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The Baker McKenzie **International Arbitration Yearbook**

Venezuela

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A. Legislation and rules

A.1 Legislation

Article 258 of the Constitution of the Bolivarian Republic of Venezuela (Venezuela) expressly provides in general terms that the law shall promote arbitration, conciliation, mediation and any other alternative means for resolving conflicts.

Commercial arbitration in Venezuela continues to be governed by the Law on Commercial Arbitration (LCA) (Official Gazette No. 36.530 of 7 April 1998), which is based on the UNCITRAL Model Law. The LCA governs domestic and international arbitration.

Foreign arbitral awards continue to be enforceable in Venezuela without the need of an *exequatur* or a declaratory judgment. Enforcement may only be denied for the reasons provided in Article 49 of the LCA.

The LCA, as with the Venezuelan Act on Private International Law, provides in Article 1 the preferential application of the international treaties that are currently in force in the country. Venezuela is a party to the following treaties relating to arbitration: the New York Convention; the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards; and the Panama Convention.

In relation to investment arbitration, Venezuela withdrew from ICSID effective from 25 July 2012. However, ICSID arbitration is still applicable to: (a) contracts in which the parties expressly agreed to it;

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and (b) cases concerning BITs that specify ICSID for the resolution of investment disputes.

On 12 August 2012, Venezuela became a member of Mercosur and adopted the Olivos Protocol for the Settlement of Disputes, which has been in force for the original signatories since 2 January 2004. The Protocol and its Regulations provide several mechanisms for the settlement of disputes as to the interpretation and application of the Mercosur rules, including arbitration. However, effective 1 December 2016, the founding member countries of Mercosur decided the temporal cessation of the exercise of Venezuela's rights inherent in its status as member state of Mercosur, until those countries agree with the conditions to restore the exercise of its rights as a state party.

A.2 Institutions, rules and infrastructure

The most important arbitral institutions in the country are the Arbitration Center of the Caracas Chamber (ACCC) and the Business Center for Conciliation and Arbitration (CEDCA), and in general, domestic and international arbitration are handled in these centers, as well as all kinds of civil and commercial disputes such as banking, insurance, telecoms, etc. Both institutions' head offices are in Caracas.

A.2.1 ACCC

The ACCC was created on 7 June 1989 as an entity of the Caracas Chamber of Commerce. It is the oldest active arbitration center in the country. The current rules of ACCC came into force on 1 February 2013 and have been updated on 9 September 2015 and 9 November 2016, specifically regarding to the following:

A.2.1.1 Precautionary measures

Requests for precautionary measures can be made prior to the commencement of the arbitration proceedings, together with the request for arbitration, or once the arbitration has been initiated and prior to the constitution of the Arbitral Tribunal to hear the merits of the matter. The Tribunal will consist of a single arbitrator and the

Executive Committee will periodically draw up a list of persons who have accepted the invitation to act as emergency arbitrators. In some cases, the Arbitral Tribunal, or any of the parties, with its approval, may request assistance from a competent court for the enforcement of the precautionary measures.

A.2.1.2 Arbitrators

The parties can select to be co-arbitrators from the date of filing of the Request for Arbitration or its response. The silence of an arbitrator regarding their appointment or their failure to submit their duly-signed Declaration of Independence and annexes to the ACCC will be understood as a rejection of their appointment. The arbitrators will have the status of *de jure* arbitrators, unless the parties have agreed that they are *amiable compositeurs*. The Executive Directorate's power to designate the Emergency Arbitral Tribunal is included.

A.2.1.3 Procedure

A new set of abbreviated procedure rules was introduced, providing for shorter deadlines than those in the general arbitration procedure and the constitution of an arbitral tribunal composed of a single arbitrator. Regarding confidentiality, it was clarified that the original file will be filed in the ACCC archives; if a competent authority requires its presentation, the ACCC will issue a certified copy of the file. The duties of the parties in case of multiplicity were also clarified, especially the selection of arbitrators and the payment of rates and fees. The power of consolidation of files in case of multiplicity of contracts was also clarified. The plaintiff's abandonment of the proceedings, after the answer to the request for arbitration, will be valid only with the consent of the defendant.

A.2.1.4 Rates and fees

The administrative costs of the arbitration, as well as the fees of the arbitrators, are determined using progressive cumulative percentages of the amount involved in the case and are adjusted according to inflation.

A.2.2 CEDCA

CEDCA is an independent arbitration center established in 1999. Its creation was promoted by the Venezuelan American Chamber of Commerce and Industry (VenAmCham). Its current regulation came into effect on 15 February 2013 and its appendix of costs and fees was modified effective 20 January 2017. In general, except if there is an agreement to the contrary, or if applicable rules so require, all matters related to the arbitration and the Award itself will be confidential. However, any interested person may request a copy of the Award, except if the parties have expressly agreed on its confidentiality. The CEDCA has an expedited procedure whose approximate duration is 40 days. This dispute is decided by a sole arbitrator. The arbitral tribunal must issue the Award within a term not exceeding 60 business days as of the date of approval of the terms of reference, which are signed by the parties in the first hearing. The fees of the arbitrators and the administrative costs of CEDCA are determined by the amount cited in the complaint and the number of arbitrators. The CEDCA's rules established from the outset the possibility of ordering advanced precautionary injunctions. The mechanism for appointing arbitrators is based on the reduced list system.

