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## The Good, the Bad, and the Ugly in Distribution Contracts: Limitation of Party Autonomy in Arbitration?

Pilar Perales Viscasillas  
*Carlos III University of Madrid*

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**THE GOOD, THE BAD, AND THE UGLY  
IN DISTRIBUTION CONTRACTS:  
LIMITATION OF PARTY AUTONOMY IN  
ARBITRATION?**

*Pilar Perales Viscasillas\**

INTRODUCTION, CONCEPTS AND LEGAL FRAMEWORK

Distribution contracts might respond to different kinds of modalities in practice. In fact, under some domestic laws, the name “distribution contract” is considered a generic category that includes specific contracts, such as: agency, franchise, concession, or distribution contracts, the latter being a specific kind of contract. The aforementioned contract types are considered to be cooperation or collaboration commercial contracts since they imply cooperation between two businessmen. Depending on the type of contract, cooperation may be more or less intense.<sup>1</sup>

From a legal perspective, it is clear that distributors and franchisees are independent businesspersons who invest and risk their

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\* Pilar Perales Viscasillas is a Commercial Law Professor at the Carlos III University of Madrid. She serves as Counsel at Baker & McKenzie. This paper was written under a research project for the Ministerio de Economía y Competitividad. (DER2013-48401-P).

<sup>1</sup> On the basis of such cooperation the contracts are classified under the STUDY GROUP ON A EUROPEAN CIVIL CODE, PRINCIPLES OF EUROPEAN LAW: COMMERCIAL AGENCY, FRANCHISE AND DISTRIBUTION CONTRACTS (PEL CAFDC) (2006). See also Eleanor Cashin Ritane, The Common Frame of Reference (CFR) and the Principles of European Law on Commercial Agency, Franchise and Distribution Contracts, ERA Forum, Dec. 2007 at 563.

own funds.<sup>2</sup> Agents are also legally independent from their principal but their status under domestic law might vary and there are some legal systems that provide them special treatment under their own labor laws.<sup>3</sup>

As far as arbitration is concerned, the object of this paper is to explore the limitations imposed by certain countries on the freedom of the parties to submit their contracts to arbitration and whether this approach should be rejected considering that other countries follow policies in favor of arbitration.

#### A. Substantive Regulation of Distribution Contracts

The substantive regulation of these contracts varies depending on the kind of contract and the binding force of the instrument at an international level. This section sets forth an overview of the three major types of contracts.

1. *Agency Contracts* - UNIDROIT approved a Convention on Agency in the International Sale of Goods<sup>4</sup>, which defines an agency contract as a contract “where one person, the agent, has authority or purports to have authority on behalf of another person, the principal, to conclude a contract of sale of goods with a third party.”<sup>5</sup>

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<sup>2</sup> See UNIDROIT, GUIDE TO INTERNATIONAL MASTER FRANCHISE AGREEMENTS (2d ed. 2007) [hereinafter UNIDROIT GUIDE], available at <http://www.unidroit.org/instruments/franchising/guide/second-edition-2007>.

<sup>3</sup> Spain, for example, treats agents differently and affords them special treatment. Besides the 1992 Law on Agency Contracts, the so-called “economic dependent agents” are considered to be autonomous workers and thus partially regulated under a special Labor Law. See Ley del Estatuto del Trabajador Autónomo (LETA) (B.O.E. 2007, 20) (Spain).

<sup>4</sup> UNIDROIT, *Convention on Agency in the International Sale of Goods*, 22 I.L.M. 249 (opened for signature Feb. 17, 1983).

<sup>5</sup> It has not entered into force yet, as ten ratification instruments are required. So far, it has been ratified by: France, Italy, Mexico, Netherlands, and South Africa. See UNIDROIT, *Status of the Convention on Agency in the International Sale of Goods - Signatures, Ratifications*, <http://www.unidroit.org/status-agency> (last visited Nov. 30, 2015).

European Union law<sup>6</sup> has a similar definition, but it is more precise as it considers the power to negotiate or to negotiate and conclude the contract by the agent. It defines a ‘commercial agent’ as one who is a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, hereinafter called the ‘principal’, or to negotiate and conclude such transactions on behalf of and in the name of that principal.<sup>7</sup>

In terms of soft law instruments, there is also the possibility for the parties to agree on the UNIDROIT Principles of International Commercial Contracts<sup>8</sup> (UPICC, 2010). Furthermore, there is also a model contract offered by the International Chamber of Commerce (ICC).<sup>9</sup>

2. *Distribution or Concession Contracts* - In many legal systems, distribution or concession contracts are atypical contracts, or are only partially regulated.<sup>10</sup> At an international level, there is no uniform legal instrument such as the CISG for distribution contracts, although the CISG might apply to specific distribution contracts.<sup>11</sup> It is also possible that the parties could agree on the application of The UNIDROIT

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<sup>6</sup> Council Directive 86/653, On Self-Employed Commercial Agents, 1986 O.J. (L 382) 17 (EC).

<sup>7</sup> *Id.* art. 1.2. The common law concept of “agent” is in fact to all intents and purposes the same as that of the general agent under the civil law systems, according to the UNIDROIT Guide. UNIDROIT GUIDE, *supra* note 2, at 9.

<sup>8</sup> See UNIDROIT, *Unidroit Principles of International Commercial Contracts*, at Preamble, (2010). As explained by Comment 2 to the Preamble: “The Principles do not provide any express definition, but the assumption is that the concept of “commercial” contracts should be understood in the broadest possible sense, so as to include not only trade transactions for the supply or exchange of goods or services, but also other types of economic transactions, such as investment and/or concession agreements, contracts for professional services, etc.” See *id.* cmt. 2.

<sup>9</sup> See generally INTERNATIONAL CHAMBER OF COMMERCE, ICC MODEL CONTRACT: COMMERCIAL AGENCY (2d ed. 2002).

<sup>10</sup> For example, in Spain, although sometimes the Courts have applied by analogy some of the substantive provisions of the Agency Law.

<sup>11</sup> See generally María del Pilar Perales Viscasillas, *International Distribution Contracts and CISG*, in ESTUDIOS DE DERECHO MERCANTIL (2013).

