

## Arbitration 2010 – Dominican Republic

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### Legislation

#### 1. Which legislation governs the enforcement of international commercial arbitration awards and arbitral agreements in international business contracts, and international commercial arbitration proceedings?

Law 489-09 on Commercial Arbitration, dated 19 December 2008 and published in the Official Gazette No. 10502 on 30 December 2008, governs the enforcement of commercial arbitration awards and arbitral agreements, and arbitration proceedings in the Dominican Republic.

Pursuant to Article 1 of Law 489-09, an arbitration is international if: the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states; or the parties are domiciled outside of the Dominican Republic, and the place where a substantial part of the obligations of the commercial relationship is to be performed is situated outside the state in which the parties have their places of business.

Also, Law 50-87 on Chambers of Commerce and Production, as amended by Law 181-09 dated 6 July 2009, contains a chapter on arbitration, and allows for international arbitration cases to be administered by the Alternative Dispute Resolution Centres of the respective chambers.

#### 2. Has the UNCITRAL model arbitration law been adopted in your jurisdiction?

Law 489-09 is based on the UNCITRAL model arbitration law with a few variations, although not substantial, such as:

- the definition of international arbitration is narrower, as it does not contain the opting-in option according to which the parties expressly agree that the subject matter of the arbitration agreement relates to more than one country;
- it incorporates the set of rules that should be taken into account by the arbitral tribunal in an international procedure to determine the validity of the arbitral agreement (article 10);
- following the general principles of arbitration, the parties are free to determine the number of arbitrators called upon to resolve the dispute, but to prevent risks of slowing the decision process in the arbitral proceeding, the law requires an odd number of arbitrators. Failing such determination, the law provides that a sole arbitrator shall be appointed instead of three (article 14);
- when interim measures are ordered by a local court, the requesting party is bound to initiate arbitration 60 days after said order is issued;
- the arbitrators, the parties and the arbitral institutions shall maintain the confidentiality of the proceedings (article 22);
- to the extent the parties have not agreed otherwise, along with the demand for arbitration, a claimant shall notify the name of the proposed or appointed arbitrators, and within the specified time limit the respondent shall notify

the claimant of its statement of defence and appoint an arbitrator (article 27). This differs from the UNCITRAL Model Law according to which the claimant first serves a request for arbitration, and subsequently the statements of claim and defence are submitted within the time limits agreed by the parties or set by the arbitral tribunal;

- since the demand for arbitration is what initiates the proceedings, the claimant will not default on this basis, but only for not appearing before the tribunal. If under these circumstances the arbitrators continue with the proceedings and render an award, both the proceedings and award shall be considered as contradictory and no violation of the right of each party to fully present its case may be invoked (article 29);
- the law states in a detailed manner the procedure to be followed by the parties in the taking and presentation of evidence before the tribunal, even addressing the situation in which the evidence has to be taken in a foreign country (article 30); and
- recognition and enforcement of an award can be refused if the court, on its own initiative and not necessarily on grounds proposed by a party (*sua sponte*), finds that there was a disregard of the rules of due process that amounts to a violation of the rights of a party to present its case, in addition to the grounds set forth in article 36(b) on the Model Law (article 46).

### Conventions

#### 3. Is your jurisdiction a party to both the New York Convention and the Panama Convention? Is it a party to any other conventions or treaties governing international commercial arbitration agreements, awards or proceedings?

The Dominican Republic is a party to both the Convention for the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), ratified on 8 November 2001 and in force as of 10 July 2002, and the Inter-American Convention on International Commercial Arbitration (Panama Convention), ratified on 24 December 2007.

#### 4. Is your jurisdiction a party to the ICSID Convention? Have steps been taken to renounce the Convention or withdraw from ICSID?

The Dominican Republic signed the ICSID Convention on 20 March 2000, but to this date it has not been ratified by the Dominican congress.