CEDCA emphasizes conciliation and according to its 2013 statistics, it resolved 35% of disputes in the conciliation phase within the arbitration proceedings. Of these cases, 66% were resolved within 1 to 3 months.

B. Cases

B.1 Recognizing the importance of arbitration

On 17 October 2008, the Constitutional Chamber of the Supreme Court of Justice issued an important and binding decision, in which it reaffirmed both domestic and international arbitration as an alternative means to resolve disputes. In deciding on a motion to interpret Article 258 of the Constitution, the Chamber reaffirmed the judiciary's constitutional duty to recognize and promote arbitration as a means of

resolving disputes. The Chamber also declared that the Constitution grants importance to arbitration, mediation, negotiation and reconciliation, and parties may elect any option that best suits their needs in the specific case.

It acknowledged the effectiveness of an alternate means for resolving disputes based on bilateral agreements for the protection of investments signed by Venezuela, as well as the various international treaties on arbitration ratified by Venezuela, including the New York, Panama and ICSID Conventions. The Chamber recognized that arbitral decisions are fully binding on the parties. It also confirmed that requests for the annulment of an arbitral award should be exceptional. The exceptional nature of a request for annulment is emphasized by the fact that a party opposing an award can only suspend the effects of the award by posting a guarantee as a preliminary measure.

The Chamber made two very important rulings in this decision regarding the arbitration of matters of public order and the submission of the state to international arbitration.

In the first case, which regards public order and mainly concerns domestic arbitration, the decision confirmed that it is perfectly acceptable to use alternative dispute resolution for "public order" issues. The Chamber clarified for the first time that the contradiction between arbitration and public order is fictitious, because there is no impediment to settling disputes regarding matters of public order through arbitration. Such matters include disputes over leases, employment contracts, and banking and consumer complaints, which are considered "sensitive" issues. The decision stated that the public order nature of these matters pertains exclusively to substantive rules, which cannot be relaxed by the parties or by a judicial body (be it a court or arbitral tribunal). However, the public order nature of these matters cannot prevent the parties from exercising their constitutional free will to decide to resolve their employment- or lease-related disputes through arbitration, reconciliation or mediation, if they wish,

because the decision to select an alternative means for resolving disputes only affects procedural rules that do not have a bearing on the public order nature of the substantive rules that govern these specially sensitive social matters. Therefore, the Chamber underlined that stipulating an arbitration clause in an employment or lease agreement does not imply a waiver of the protections, rights or guarantees that the special law on those matters grants to the legally weaker party, because the arbitral tribunal is obliged to recognize and respect such guarantees and protections. In its decision, the Chamber sets out a very simple means of determining what matters may be subject to arbitration and what are not: if a judge in an ordinary court can hear the matter, an arbitrator may also hear and decide it. Conversely, if the matter cannot be submitted to an ordinary court (that is, matters reserved for administrative authorities) it cannot be subject to arbitration either. To conclude, this decision of the Constitutional Chamber puts an end to the discrepancies, both from the doctrinal and case law standpoints, which existed previously on whether arbitration can apply to public order matters.

According to the second major pronouncement in this decision, which is more relevant for international arbitration, the Chamber permits the state to submit to an internal or international arbitration procedure, even in contracts of "general interest." It further acknowledges that international arbitration is the best way to favor "the indisputable need of the State to directly or indirectly enter into commercial relations with foreign entities to develop activities of common interest that in many cases cannot be brought about by the public administration or the private sector." The decision, far from going against the principle of state sovereignty, actually reaffirms this principle, because the state will have the power to decide under its own sovereign powers on the scope, opportunity and convenience of submitting a given matter to an arbitration clause. The decision promotes international arbitration for foreign investments. It states that international arbitration is an ideal mechanism for investors, to feel that they are guaranteed impartiality in any dispute that they might not otherwise feel if a conflict arising from an investment agreement with the state were heard by an

ordinary court of that same state. However, the Chamber reiterates (with special reference to the ICSID Convention) that an arbitration clause will not be binding upon the state unless the state unequivocally submits in writing to arbitration in one of three ways: (i) directly signing a contract containing an arbitration clause; (ii) signing a bilateral or multilateral agreement for promoting and protecting investments; or (iii) enacting a national law. It would not be possible to find that the state is obliged to submit to arbitration without there being an arbitration agreement or a statement of express and unequivocal will by the state to that effect.