Principles or the ICC, which also offers a model contract for the parties.<sup>12</sup>

There is no universal definition of an international distribution contract, but a good example to illustrate this type of contract and its modalities is found in the Draft Common Frame of Reference (DCFR): IV. E. – 5:101 (Scope and definitions), which follows The Principles on Agency, Franchise and Distribution Contracts (PEL CAFDC)<sup>13</sup>:

(1) This Chapter applies to contracts (distribution contracts) under which one party, the supplier, agrees to supply the other party, the distributor, with products on a continuing basis and the distributor agrees to purchase them, or to take and pay for them, and to supply them to others in the distributor's name and on the distributor's behalf.

(2) An exclusive distribution contract is a distribution contract under which the supplier agrees to supply products to only one distributor within a certain territory or to a certain group of customers.

(3) A selective distribution contract is a distribution contract under which the supplier agrees to supply products, either directly or indirectly, only to distributors selected on the basis of specified criteria.

(4) An exclusive purchasing contract is a distribution contract under which the distributor agrees to purchase, or to take and pay for, products only from the supplier or from a party designated by the supplier.

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<sup>12</sup> *See generally* INTERNATIONAL CHAMBER OF COMMERCE, ICC MODEL DISTRIBUTORSHIP DISTRIBUTION CONTRACT (2002).

<sup>13</sup> PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE 2435 (Christian von Bar et al. eds., 2009), *available at* [http://ec.europa.eu/justice/contract/files/european-private-law\\_en.pdf](http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf)

A more succinct example, the UNIDROIT Guide provides:

The distributor is wholly independently owned and financed and buys the products from the supplier by whom it has been granted the distribution rights. In some jurisdictions these distribution rights may be granted also for the supplying of services. In others, the distribution agreement is considered to incorporate the distributor into the manufacturer's or supplier's sales organization.<sup>14</sup>

3. *Franchising Contracts*- In many legal systems, franchising contracts are also atypical contracts and therefore there is no special regulation for these contracts. UNIDROIT has, however, developed partial regulation guides for these contracts.<sup>15</sup>

According to Article 2 of The UNIDROIT Model Franchise Disclosure Law (2002):

[F]ranchise means the rights granted by a party (the franchisor) authorizing and requiring another party (the franchisee), in exchange for direct or indirect financial compensation, to engage in the business of selling goods or services on its own behalf under a system designated by the franchisor which includes know-how and assistance, prescribes in substantial part the manner in which the franchised business is to be operated, includes significant and continuing operational control by the franchisor, and is substantially associated with a trademark, service mark, trade name or logotype designated by the franchisor. It includes:

(A) the rights granted by a franchisor to a sub-franchisor under a master franchise agreement;

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<sup>14</sup> See UNIDROIT Guide, *supra* at 2.

<sup>15</sup> See UNIDROIT, A MODEL LAW ON PRECONTRACTUAL INFORMATION (2002); see also UNIDROIT, A GUIDE FOR INTERNATIONAL MASTER FRANCHISE ARRANGEMENTS (2d ed. 2007).

(B) the rights granted by a sub-franchisor to a sub-franchisee under a sub-franchise agreement;

(C) the rights granted by a franchisor to a party under a development agreement.<sup>16</sup>

As considered by the UNIDROIT Guide, in most franchise agreements there is an exclusivity clause that provides that the franchisee is allowed to market only the products of the franchisor. The vendor-purchaser relationship may also be present in a franchise relationship, but will typically be a mere feature of the broader franchise arrangement, which will also include the licensing of the trademark, system of the franchisor, and the providing of certain services by the franchisor to the franchisee, such as training and continued assistance.<sup>17</sup>

## B. International Commercial Arbitration

As previously mentioned, distribution contracts are based upon the cooperation between two parties: the supplier and the distributor. In order to minimize transaction costs, the supplier has a priority interest to base his relationship with the distributors on the same model contract containing the same arbitration clause and providing for the same forum.<sup>18</sup> Therefore, it is not unusual to find arbitration clauses in these contracts because the advantages of arbitration in commercial contracts, particularly international contracts, also applies to distribution contracts.

Generally speaking, arbitration laws do not contain specific regulations as to distribution contracts and thus general arbitration rules apply. In fact, the 1985 UNCITRAL Model Law on International Commercial Arbitration (MAL) does not contain any specific rules for distribution contracts. Yet, within the general definition of what is

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<sup>16</sup> UNIDROIT, MODEL FRANCHISE DISCLOSURE LAW art. 2 (2002).

<sup>17</sup> See UNIDROIT Guide, *supra* note 2, at 10.

<sup>18</sup> See generally Stefan Kröll, *The "Arbitrability of Disputes Arising from Commercial Representation, in ARBITRABILITY: INTERNATIONAL & COMPARATIVE PERSPECTIVES* 317 (2009).

considered to be commercial distribution contracts are included, as well as agency and other forms of industrial or business cooperation.<sup>19</sup>

Some countries do provide specific legislation on this area, adopting certain restrictions on arbitration or the applicable law and thus limiting party autonomy in arbitration.

The reasons for adopting such limitations are based upon the idea that there is a weaker party and thus an unequal bargaining power whereby the principal imposes arbitration clauses on the agent, distributor, or franchisee. Such a clause might have the effect of depriving the weaker party of the rights afforded by the domestic statutes, and shows that there is a need to protect the essential conditions of a given market.

As will be developed in this paper, these limitations primarily affect the arbitrability of the dispute (*see infra* section I). On the other hand, other legal regimes have adopted a more liberal approach towards arbitration in the area of distribution contracts as a way to attract investment and trade (*see infra* section II).