#### 5. Has your jurisdiction refused to honour an international arbitral award issued against it?

After the entry into force of these Conventions, and the passing of Law 489-08, there is no public record in the Dominican Republic of not honouring an international arbitration award issued against it. To the contrary, an express provision has been included in the Constitution, in support of arbitration as a dispute resolution mechanism in contracts entered into by the Dominican State.

**Commercial arbitral agreements and arbitrability****6. Is a pre-dispute clause or separate agreement to resolve international commercial disputes by arbitration enforceable?**

Pursuant to article 10 of Law 489-08, pre-dispute clauses or separate agreements as well as post-dispute agreements to resolve international commercial disputes are enforceable. This has been the case for commercial domestic disputes since the enactment of Law 845 dated 15 July 1978, which modified certain provisions of the Code of Civil Procedure and the Commercial Code.

**7. Is a pre-dispute clause or separate agreement to resolve disputes by arbitration enforceable in consumer cases? Is there any legislation in your jurisdiction governing the arbitrability of consumer disputes?**

Law 358-05 on Protection of Consumers or Users Rights, dated 19 September 2005 (“Law 358-05”), is the legal framework that governs consumer-related disputes in the Dominican Republic; in addition to the Regulation No. 11 issued by the National Institute for the Protection of Consumers or Users Rights (Pro Consumidor), on 3 June 2008, which institutes the Conciliation and Arbitration System for Consumer Disputes (“Regulation No. 11”).

According to article 130 of Law 358-05 and articles 11 and 12 of Regulation No. 11, pre-dispute clauses and separate agreements to resolve disputes by arbitration are enforceable in consumer cases. The arbitration is administered by Pro Consumidor, and arbitrators are appointed from a roster of arbitrators available at Pro Consumidor. All procedural aspects are detailed in Regulation No. 11. In contrast, article 83 prohibits the inclusion of arbitration clauses in form contracts (“contratos de adhesión”).

**8. What are the requirements for an enforceable arbitral agreement?**

The general rule for an arbitral agreement to be enforceable is that it has to be in writing (article 10 of Law 489-08), which means that its content has to be recorded in any form that is accessible for subsequent reference. However, this is a requirement that is *ad probationem*, for the purposes of serving as evidence of the compromise assumed by each party. Hence, the non-observance of this requirement does not render the arbitral agreement void. In the case of domestic arbitration, the agreement has to comply with the general principles on the formation of contracts, set out in article 1,108 of the Civil Code (the most important of these being that the parties have legal capacity to enter into agreements). The requirements for an arbitral agreement to be enforceable in an international arbitration are determined by the set of rules chosen by the parties, or the substantive law that applies to the merits of the dispute, or Dominican law.

**9. Is there a subject matter that is not legally subject to arbitration (such as antitrust, licensing, patent, etc) in the context of an international business transaction?**

The general rule is that only matters that can be subject to compromise and settlement shall be referred to arbitration. However, Law 489-08 expressly states in article 3 that subject matter regarding the status of a person, separations between husband and wife, criminal cases and cases that concern ‘public order’ cannot be resolved through arbitration. Law 489-08 does not contain a definition of ‘public order’, for the purposes of application of article 3.

**10. Does the law specify whether an arbitration will be in equity or under law if the parties do not expressly specify the nature of the arbitration in the agreement?**

Article 33 of Law 489-08 provides that the arbitration will be in equity only when the parties have expressly indicated so in the agreement. Thus it can be construed that in all other cases where no express authorisation exists, arbitrations will be decided under law.

**11. How does the law limit party autonomy with respect to the terms of an arbitral agreement?**

The parties are free to determine the terms of the arbitral agreement, that is, the number of arbitrators and procedure for their appointment, the rules applicable to the procedure and the merits of the case, place of arbitration and language. The only requirement the law imposes on this regard is for the number of arbitrators to be odd.

**12. In what circumstances does the law allow a non-signatory to an arbitral agreement to pursue a claim in an international arbitration against a party that signed the arbitral agreement and vice versa?**

Dominican law does not contain any provision in that regard. However, according to general principles of law, the assignment of the underlying contract may be presumed to include acceptance to any arbitration agreement contained in the contract; and also, in the case of succession of the rights and obligations under a contract, a non-signatory may pursue a claim against a party to the arbitration agreement.

