

November 23, 2010

FLASH REPORT

ARBITRATION

Decision of the Constitutional Chamber of the Supreme Tribunal of Justice that sets forth binding jurisprudence on several aspects of arbitration

On November 3, 2010, when settling an Appeal for the Constitutional Review of a ruling handed down by the Political-Administrative Chamber of the Supreme Tribunal of Justice (STJ) in a dispute pertaining to the existence and validity of an arbitration clause in a contract that provided for arbitration proceedings in England, the Constitutional Chamber handed down a transcendental decision that will greatly contribute to the consolidation of the institution of arbitration in Venezuela. The decision supersedes a number of criteria of jurisprudence that were hampering the use of arbitration and which, as ordered by the decision at hand, can no longer be applied by any entity of the Judicial Branch. The decision was published in the portal of the STJ and should soon be published in the Official Gazette.

The purpose of this Report is to provide a summary, in simple terms, of the highlights of the decision, with the intention of encouraging the use of arbitration as the available option, fast and effective, to resolve disputes other than at the courts of general jurisdiction.

The highlights of the decision are as follows:

1) Arbitration is not an exception.

The Chamber does away with the jurisprudence criterion that was being used according to which arbitration was considered to be an “exception” to the constitutional authority of the courts of general jurisdiction to settle disputes submitted to them. Contrary to this, the Chamber reaffirms the constitutional principle that alternate means of justice—arbitration and conciliation, among others—, are as much an integral part of the administration of justice as the bodies of the Judicial Branch and, consequently, they share in and pursuit the same ideal of justice. The Chamber states that, rather than a détente among the courts of the Judicial Branch and the arbitration bodies, what must exist is the necessary assistance and cooperation among them in order to provide effective protection. We should mention at this point that the assistance and

cooperation emphasized by the Chamber in its decision guarantees to the arbitration courts the support and assistance of the courts of general jurisdiction with regard, for example, to the execution of precautionary measures (attachments, etc.) and obtaining evidence. The Chamber further highlights, in connection with the control that exists among the courts of Judicial Branch and the arbitration tribunals, that such control is apparent basically through the exceptional remedy of the petition for the annulment of arbitration awards, which can only be filed under the strict conditions and grounds provided for in the Commercial Arbitration Act.

2) Arbitration clause. Court analysis

In order to apply the criterion of jurisprudence mentioned above, another criterion was set forth that ordered the extremely rigorous analysis of the arbitration clause and the procedural actions of the conflicting parties. When challenging the existence of an arbitration agreement or clause by using the argument that the courts of general jurisdiction did not have the authority to hear the case, the criterion under analysis demanded the assessment of the validity and effectiveness of the clause in order to verify the unequivocal and express willingness of the parties to submit themselves to arbitration, as well as whether those who entered into the arbitration agreement or clause had sufficient authority to do so, on the one hand; and on the other, the assessment of the actions of the parties to prove the unequivocal, undisputable and totally honest intention of submitting to arbitration. In this regard the jurisprudence had established several types of actions of the defendant as proving its intention of waiving arbitration (Tacit Waiver of Arbitration).

The Constitutional Chamber rejects this criterion of jurisprudence and sets forth that:

- a)** The verification to be performed by the courts of the courts of general jurisdiction does not entail a detailed judicial examination of the substance of the arbitration agreement but rather the verification that the arbitration agreement is in writing and, in the absence of any obvious or outright invalidity, ineffectiveness or inapplicability, the courts must forward the matter to the appropriate arbitration body. The Chamber further states that the verification excludes any analysis related to flaws of consent that might stem from the arbitration agreement. Moreover, the Chamber sets forth that any in-depth analysis of the validity, effectiveness or nullity of the arbitration agreement, pertains solely and exclusively to the arbitration court.
- b)** The examination of the procedural actions of the parties must focus on determining whether such actions manifest the unquestionable inclination to submit to arbitration. Consequently, neither the possibility that the defendant might challenge any precautionary measures issued against it nor any actions by the defendant that show the need to act in

defense of its own interests against invalid actions by the court of general jurisdiction will be deemed to be a “tacit waiver of arbitration.”

3) Precautionary measures in arbitration

Lastly, in addition to reaffirming as binding the possibility that the arbitration tribunals might issue precautionary measures within an arbitration proceeding, the Chamber provides as feasible that a court of general jurisdiction may, at the request of any of the parties to an arbitration agreement, issue of its own accord precautionary measures even before the constitution of the arbitration tribunal. A petition of this type will not be construed as a tacit waiver of the arbitration agreement. In light of the novel quality of the preceding, the Chamber sets the conditions, circumstances and terms pursuant to which such precautionary measures are applicable and effective. This precedent is a great tool that will undoubtedly encourage the use of arbitration.

In conclusion, the decision of the Constitutional Chamber paves the way for arbitration to be held as the valid, speedy and efficient option for the resolution of disputes other than the courts of general jurisdiction. Thence our suggestion to consider either including an arbitration clause in agreements to be signed or entering into an arbitration agreement for the resolution of disputes where such a clause does not exist.

Yours truly,
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