There are also other issues in arbitration and distribution contracts that are shared by other commercial contracts, which includes the extension of the arbitration clause to third parties that might have an impact in networking distribution contracts or in franchising contracts, particularly if there is a master franchise

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<sup>19</sup> United Nations Committee on International Trade Law (UNCITRAL), UNCITRAL Model Law on International Commercial Arbitration art. 1 ¶ 1, U.N. Sales No. E.95.V.18 (1985). This provides:

The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

contract;<sup>20</sup> the incorporation of arbitration clauses in general terms and conditions;<sup>21</sup> the delimitation between the mediator, the expert and the arbitrator in distribution contracts which might be problematic in the automotive sector;<sup>22</sup> the power of arbitrators in long-term contracts;<sup>23</sup> the consent to arbitration when an agent is concluding the contract on behalf of the principal;<sup>24</sup> the impact upon distribution contracts of issues where arbitrability might be contentious, for example, when intellectual rights or competition issues are linked to the distribution contract;<sup>25</sup> and the application of the standards of independence and impartiality to arbitrators.<sup>26</sup>

## I. LIMITATION OF PARTY AUTONOMY IN ARBITRATION

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<sup>20</sup> BERNARD HANOTIAU, *COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS 1* (Kluwer International Law, 2005); Stephen R. Bond, *Multi-party Arbitration — The Experience of the ICC International Court of Arbitration*, in *MULTI-PARTY ARBITRATION* 39 (INT'L CHAMBER COM., 1991); Carmine R. Zarlenga, *Defending Against Litigation by Third Parties in the Franchise Context*, 11 *FRANCHISE L.J.* 1, 19-24 (1991) (examining franchising contracts).

<sup>21</sup> Vera Van Houtte, *Consent to Arbitration through Agreement to Printed Contracts: The Continental Experience*, 16 *ARB. INT'L.* 1, 1–18 (2000).

<sup>22</sup> LAURENT DU JARDIN ET AL., *ARBITRAGE V. EXPERTISE EN DROIT DE LA DISTRIBUTION* (2006); JOHAN ERAUW ET AL., *L'ARBITRAGE ET LA DISTRIBUTION COMMERCIALE* 159-170 (2005).

<sup>23</sup> Didier Matray, Françoise Vidts, & Baudouin Roels, *L'Arbitrage et le caractère évolutif des contrats de distribution*, in *L'ARBITRAGE ET LA DISTRIBUTION COMMERCIALE* 109 (2005); ERAUW ET AL., *supra* note 22, at 111-55.

<sup>24</sup> See Stefan Kröll, *El desarrollo del arbitraje en los años 2007-2008*, 9 *REVISTA DEL CLUB ESPAÑOL DEL ARBITRAJE* 15 (2010). For an overview of German Domestic Law and the lack of power by commercial agents to conclude arbitration agreements, see *HANDELGESETZBUCH [HGB] [COMMERCIAL CODE]*, May 10, 1987, *REICHGESETZBLATT [RGL.]* 219, art. 53.2 (Ger.), see also *Oberlandesgericht München [OLG] [Munich Appellate Court]*, Aug. 19, 2008, 34 *SchH* 007/07 (Ger.).

<sup>25</sup> Hans Van Houtte, *Distribution Arbitration and European Competition Law*, in *JOHAN ERAUW ET AL., L'ARBITRAGE ET LA DISTRIBUTION COMMERCIALE* 97-107 (Bruylant, 1st ed. 2005); Pilar Perales Viscasillas, *Arbitrabilidad de los Derechos de la Propiedad Industrial y de la Competencia*, 6 *ANUARIO DE JUSTICIA ALTERNATIVA: DERECHO ARBITRAL* 4-43 (2005).

<sup>26</sup> Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Distribution*, 14 *ARB. INT'L.* 28-32 (1998).

## THROUGH ARBITRABILITY

Distribution contracts are commercial contracts. Traditionally, commercial contracts might be subject to arbitration without the need to impose limitations. The rationale behind this general rule is that in commercial contracts, both parties share equal contracting power and thus there is no need to impose limitations, like, for example, in consumer arbitration.<sup>27</sup>

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<sup>27</sup> Jan Kleinheisterkamp, *The Impact of Internationally Mandatory Law on the Enforceability of Arbitration Agreements 1-2* (LSE LAW, SOC'Y AND ECON. WORKING PAPERS No. 22 2009), available at, <http://ssrn.com/abstract=1496923> (See for all with special reference to distribution contracts).

See also Directive 2013/11, of the European Parliament and of the Council of 21 May 2013, On Alternative Dispute Resolution for Consumer Disputes, 2013 O.J. (L 165/63) (EU). For a further discussion, see Norbert Reich, *Party Autonomy and Consumer Arbitration in conflict -A "Trojan Horse" in the Access to Justice in the EU ADR-Directive 2013/11?*, 4 PENN. ST. J.L. & INT'L AFF. 290 (2015).

Following art. 10 of Directive 2013/11, Spanish Consumer Arbitration has been recently changed by Modificación del texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias (B.O.E. 2014, 3) [hereinafter Law 3/2014], art. 57.4 (B.O.E. 2007, 1) [hereinafter Ley 1/2007]. According to the old system, pre-disputed arbitration clauses in Law 1/2007 (art. 57.4), as well as agreements to arbitrate contained in general conditions governed by Law 1/2007 (art. 90), were binding on consumers if the arbitration system provided for was the special consumer arbitration system created by the State and regulated under the consumer arbitral system (Sistema Arbitral de Consumo (B.O.E. 2008, 231) [hereinafter Royal Decree 231/2008]). Now, under the new art. 57.4 as modified by Law 3/2014, any arbitration agreement concluded before the dispute does not bind the consumer, but it binds the merchant if the consumer later accepts it, and when a further condition is met: the arbitration agreement should meet the conditions required by the applicable laws. Presently, Article 57.4 Law 1/2007 as amended by Ley 3/2014 states that:

No serán vinculantes para los consumidores los convenios arbitrales suscritos con un empresario antes de surgir el conflicto. La suscripción de dicho convenio, tendrá para el empresario la consideración de aceptación del arbitraje para la solución de las controversias derivadas de la relación jurídica a la que se refiera, siempre que el acuerdo de sometimiento reúna los requisitos exigidos por las normas aplicables.