**13. Is there a concept in your jurisdiction providing for class-action arbitration or group arbitration?**

Dominican law does not contain any provision governing class-action arbitral proceedings or group arbitration.

**Arbitral institutions and arbitrators****14. Are foreign arbitral institutions authorised to administer arbitrations in your jurisdiction?**

Foreign arbitral institutions may administer arbitrations in the Dominican Republic since the law on arbitration does not contain a specific prohibition. However, an arbitral award issued in an arbitration seated in the Dominican Republic, under the auspices of a foreign institution such as the International Centre for Dispute Resolution, the Court of International Arbitration of the International Chamber of Commerce or the London Court of International Arbitration will be considered as domestic and under the local courts’ jurisdiction.

**15. Does the law require that arbitrators in international arbitrations be citizens or residents of your jurisdiction? Does your law require that arbitrators in international cases be lawyers? Are the fees of foreign arbitrators serving in an arbitration seated in your jurisdiction subject to taxation?**

Law 489-08 does not contain prohibitions on the nationality of the arbitrators or restrictions on their profession, therefore a foreign citizen or a non-resident may act as an arbitrator as well as a non-lawyer. The fact that the place of the arbitration is the Dominican Republic is not a sufficient basis for applying income tax or withholding taxes over the fees paid to the arbitrators. It is important to note though, that if payment for the services is to be made abroad by a Dominican tax-paying entity, it may be subject to a 25 per cent withholding tax.

The same applies to administered arbitrations, pursuant to Law 50-87 as amended.

**16. Must arbitrators in international arbitrations be independent and impartial? What is the legal standard governing conflicts of interest and disclosure by arbitrators in international arbitrations?**

Arbitrators must be independent and impartial in accordance with article 16 of Law 489-08. Disclosure by each arbitrator of all the causes that may give rise to justifiable doubts as to his impartiality or independence is required when appointed or during the proceedings. Following the provisions in the Model Law, an arbitrator may be challenged when circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or when he/she does not possess qualifications agreed to by the parties.

**17. Will courts entertain requests to disqualify an arbitrator during an arbitration?**

If the challenge of the arbitrator under the procedure agreed upon by the parties or that stated in the law is not successful, the challenging party may request the Court of Appeals of the place of arbitration to render a decision per curiam (en Cámara de Consejo) on the matter, subject to no appeal (see article 16(3)).

**Arbitral proceedings****18. Does the law require that arbitral proceedings be held in a specific language?**

No, as previously stated, the parties are free to agree on the language or languages of the arbitration. The arbitrators are given the right to order the production of documents or the taking of any other evidence in a language different to that of the arbitration, if the parties do not oppose.

**19. Can foreign lawyers serve as advocates in arbitral proceedings in your jurisdiction? If so, can they do so alone or must a local lawyer serve as co-counsel? Are their fees subject to local taxation?**

A foreign lawyer can provide legal services different to those related to the judicial exercise or appearance in court, as long as they are members of the Bar Association (Colegio de Abogados) of the Dominican Republic, according to Law 91-83 dated 3 February 1983, which institutes the Bar Association of the Dominican Republic. Pursuant to the United States/Dominican Republic/Central American Free Trade Agreement (DR-CAFTA), a foreign lawyer who is not a member of the Dominican Bar Association can provide services of consulting on foreign law as long as the foreign lawyer has a licence to exercise law in a jurisdiction that allows Dominicans to provide consulting services on foreign law. It is not clear whether a foreign lawyer may assist a client before an arbitral tribunal, when such assistance is the result of a particular case and not aimed at establishing a practice in the Dominican Republic. Our view is that a foreign lawyer may assist a client in an international arbitration taking place in the Dominican Republic.

The lawyers' fees may be subject to local taxation, as stated in article 270 of the tax law.

