of the arbitral clause;
- b) fraud or coercion in the execution of the arbitration agreement;
- c) the award decides matters beyond the scope of the submission to arbitration or fails to decide on matters submitted to arbitration;
- d) the award rendered by *de jure* arbitrators contains procedural defects which are deemed to be material;
- e) the terms of the arbitral award are contradictory; or
- f) the arbitral award is rendered after the indicated time limit.

IV. ARBITRAL PROCEEDINGS IN PARTNERSHIP AND COMMERCIAL DISPUTES

According to Articles 12 through 20 of the L.C.P., and ancillary provisions of the Com. C., the arbitral procedure is as follows:

1) A partner in a partnership or one of the contracting parties to a commercial contract submits a statement of a claim. This statement must be filed with the court which would have jurisdiction in the absence of arbitration. The statement of claim must

contain an itemized report of the events of the controversy, specify the controverted issues on which the arbitral award will be based, and identify the names and addresses of the other partners or of the other contracting parties. The statement of claim must also include the arbitral agreement. Copies of the statement of claim for as many partners in the partnership or parties to the contract must be submitted.

2) The partners that did not sign the statement of claim or the other parties to the contract must be notified of the statement of claim and receive copies of it. The statement of claim must be answered within three days.

3) The other partners or other parties to the contract must answer the statement of claim, clearly indicating whether they oppose or favor arbitration, as well as their proposed issues if they favor arbitration.

4) If there is no response within the indicated time period, or if the answer fails to indicate whether arbitration is favored, it is presumed that arbitration is approved.

5) If the other partners or other contracting parties are opposed to arbitration, the proceedings are transformed into a summary proceeding where the court shall decide whether or not the case should proceed to arbitration.

6) If there is no opposition to arbitration, or if the summary proceedings result in favor of arbitration, the judge must invite the partners or the parties to the contract to appoint the arbitrators, pursuant to the Com. C. provisions. If the time limit set by the judge expires without receipt of any written communication as to the names of the arbitrators to be appointed, the judge must make the appointment.

7) Once the arbitrators have been appointed, the judge must summon them to determine whether they agree to serve as arbitrators. In the first ruling, the arbitrators must appoint a third person to settle eventual disagreements among them; they must also appoint a secretary of the arbitral tribunal.

8) Once the arbitral award has been rendered, if one of the parties lacks legal capacity, the arbitrators must submit the award to the judge who swore them in. The judge must rule within ten days whether the award must be confirmed.

9) Notice of the arbitral award and the judgment confirming the award is given to the partners or parties to the contract.

10) If the case involves *de jure* arbitration and the parties have reserved the right to appeal, the appeal must be filed with the judge who gave notice of the arbitral award. If the case involves an *amiable composition*, a writ of cassation may be brought before the Civil Chamber of the Supreme Court.

11) The judgment or the arbitral award is enforced by the judge who notified the parties of the award, regardless of the type of arbitration involved.

V. CONCLUSION

In partnership disputes, the Com. C. of El Salvador provides that parties are presumed to submit their disputes to arbitration unless the partnership agreement provides otherwise. This legal presumption was established as a result of the practice of including arbitral clauses in most partnership agreements.

The Com. C. does not provide for arbitration of disputes arising within corporations, but, pursuant to Article 1004 of the Com. C., nothing prevents the inclusion of an arbitral clause in the by-laws of a corporation. In such case, arbitration is subject to Articles 1004 to 1012 of the Com. C. and the arbitral proceedings are conducted pursuant to Articles 12 to 20 of the L.C.P.

In commercial transactions, an arbitral clause is enforced even if it is executed in a separate agreement after execution of the principal contract. Thus, in contrast to the arbitration of partnership disputes, arbitration of commercial transactions only arises where there exists an arbitral clause.

The arbitral proceedings include: a) a first phase of a judicial nature to determine whether the subject matter of the dispute is capable of being settled by arbitration and to supervise the appointment of arbitrators; b) a second phase in which the arbitrators, once they have been sworn in, proceed in conducting the arbitral proceedings; and c) a final phase in which a court either approves or disapproves the arbitral award in cases where partners lack legal capacity; notifies the partners or the parties to the contract of the arbitral award; decides on what recourse is available to the parties to challenge the award; and enforces the arbitral award.

It should be noted that in the practice of arbitration, Salvadoran courts have not clearly indicated the procedure to be followed when one of the parties to the contract which contains an arbitral

clause opposes arbitration. In some cases, it has been held that the party opposing arbitration must file a petition before the courts, requesting in summary proceedings a judicial pronouncement as to whether the case should be submitted to arbitration. This author thinks that such judicial proceeding is not authorized by law and that these procedural obstacles reflect a traditional lack of trust on part of the judiciary towards arbitration.