For further details, see Pilar Perales Viscasillas, *Los convenios arbitrales con los consumidores (La modificación del art. 57.4 TRLGDCU por la Ley 3/2014 de 27 de*

Scholars studying arbitrability typically distinguish between objective arbitrability (arbitrability *rationae materiae*, i.e. matters that are capable of settlement by arbitration) and subjective arbitrability<sup>28</sup> (authority and capacity of the parties). Objective arbitrability is an issue to be decided in accordance with domestic laws on arbitration, which defines arbitrability as including both the subject matter of arbitration and the need for a dispute to exist. The issue of arbitrability goes beyond the scope of an arbitration agreement. It is inherent to the power of States to decide what issues are capable of being resolved through arbitration, and it is outside the will of the parties. On the other hand, the object of an arbitration clause is an issue to be decided by the will of the parties, who within the scope of issues that are arbitrable, might exclude some of them. The parties cannot, however, agree to submit to arbitration disputes that are not arbitrable.

Generally, domestic laws consider arbitrability under general rather than exhaustive provisions. Some national laws provide that all rights or matters that the parties “may freely dispose”<sup>29</sup> or “property issues”<sup>30</sup> might be subject to arbitration. Also, many statutes link arbitrability with the transaction, and thus the matters that are the object of a transaction might be also subject to arbitration.<sup>31</sup> These general

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marzo), 7 La Ley Mercantil 22 (2014).

<sup>28</sup> See JULIAN D. M. LEW, LOUKAS A. MISTELIS & STEFAN MICHAEL KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* Ch. 9 (Kluwer Law International, 2003); see also Kresimir Sajko, *Arbitration Agreement and Arbitrability. Solutions and Open Issues in Croatian and Comparative Law*, 3 CROAT. ARB. Y.B. 43, 44 (1996) (some authors also refer to arbitrability *ratione jurisdictionis*); Alan Uzelac, *New Boundaries of Arbitrability under the Croatian Law on Arbitration*, 9 CROAT. ARB. Y.B. 139, 140, 152, 155 (2002) (referring also to arbitrability *ratione institutionis*).

<sup>29</sup> Ley de Arbitraje art. 2.1 (B.O.E. 2003, 60) (Spain); Code Civil [C. CIV.] art. 2059 (Fr.); Codice di Procedura Civile [C.p.c.] art. 808, art. 1966.2 (It.); Peru Arbitration Act, art. 1 (2008); ORGANIZATION FOR THE HARMONIZATION OF BUSINESS LAW IN AFRICA (OHADA), UNIFORM ACT OF ARBITRATION (1999).

<sup>30</sup> LOI FÉDÉRALE SUR LE DROIT INTERNATIONAL PRIVÉ [LDIP] [PRIVATE INTERNATIONAL LAW] Dec. 18, 1987, RO 1776, art. 177.1 (Switz.); ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE] Jan. 30, 1877, REICHSGESETZBLATT [RGBL.] art. 1030.1 (Ger.); Lei No. 9.307, de 23 de Setembro de 1996, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] (t. 1): de 24.9.1996 (Braz.).

<sup>31</sup> ZIVILPROZESSORDNUNG [ZPO] [CIVIL PROCEDURE STATUTE] REICHSGESETZBLATT [RGBL.] No. 113/1895 (Austria); Finnish Arbitration Law, art. 2, (Oct. 23 1992); Chūsai-hō [Arbitration Law], Law No. 138 of 2003, art. 13.1 (Japan);

clauses require significant specification and interpretation in order to assess which of the specific issues related to distribution contracts are arbitrable.

Arbitrability will vary from country to country, and even within a given country it will vary since it is a concept that has changed with time. Despite this, however, one clear principle applies to arbitrability, particularly in international commercial arbitration: the principle of favour arbitris. The application of this principle to arbitrability means, first, there is a general presumption in favour of the arbitrability of commercial disputes (policy favouring arbitrability);<sup>32</sup> and second, there is a tendency to expand the scope of the subject-matter of arbitration.

Despite this modern approach to arbitrability, some countries adopt limitations to party autonomy by restricting objective arbitrability of the dispute, either by excluding arbitration before the dispute has arisen (*see infra* section I.A) or by excluding it through the imposition of the exclusive jurisdiction of the State Courts (*see infra* I.B).

#### A. Invalidation of the Pre-Disputed Arbitration Clauses: United States

The idea of the protecting the weaker party in distribution contracts, i.e., the agent, distributor or franchisee, as if they were consumers is the impetus for certain laws. These laws are intended to restrict arbitration from hindering an agreement before a dispute has arisen.

An example of this is The Motor Vehicle Franchise Contract Arbitration Fairness Act (2002) (United States).<sup>33</sup> This act would have

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1a § LAG OM SKILJEFÖRFARANDE (Svensk författningssamling [SFS] 1999:116) (Swed.).

<sup>32</sup> María Fernanda Vasquez Palma, 2 IUS ET PRAXIS 407-410 (2012) (reviewing MARTA DE GONZALO QUIROGA, ORDEN PÚBLICO Y ARBITRAJE INTERNACIONAL ARBITRAJE INTERNACIONAL EN EL MARCO DE LA GLOBALIZACIÓN COMERCIAL GLOBALIZACIÓN COMERCIAL ARBITRABILIDAD Y DERECHO APLICABLE DERECHO APLICABLE AL FONDO DE LA CONTROVERSA INTERNACIONAL (2003)).

<sup>33</sup> S. REP. NO. 107-266, at 2 (2002):

This legislation would allow motor vehicle dealers the option of either going to arbitration or utilizing procedures and remedies

applied to Business to Business transactions, i.e., to contracts whereby “a motor vehicle manufacturer, importer or distributor sells motor vehicles to any other person for resale to an ultimate purchaser and authorizes such other person to repair and authorizes such other person to repair and service manufacturer’s motor vehicles.”<sup>34</sup> Leaving aside the confusion between distribution and franchise contracts, this act would have considered arbitration valid only if agreed to by the parties after the controversy arises.<sup>35</sup>

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available under State law such as those involving State-established administrative boards specifically created and uniquely equipped to resolve disputes between motor vehicle dealers and manufacturers. This legislation is intended to ensure that motor vehicle dealers are not required to forfeit important rights and remedies afforded by State law as a condition of obtaining or renewing a motor vehicle franchise contract.