**20. In what circumstances, if any, does your law allow the consolidation of multiple arbitral proceedings?**

Dominican law does not contain any provisions governing multiple arbitral proceedings.

**21. Please describe common practice and usage in international arbitrations seated in your jurisdiction with respect to a party's right to require an opposing party to produce documents pertinent to the dispute.**

The law does not provide much detail as to how the production of evidence shall be carried out, mainly due to the inquisitorial nature of the proceedings before local courts, in which each party has the burden of proving the facts relied upon to support its claim or defence. The notion of discovery is in-existent.

However, pursuant to article 27 of Law 489-08, at the outset of the proceedings the parties may file the relevant documents, or make reference to the documents and evidence they intend to produce to support their case. Following the constitution of the tribunal, the arbitrators may set a limit for the parties to present the evidence proposed or requested by the opposing party.

**Court support for arbitration****22. Is the principle of 'Kompetenz-Kompetenz' followed in the courts, and do the courts follow the principle of the independence and separability of the arbitration clause?**

The principles of 'Kompetenz-Kompetenz' and of independence and separability of the arbitration clause are both contained in Law 489-08. Previous legislation on the matter did not include these principles, but decisions and declarations of the courts have signalled due regard to those principles.

In case of administered arbitrations by the Chambers of Commerce, the Arbitration Rules of the Centre for Alternative Dispute Resolution sets

forth both principles. Dominican courts tend to decide they have no jurisdiction when there is an arbitration agreement and thus submit the parties to arbitration.

**23. If a party files a lawsuit in violation of an agreement to arbitrate, will a petition by the defendant to remit the lawsuit to arbitration be granted by the courts under normal circumstances? If so, will that petition be treated as a threshold matter or will it be rolled into the merits of the litigation such that the defendant will also need to defend the merits of the lawsuit in court?**

As stated before, the Dominican courts tend to decide they have no jurisdiction when there is an arbitration agreement and submit the parties to arbitration. A petition on these grounds shall be presented by the party and decided by the court prior to any other motion, regardless of the rights recognised in practice to the courts of accumulating any preliminary objection on lack of jurisdiction and requesting the parties to refer to the merits of the case.

**24. Are arbitral tribunals empowered to grant interim relief? If so, how is that relief enforced in the courts?**

According to article 21 of Law 489-08, the arbitral tribunal may, at the request of a party, grant interim measures, and accordingly, require the party requesting an interim measure to provide appropriate security in connection with the measure. The decision on interim relief will be subject to the rules on challenges and enforcement applicable to arbitral awards (except those relating to the suspension of enforcement of the award).

If the interim relief is granted prior to the commencement of the arbitral proceedings, the Court shall order the requesting party to file the demand for arbitration within the 60 days that follow the issuance of the interim relief.

**25. Can arbitrators issue orders, subpoenas or use other legal processes to compel the production of evidence by a third party or compel a third-party witness to appear before them? If so, will a court lend its aid in enforcing such an order against a recalcitrant third party?**

Law 489-08 does not contain any provision in that regard, therefore an arbitral tribunal may not compel a third party to appear before it.

**26. Can a party to an arbitration seek relief from the court to obtain evidence in aid of an international arbitration? What is the scope of such relief?**

According to articles 9(2) and 32 of Law 489-08, an arbitral tribunal or any of the parties as authorised by the arbitral tribunal may request the local court to assist with the taking of evidence. The competent court shall be the Civil and Commercial Chamber of the First Instance Court of the place of arbitration, or of the place where the taking of evidence has to be practised. The assistance of the court may be to either participate directly in ordering and obtaining the evidence, or adopting the appropriate measures so the taking of evidence can be practised before the arbitral tribunal.

Law 489-08 does not limit the scope of such relief to certain types of evidence; however, special reference is made to allowing the court to assist with ordering depositions and hearing witnesses' declarations.