B.2 Granting preliminary injunctions in arbitration

On 3 November 2010, the Constitutional Chamber of the Supreme Court issued a decision that courts could issue preliminary injunctions in disputes that are subject to arbitration. The decision, which carries precedential weight, allows parties that have agreed to arbitrate their disputes to petition for a preliminary injunction not only before the composition of the arbitral tribunal, but even before filing a request for arbitration. In submitting a petition for a preliminary injunction, the petitioning party must: (i) submit the petition for an injunction with a competent court; (ii) attach the agreement containing the arbitration clause; (iii) demonstrate the existence of the legal requirements for the requested injunction to be granted; and (iv) provide evidence that the arbitration has already begun, or undertake to begin it within a term not less than 30 calendar days following the granting of the injunction. If the petitioner does not provide such evidence, the court will suspend the injunction. After granting the injunction, the court can then enforce pursuant to the procedures established by law.

Once an arbitral tribunal has been constituted, the tribunal can decide to revoke, modify or confirm the court injunction. If the arbitral tribunal is not constituted within 90 calendar days from the date on which the injunction was granted, the injunction will be automatically suspended.

B.3 Arbitration agreements can be evidenced by exchange of emails

In *Uniseguros v. Americana de Reaseguros*,[4] the Political-Administrative Chamber of the Supreme Court rendered a decision on 28 May 2013, applying Article 6 of the LCA, and declared that an arbitration agreement existed where there had been an extensive exchange of emails between the parties' attorneys, who were empowered to execute arbitration agreements. Article 6 provides that the arbitration clause must be evidenced in writing by a document or set of documents that record the will of the parties to resolve the controversy by arbitration. In this case, the Chamber determined that the fact that the parties apparently had never signed an arbitration clause was irrelevant, as the exchange of emails evidenced the will of the parties to resort to arbitration.

B.4 Limits on examination of an arbitration clause by an ordinary court

In *Apure Grill Restaurant, C.A. v. Inversiones Soleos, C.A.* (26 June 2013),[5] the Political-Administrative Chamber of the Supreme Court confirmed a ruling by the Constitutional Chamber of the Supreme Court (3 November 2010) establishing that the examination that an ordinary court is allowed to make regarding an arbitration clause is merely a *prima facie* examination, to verify compliance with the formal requisites for its validity. The analysis is limited to verifying the textual characteristics of the arbitration clause and excludes any consideration of potential defects. This ruling departs from past practice whereby the Chamber, when considering the validity of an arbitration clause, would review the facts related to whether the signatory was authorized to execute the arbitration clause. The Chamber's ruling confirms that this review should be left to the arbitration tribunal under the principle of *Kompetenz-Kompetenz*.

[4] Case No. 2012-1682.
[5] Judgment No. 706.

B.5 Constitutional protection request against international arbitration awards

In *Juan José Castillo Bozo v. Leopoldo Castillo Bozo and Gabriel Castillo Bozo*,[6] a petition for constitutional protection (*amparo*) was filed before a superior court in Caracas, requesting on public policy grounds that the court annul an arbitration award rendered in an ICDR arbitration in Miami. The arbitration award had not been subject to nullity actions in the arbitration seat, and at the time of the filing of the petition, there was no action for enforcement of the arbitration award pending before the Venezuelan courts. The superior court annulled the award on public policy grounds and exhorted foreign authorities to deem it null and not to recognize the award.

C. Trends and observations

Arbitration has become a common mechanism for resolving commercial disputes in Venezuela. Several judgments rendered by the Constitutional Chamber of the Supreme Court have contributed to this trend by confirming the constitutional provision that the law will promote arbitration. Specifically, the Constitutional Chamber has emphasized that access to arbitration is a constitutional right that must be promoted and respected as part of the right of access to justice, and that commercial disputes are not automatically excluded from arbitration merely because they involve issues of public policy. Rather, the existence of such public policy issues simply obliges the arbitrators to apply the appropriate public policy rules when resolving commercial disputes.

Notwithstanding these rulings, the government has taken steps in recent years to exclude certain matters from commercial arbitration on the ground that public policy issues are involved. For example, a presidential decree dated 29 November 2013 expressly prohibited the use of arbitration in disputes related to commercial real estate lease

[6] First Civil and Commercial Superior Court of Caracas (13 April 2013), Case No. AP71-O-2012- 00042.

agreements, thus bringing commercial lease agreements in line with an existing prohibition concerning residential lease agreements.

Regarding investment arbitration, the current government appears to be reconsidering the arrangements for the resolution of investment disputes involving Venezuela and is looking into possibilities, including the renegotiation of Venezuela's existing BITs and/or the creation of new regional dispute resolution mechanisms for investment disputes. The government is also encouraging countries in the *Alianza Bolivariana* (ALBA) to move in that direction.

Finally, there is a trend in recent special laws to provide for arbitration but administered by the State, as it happens with the Organic Tax Code (18 November 2014) and also obligatory, as it is contemplated in the Securities Market Law (30 December 2015).