The report of the Senate refers also extensively to the unequal bargaining power between the parties and the fact that arbitration agreements are included in standard terms or conditions on a “take it or leave it” basis, which converts those clauses in “mandatory binding arbitration” with the effect of making null or void the substantive protective rights afforded by the Statute.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 17 (2002) (discussing motor vehicle franchise contracts):

(a) For purposes of this section, the term (2) “motor vehicle franchise contract” means a contract under which a motor vehicle manufacturer, importer, or distributor sells motor vehicles to any other person for resale to an ultimate purchaser and authorizes such other person to repair and service the manufacturer’s motor vehicles.

(b) Whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to the contract, arbitration may be used to settle such controversy only if after such controversy arises both parties consent in writing to use arbitration to settle such controversy.

(c) Whenever arbitration is elected to settle a dispute under a motor vehicle franchise contract, the arbitrator shall provide the parties to the contract with a written explanation of the factual and legal basis for the award.

An identical solution is found in the Draft Arbitration Fairness Act (2013) in relation to consumer, labor and competition issues. Franchising contracts were included in previous drafts.<sup>36</sup>

B. Exclusive Jurisdiction of State Courts: Panama

A more restrictive view towards arbitration has been adopted by certain legal systems that consider both pre and post-dispute arbitration clauses to be invalid, because in these jurisdictions only the state courts are considered competent to hear a dispute. Therefore, arbitration as a means to solve disputes is preempted by imposing the exclusive jurisdiction of state courts. An example is the recent Code of Private International Law of the Republic of Panama.<sup>37</sup>

According to this Code, commercial contracts follow a presumption that contracts are concluded among equal parties.<sup>38</sup> However, a special regulation is provided for distribution contracts when the commissioner is rendering the services in Panama. According to the Law, these contracts are considered to be unequal contracts or adhesive contracts<sup>39</sup> and are under the exclusive jurisdiction of the courts in

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<sup>36</sup> See Kröll, *supra* note 18 § 16-30, 16-32.

<sup>37</sup> Code of Private International Law of the Republic of Panama (May 8, 2014).

<sup>38</sup> *Id.* art. 88.

<sup>39</sup> *Id.* art. 89. (Unequal contracts are also considered those whereby the weaker party has not capacity to negotiate the essential elements of the contract; those are considered to be: price, clauses for the performance of the contract, and the settlement of disputes).

Panama if the contract is performed within Panamanian borders.<sup>40</sup> The same limitation applies to labor and consumer contracts.<sup>41</sup>

At the same time, when the contract is an international commercial representation or franchising contract, the Code establishes certain limitations to the general principle of freedom of contract in relation to the applicable law to the indemnification for breach of the contract or unilateral termination. . In this situation, the commissioner or the franchisee has the only option to choose between the application of the law applicable to the performance of the contract or the law that provides the highest standard of protection.

Belgium is another example of a jurisdiction where legislation provides for the exclusive jurisdiction of the state courts, as well as for the mandatory application of state law for certain distribution contracts and agency contracts. Belgian case law tends to apply Article II(3) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and, thus, Belgian courts have found that arbitration agreements are null and void because of the exclusive competence of state courts.<sup>42</sup>

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<sup>40</sup> *Id.* art 90, 91. (These limitations both in regard to arbitration and to the choice of law do not encompass some other well advanced provisions. To this regard, Panama has an arbitration Law that follows very closely The United Nations Committee on International Trade Law (UNCITRAL), UNCITRAL Model Law on International Commercial Arbitration, U.N. Sales No. E.08.V.4 (2008) as modified in 2006. *See* Arbitration Law of Panama (Dec. 31, 2013). Arbitrability of the subject matter of the dispute is seen under the general rule of the free disposition of the parties in art. 4, and in terms of applicable law, due regard is to be given by the arbitrators to the UNIDROIT Principles of International Commercial Contracts, since in all cases the arbitrators will have to take into account the provisions of the contract, the usages of trade as well as the UNIDROIT Principles when the contract is international, as required by art. 56.3.

Identical conclusions in regard to the Code of Private International Law of the Republic of Panama, *supra* note 37, that recognizes the principle of *pacta sunt servanda* in art.72, and also recognizes the agreement of the parties to apply the UNIDROIT Principles as a secondary source to the applicable Law or as a mean to interpret an international commercial contract by the judge or the arbitrator in art.86.

<sup>41</sup> Code of Private International Law of the Republic of Panama, *supra* note 37, art. 90.

<sup>42</sup> *See* Kleinheisterkamp, *supra* note 27, at 1 et seq.; Kröll, *supra* note 17, at 16-33 et seq.; Pilar Perales Viscasillas, *Contratos de internacional Distribución Internacional*

The overriding effect of domestic laws upon arbitration, even with regard to other substantive laws, including those that are based upon European Union (EU) Law, is seen when analyzing the Unamar case, ECJ 17 October 2013.<sup>43</sup> In Unamar, the court states the important consequences for agency contracts within the EU, but does not consider arbitration in its analysis.

In *Unamar*, the parties were an agent from Belgium and a principal from Bulgaria, the applicable law in the contract was Bulgarian Law, and there was also an arbitration clause that provided for an arbitral seat and institution in Bulgaria (Bulgaria Chamber of Commerce). Article 27 of the Belgium Law on commercial agency contracts provides that:

Without prejudice to the application of international conventions to which Belgium is a party, any activity of a commercial agent whose principal place of business is in Belgium shall be governed by Belgian law and shall be subject to the jurisdiction of the Belgian courts.

The Hof van Cassatie (Court of Cassation), considering art. II(3) NYC, held that it had jurisdiction,<sup>44</sup> thereby considering the *lex fori* in its analysis,<sup>45</sup> but submitted the question of the applicable law to a preliminary ruling. The ECJ in the UNAMAR Case had to consider

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*y Arbitraje*, in *DISTRIBUCIÓN COMERCIAL Y DERECHO DE LA COMPETENCIA* 45-102 (Jorge Viera González & Joseba Aitor Echevarría Sáenz eds., 2011).

<sup>43</sup> C-184/12, *United Antwerp Maritime Agencies (Unamar) NV v. Navigation Maritime Bulgare*, 2013 EUR-Lex CELEX Lexis 4306 (Oct. 17, 2013). See also Hilda Grieder Aguilar, *La Intervención de las "Leyes De Policía" Como Límite al Principio de la Autonomía de la Voluntad de las Partes en los Contratos de Agencia Comercial: Un Nuevo Paso en la Comprensión del Sistema*, *DIARIO LA LEY* No. 8234 (2014).