**27. Can a party in an international commercial arbitration seek interim or provisional relief from a court without first seeking relief from the arbitral tribunal?**

Article 13 of Law 489-09 permits the parties to request a court to order an interim measure before or during the arbitral proceedings. In the event the court orders such a relief, it shall request the requesting party to submit its statement of claim for arbitration in a time limit not exceeding 60 days as of the date the order is issued. The court may too require the party requesting an interim measure to provide appropriate security. Once the arbitral tribunal is constituted, it may order the suspension or termination of the interim measures adopted by the court.

Moreover, pursuant to article 48 of the Code of Civil Procedure, a party whose credit is in danger may request the First Instance Court of the competent jurisdiction to order a provisional or interim measure to prevent the insolvency of the debtor for the payment of its debts. The authorisation process is ex parte.

**28. Have the courts issued injunctions enjoining arbitral proceedings from going forward?**

A court would not normally allow such a petition. However, we could point to two or three old cases in which public order has been argued and accepted in order to have a local court enjoin an arbitral proceeding from going forward.

**Awards – content**

**29. Does the law provide that post-award interest accrues on an unpaid arbitral award?**

The laws on arbitration do not contain any provisions on this matter. Law No. 183-02 dated 1 November 2002, expressly repealed the order that established legal interest. The Supreme Court of Justice has stated that with the enactment of this law, no interest can be accrued as additional indemnity (SCJ, 9 November 2005, BJ 1140). For interest to be awarded, the parties must have agreed to it.

**30. Is an arbitral tribunal empowered to award attorneys' fees to the prevailing party or is that power reserved to the courts?**

Yes, subject to the agreement of the parties, the arbitral tribunal shall fix the costs of arbitration in the award; these costs include the fees and expenses of the arbitrators, the costs for legal representation of the parties, fees and expenses of the arbitral institution and any such costs incurred in connection with the arbitral proceedings. However, Law 489-08 does not contain an express rule on how the costs should be allocated; in local courts, following the provisions set forth in article 130 of the Civil Procedure Code, the party against whom the decision is rendered shall bear the costs of the process.

**Awards – challenges and vacatur**

**31. What are the grounds for challenging an international award issued in an arbitration seated there and what is the period of time a party has to challenge that award?**

The grounds for challenging an award issued in arbitration with its seat in the Dominican Republic are set forth in article 39 of Law 489-08, and basically follow the provisions of the Model Law. Hence, an award shall be set aside when the party against whom enforcement is invoked demonstrates that:

- a party to the arbitration agreement referred to in article 10 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the laws of the Dominican Republic;
- there has been a disregard of the rules of due process that results in a violation of the rights of a party to present its case;
- the award deals with a dispute not contemplated by, or not falling within, the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of Law 489-08 from which the parties cannot derogate, or, failing such agreement, was not in accordance with said law;
- the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
- the award is in conflict with the public order of the Dominican Republic.

The last two causes may be sought by the arbitral tribunal in its own initiative (*sua sponte*). A request for setting aside may not be made after a month has elapsed from the date the award was served; or in the event a party requested the correction, interpretation or addition award, from the date any such decision from the arbitral tribunal was served to the parties.

**32. Please describe the standard used by the courts in deciding whether to vacate an international arbitral award. Is 'lack of reasonableness', or manifest disregard or a mistake in the application of the substantive law to the dispute of an international award grounds to vacate it? To what degree have international awards rendered in your jurisdiction been vacated on the grounds of 'public policy'?**

Currently, courts do not look into the merits of the case when deciding whether to vacate an award, but rather on the general principles established in the law and international conventions the Dominican Republic is a party which were previously cited in question 31. Lack of reasonableness does not constitute sufficient grounds to challenge an award. Manifest disregard of the rules or mistake in the application of the substantive law to the dispute may constitute grounds to vacate an award, when invoked by a party, following the provisions of article 39(2)(d) of Law 489-08.

There are no reported cases of international awards rendered in the Dominican Republic that have been vacated on the grounds of 'public order'.

**33. Please describe any recent significant experiences or cases that illustrate the attitude of your courts toward the vacatur of international awards.**

There is no relevant decision in the last 12 months on this matter.