<sup>44</sup> See Hof van Cassatie [Cass.] [Court of Cassation], May 4, 2012, N-20120405-2, <http://www.cass.be> (Belg.) (where the parties agree to arbitration in Quebec (Canada) and the arbitration clause was considered to be null and void; as usual in Belgian Law a comparison is drawn between the applicable law chosen by the parties and Belgian Law, being the one agreed less protective to the agent.).

<sup>45</sup> Pilar Perales Viscasillas, *Contratos de Distribucion Internacional* 77 et seq., in *DISTRIBUCION COMERCIAL Y DERECHO DE LA COMPETENCIA* (La Ley Grupo Wolters Kluwer, 2011) (an analysis that has been very much subject to criticism because it ought to have been in accordance to the *lex contractus*, see further details).

whether the Agency Law of Belgium was or was not part of the international public policy, within the meaning of Article 7 of the Rome Convention.<sup>46</sup>

According to the facts of the case, Bulgaria correctly implemented the Agency Directive into its domestic law, which is a minimum harmonization directive. However, it did so in less protective terms when compared to Belgium Agency Law. Therefore, the question was whether Articles 3 and 7(2) of the Rome Convention might authorize the Belgium courts (law of the forum) to disregard the application of the law chosen by the parties (Bulgarian Law) in favor of the mandatory laws of the forum (Belgium Law on Agency Contracts), despite the fact that the law chosen (Bulgarian Law) meets the requirement of Directive 86/653.

The answer to this question was that Bulgarian Law could be disregarded by the Belgian Court owing to the mandatory nature, in the legal order of Belgium, of the rules governing the situation of self-employed commercial agents.

These rules are mandatory only when the court before which the case has been brought finds, on the basis of a detailed assessment, that, in the course of *that transposition, the legislature of the forum state (Belgium) found it to be crucial, in the legal order concerned, to grant the commercial agent protection going beyond that provided for by the directive.* In that regard, the

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<sup>46</sup> Convention on the Law Applicable to Contractual Obligations, art. 7 1980 OJ (L 266) (EC) [hereinafter Rome Convention]:

1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application

2. Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.

legislature of the forum state must also take into account the nature and of the objective of such mandatory provisions.<sup>47</sup>

Therefore:

it is thus for the national court, in the course of its assessment of whether the national law which it proposes to substitute for that expressly chosen by the parties to the contract is a ‘mandatory rule’, to take account not only of the exact terms of that law, but also of its general structure and of all the circumstances in which that law was adopted in order to determine whether it is mandatory in nature in so far as it appears that the legislature adopted it in order to protect an interest judged to be essential by the Member State concerned. As the Commission pointed out, such a case might be one where the transposition in the Member State of the forum, by extending the scope of a directive or by choosing to make wider use of the discretion afforded by that directive, offers greater protection to commercial agents by virtue of the particular interest which the Member State pays to that category of nationals” (pfo.50).

C. The Mandatory Character of Substantive Rules for the Protection of the Weaker Party and its Impact on Arbitration: Agency Contracts in Europe

As we have considered in the two previous sections, arbitration agreements might be totally or partially affected by an express rule limiting arbitrability of the dispute. A third approach to limit the freedom of the parties to submit disputes to arbitration is somewhat indirect because it is derived from the idea that there is a fraud of law by one of the parties (the party with more contracting power) when imposing arbitration with a foreign seat and with a foreign law. This implies that the principal is trying to escape from the mandatory laws protecting the agent, distributor, or franchisee. In fact, this

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<sup>47</sup> See Unamar, *supra* note 43.

consideration is also behind those laws that expressly prohibit arbitration.<sup>48</sup>

A typical example of forum shopping in this area is found in real cases: a Californian principal, with a commercial agent in Europe, elects for arbitration proceedings in California, under Californian law. Interestingly, California law does not recognize a possible indemnification to the commercial agent after the termination of the contract, contrary to the 1986 Agency Directive<sup>49</sup>. In this regard, art. 17 of the Agency Directive is considered a mandatory rule within the European Union that cannot be evaded by the simple expedient of a choice of law clause<sup>50</sup> and/or arbitration clause.<sup>51</sup> Hence, the disputes are non-arbitrable if the applicable law is the law of a non-European country.<sup>52</sup>

## II. A POLICY FAVORING ARBITRATION IN THE AREA OF DISTRIBUTION CONTRACTS

Contrary to the approach undertaken by several countries, other legal systems do not constrain the principle of freedom of the parties to submit their disputes to arbitration in the framework of distribution contracts; on the contrary they have followed a policy in favor of arbitration.

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<sup>48</sup> See *supra* Sections I.1, I.2.

<sup>49</sup> Council Directive 86/653, On Self-Employed Commercial Agents, art. 17 1986 O.J. (L 382) 17 (EC).

<sup>50</sup> C-381/98, *Ingmar v. Eaton*, 2000 E.C.R. I-09305 (in the case, the agent had his place of business in the United Kingdom, and there was no forum or arbitration clause agreed. In terms of applicable law, as we have mentioned, it is not only that the law of the third country might be disregarded but also, as the UNAMAR Case shows, the law of EU country in favor of the mandatory law of the forum).

<sup>51</sup> As interpreted by German Courts when facing art. 89b HGB (HANDELSGESETZBUCH, CCo), i.e., Art.17 of the Agency Directive. See Kröll, *supra*, note 18, at 16-55.

<sup>52</sup> For further details, see Kröll, *supra* note 17, at 16-55 et seq; see also Kleinheisterkamp, *supra* note 26, at 10. This doctrine does not extend to distribution contracts. See Oberster Gerichtshof [OGH] [Supreme Court] Jan. 27, 2010, docket No. 7 Ob 255/09i (Austria) (principal in USA, arbitration in California, distributor in Austria).

### A. Agency Contracts under Spanish Law

Spanish law bases its agency contract law on the EU Directive of 1986.<sup>53</sup> This law establishes that the competence to hear disputes related to agency contracts belongs to the judge of the agent's domicile, making null any contrary agreement of the parties.<sup>54</sup> This imperative provision<sup>55</sup> could have been interpreted as a rule that provides for the exclusion of arbitration. However, the majority of scholars and the case law agree that this provision does not provide for an exclusive jurisdiction of State Courts,<sup>56</sup> but only a territorial competence among State Courts,<sup>57</sup> and thus it does not exclude arbitration even if it has a seat in a foreign country.<sup>58</sup>

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<sup>53</sup> Ley Sobre Contrato de Agencia (B.O.E. 1992, 12) (Spain). *See also* Council Directive 86/653, On Self-Employed Commercial Agents, 1986 O.J. (L 382) 17 (EC).

<sup>54</sup> *Id.* "La competencia para el conocimiento de las acciones derivadas del contrato de agencia corresponderá al Juez del domicilio del agente, siendo nulo cualquier pacto en contrario

<sup>55</sup> *Id.* In general, most of the rules contained in the Agency Contract Law are imperative, see Article 3.1.

<sup>56</sup> Pilar Jiménez Blanco, *Nota al Auto AP Barcelona (sección 17ª) 28 mayo 2009*, 1 ARBITRAJE: REVISTA DE ARBITRAJE COMERCIAL Y DE INVERSIONES 270 (2010); Alejandro López Ortiz, *Interferencias y desajustes entre competencia judicial internacional y competencia territorial en los tribunales civiles españoles: la disposición adicional de la Ley Desajustes Entre Competencia Judicial Internacional y Competencia Territorial en los Tribunales Civiles Españoles: La Disposición Adicional de la Ley 12/1992, del contrato de agencia del Contrato de Agencia*, 14/157 DERECHO DE NEGOCIOS 17 (2003); Pilar Perales Viscasillas, *Algunos Problemas en Torno a la Arbitrabilidad: Insolvencia y Contrato de Agencia*, 5 FORO DE DERECHO MERCANTIL 7-29 (2004).

<sup>57</sup> *See* S.T.S.J. Murcia, Apr. 16, 2014 (R.O.J., 1035/2014) for a recent domestic agency contract (decision of The High Superior Court of Justice of Murcia).

<sup>58</sup> *See* Pilar Jimenez Blanco, *Nota al Auto AP Barcelona (sección 17ª) 28 mayo 2009*, 1 ARBITRAJE: REVISTA DE ARBITRAJE COMERCIAL Y DE INVERSIONES 266-272 (2010) (in relation with an international agency contract (Arbitration in Finland, Finnish principal, Spanish agent)); *see also* S.A.P. Barcelona, June 1, 2004 (R.O.J., 7108/2004); S.A.P. Barcelona, Feb. 7, 2006 (R.O.J., 14828/2006), S.A.P., Nov. 6, 2000 (R.O.J., 13153/2000) and S.A.P. Barcelona, Nov. 19, 2002 (R.O.J. 11552/2002); *see also* S.A.A.P. Lleida 28 Jan. 2009 (R.O.J. 98/2009).

Impliedly also, S.T.S., July 3, 2002 (R.O.J. 4928/2002); S.A.P. Barcelona, Nov. 6, 2000 (R.O.J. 13153/2000) considering the second look doctrine; and S.A.P. Córdoba, July 23, 2001 (R.O.J. 1013/2001). But *see* contrary stating that the arbitral agreement is null: Auto AP Alicante, May 28, 2008 (R.O.J. 76/2008).

In this regard, Spanish arbitration legislation follows a policy that favors arbitration and arbitrability of the disputes.<sup>59</sup> An example of this is that arbitration is provided for by the legislator even when the agent has a special protection as a special worker.<sup>60</sup>

#### B. Distribution Contracts under DR-CAFTA

The Dominican Republic-Central America Free Trade Agreement (DR-CAFTA) is the Free Trade Agreement (FTA) between the United States and Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic. As with other FTAs, such as NAFTA (United States, Canada and Mexico), the idea is to facilitate

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<sup>59</sup> Pilar Perales Viscasillas, *Arbitration in Spain, in* WORLD ARBITRATION REPORTER (WAR) 1-53 (Loukas A. Mistelis, Laurence Shore & Hans Smite eds., 2d ed., 2012). In regard to international distribution contracts, see considering enforceable arbitration agreements with a foreign seat, see S.A.P. Barcelona, Feb. 27, 2012 (R.O.J. 709/2012); see also ICC Arbitration in Düsseldorf. Also an international distribution contract with an exclusive licensing agreement: arbitration in a foreign country with an applicable foreign law (California) and included into the general terms and conditions was considered a valid agreement during the exequatur proceedings, see S.T.S.J. Cataluña, Mar. 25, 2013 (R.O.J. 184/2013). See also considering the equal bargaining power in international distribution contracts and the agreement to arbitrate included in general terms and conditions: S.T.S.J. Cataluña, Nov. 17, 2011 (R.O.J. 525/2011) also examining this question during the enforcement proceedings under The New York Convention. For a valid agreement in international distribution contracts of the option for arbitration or state Courts, Juz. de lo Mercantil, n°11 of Madrid, May 4, 2011 (R.O.J. 3738/2014), confirmed by S.A.P. Madrid, Oct. 18, 2013 (R.O.J. 1988/2011).

Also considering that franchising contracts are negotiated contracts between the parties as derived from the mandatory pre-contractual information and thus considering the arbitration valid as no proof of the non-negotiated agreement was duly provided: S.A.P. Zaragoza, Dec. 19, 2011 (R.O.J. 3211/2011). Contrary considering the arbitration clause null as was included in general terms and conditions: S.A.P. Barcelona, Sep. 28, 2012 (R.O.J. 7296/2012), that it is however a wrong decision based upon art. 63 Code of Civil Procedure that does not apply to arbitration.