**34. Do the courts consider themselves empowered to vacate an arbitral award rendered in another jurisdiction?**

There is no clear indication on what the position of Dominican courts is on vacating a foreign award; however, it is our understanding that the position of the courts would be to refuse the enforcement of a foreign award rather than vacating the award.

**Awards enforcement**

**35. Please describe the process for enforcing an arbitral award rendered in another jurisdiction.**

A foreign arbitral award, as a domestic arbitration award, is not enforceable like the order of a state court. However, it may become enforceable through an authorisation or exequatur rendered by the Civil and Commercial Chamber of the First Instance Court of the National District without further review on the merits, pursuant to, and under the terms of Law 489-08 and the applicable international conventions to which the Dominican Republic is a party (the New York Convention or the Panama Convention). The party seeking the recognition and enforcement of the award shall file a request with the court, along with an original of the award and the arbitral agreement or contract where the arbitral clause is contained. It is a non-adversarial procedure in which the court examines the award within the limits set forth in the law and the international conventions. The decision on the recognition and enforcement may be challenged before the Court of Appeals, who shall render a definite and binding decision (article 44 of Law 489-08).

It is important to note that the Dominican Republic made no reservations when ratifying the New York Convention and Panama Convention.

**36. Assuming that the award emanates from a jurisdiction that is a party to a Convention enforceable in your jurisdiction, how long does it take to obtain an order of enforcement in the first instance and a final order of enforcement in the last instance?**

This non-adversarial procedure for the recognition and enforcement of a foreign award before the First Instance Court may take up to three months. The court's decision may be appealed before the corresponding Court of Appeals. In total, the whole process may take up to 18 months until a final decision is reached.

**37. How long does it take to confirm an arbitral award rendered abroad compared with obtaining a judgment in the courts of your jurisdiction in a similar commercial dispute?**

A final decision on a commercial dispute brought before the Dominican courts may take up to three years in litigation. This means one year before the First Instance Court, an additional year before the Court of Appeals and the third year before the Supreme Court of Justice.

**38. Please describe some significant recent experiences with the enforcement of foreign arbitral awards.**

First Instance Courts have just started receiving requests for recognition and enforcement of foreign arbitral awards under Law 489-08. The application of Law 489-08, and the attitude of the courts toward the new procedure for the recognition and enforcement of foreign arbitral awards are yet to be seen.

**39. To what degree has 'public policy' been a ground to refuse enforcement of an international award rendered abroad?**

The concept of public order is not clearly defined under Dominican law; it is more of a constantly evolving concept. In case of international arbitration, it used to be argued that public policy was violated when issues involving the Dominican state and state matters were submitted to arbitration; but that is not the case anymore. As previously mentioned, a clear commitment towards arbitration has been adopted by the Dominican state in recent cases and in the Constitution enacted in January 26, 2010.

**40. Can a foreign arbitral award be enforced if the award has been set aside by the courts at the seat of the arbitration?**

No. One of the grounds for refusing recognition and enforcement of an award is if it has not yet become binding on the parties, or if it has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made (article 45(1)(e) of Law 489-08).

**The outlook**

**41. What is your view of the future of international arbitration and is the trend positive in your jurisdiction? What advice do you have with respect to dispute resolution for a foreign lawyer advising a foreign client contemplating entering into a business deal with a company from your jurisdiction?**

The Dominican Republic is steadily advancing in the correct path towards providing a modern legal framework that promotes the use of alternative dispute resolution mechanisms, and guarantees the respect and enforceability of these agreements and decisions. The Supreme Court of Justice and the business community have manifested the commitment of supporting arbitration in the Dominican Republic. The enactment of the new Constitution on 26 January 2010, of Law 181-09 that amends the Law on Chambers of Commerce and Production, and of Law 489-08 on Commercial Arbitration, help to promote a more secure climate for investments, consolidating the grounds to be perceived in the near future as a desired forum for international arbitrations.

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