<sup>60</sup> Ley del Estatuto del Trabajador Autónomo (LETA) (B.O.E. 20/2007) (Spain) (applies to commercial agents when they are considered economically dependant from the principal. Art.17 LETA establishes the competence of Labor courts but also in accordance with Art.18.4 LETA parties may submit their disputes to arbitration.).

trade and investment to foster regional integration and harmonization.<sup>61</sup>

DR-CAFTA is different than other FTAs in that it deals, among other issues, with distribution contracts (substantive rules), as well as arbitration in relation to these contracts. The more recent FTAs focus on arbitration as the ideal, efficient and fair method for resolving commercial disputes, and they are considered the best way to promote investment and trade.<sup>62</sup>

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<sup>61</sup> David A., Gantz, *Symposium: CAFTA and Commercial Law Reform in the Americas: International Legal Development: The Complex Problem of Customs Law and Administrative Reform in Central America*, 12 *Americas*, SW. J.L. & TRADE AM. 215, 220 (2006) (U.S.) (The agreement entered into force for the United States and El Salvador, Guatemala, Honduras, and Nicaragua during 2006. For the Dominican Republic on Mar. 1, 2007, and for Costa Rica on Jan. 1, 2009.) (U.S.).

<sup>62</sup> José A. Muñoz, *Symposium: CAFTA and Commercial Law Reform in the Americas: Dealing with Shadow Economy: Comments and Reflections*, *Southwestern*, 12 SW. J.L. & TRADE AM. 373, 378 (2006); Omar García Bolívar, *Symposium: CAFTA and Commercial Law Reform in the Americas: Dispute Resolution Process and Enforcing the Rule of Law: Is Arbitration a Viable Alternative to Solving Disputes in Central America*, 12 SW. J.L. & TRADE AM. 380, 381 et seq. (2006); Jeffrey Talpis, *Symposium: CAFTA and Commercial Law Reform in the Americas: Comments on Dispute Resolution Process and Enforcing the Rule of Law*, 12 SW. J.L. & TRADE AM. 409 et seq. (2006); Pilar Perales Viscasillas et al., *Derecho Uniforme del Comercio Internacional y Tratados de Libre Comercio en América*, in *EL DERECHO MERCANTIL EN EL UMBRAL DEL SIGLO XXI: LIBRO HOMENAJE AL PROF. DR. CARLOS FERNÁNDEZ-NÓVOA EN SU OCTOGÉSIMO CUMPLEAÑOS 63-76* (J. A. Gómez Segade and A. García, Marcial Pons eds., 2010).

See also for example, Agreement between the United States of America and the Socialist Republic of Vietnam on Trade Relations, U.S.-Viet., art. 7, July 13, 2000, Hein's No. KAV 5968, available at <http://photos.state.gov/libraries/vietnam/8621/pdf-forms/bta.pdf> (commercial Disputes, which means a dispute between parties to a commercial transaction which arises out of that transaction):

2. The parties encourage the adoption of arbitration for the settlement of disputes arising out of commercial transactions concluded between nationals or companies of the United States of America and nationals or companies of the Socialist Republic of Vietnam. Such arbitration may be provided for by agreements in contracts between such nationals and companies, or in a separate written agreement between them.

3. The parties to such transactions may provide for arbitration under any internationally recognized arbitration rules, including the UNCITRAL Rules of December 15, 1976, and any

Before DR-CAFTA, legislation in Central-American countries was imperative and very protective of the distributor, agent and franchisee.<sup>63</sup> Furthermore, arbitration was prohibited because the legislation provided for the exclusive jurisdiction of State courts to resolve disputes in the area of distribution contracts. However, those barriers to the principle of freedom of contract and arbitration were

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modifications thereto, in which case the parties should designate an Appointing Authority under said rules in a country other than USA or Vietnam.

4. The parties to the dispute, unless otherwise agreed between them, should specify as the place of arbitration a country other than USA or Vietnam that is a party to the New York Convention.

5. Nothing in this Article shall be construed to prevent, and the parties shall not prohibit, the parties from agreeing upon any other form of arbitration or on the law to be applied in such arbitration, or other form of dispute settlement which they mutually prefer and agree best suits their particular needs.

6. Each party shall ensure that an effective means exists within its territory for the recognition and enforcement of arbitral awards.”

<sup>63</sup> See the Preamble to the Law No. 173, the Protection of the Importers Agents of Goods and Products of 6th April 1966 (Dominican Republic) that was considered a Public Order Law (art. 8):

CONSIDERANDO que el Estado Dominicano no puede permanecer indiferente al creciente número de casos en que personas físicas o morales del exterior, sin causas justificadas, eliminen sus concesionarios agentes tan pronto como estos han creado un mercado favorable en la República, y sin tener en cuenta sus intereses legítimos.

CONSIDERANDO que se hace necesaria la adecuada protección de las personas físicas o morales que se dedican en la República Dominicana a promover y gestionar la importación, la distribución, la venta, el alquiler o cualquier otra forma de explotación de mercaderías o productos procedentes del extranjero o cuando los mismos sean fabricados en el país, actuando como agentes, o bajo cualquiera otra denominación contra los perjuicios que puedan irrogarles la resolución injusta de las relaciones en virtud de las cuales ejerzan tales actividades, por la acción unilateral de las personas o entidades a quienes representan o por cuya cuenta o interés actúan, a fin de asegurarles la reparación equitativa y completa de todas las pérdidas que hayan sufrido, así como de las ganancias legítimas percibibles de que sean privados.

considered by the contracting parties as contrary to the objectives of DR-CAFTA, i.e., among others, to:

CONTRIBUTE to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation;

CREATE an expanded and secure market for the goods and services produced in their territories while recognizing the differences in their levels of development and the size of their economies;

AVOID distortions to their reciprocal trade;

ESTABLISH clear and mutually advantageous rules governing their trade;

ENSURE a predictable commercial framework for business planning and investment;

FOSTER creativity and innovation, and promote trade in goods and services that are the subject of intellectual property rights (. . .).

As a consequence, the Central American countries (and the Dominican Republic) needed to assume several specific commitments in order to reduce the impact of mandatory rules,<sup>64</sup> as well as, to promote arbitration both in general terms<sup>65</sup> and particularly in relation

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<sup>64</sup> For the main characteristic of this legislation, see Cecilia Barrero, *Distribution Contracts in the Dominican Republic*, 2001 COMP. LAW Y.B. INT'L BUS. 27-32; Salvador Juncadella, *Agency, Distribution and Representation Contracts in Central America and Panama*, 6 U. MIAMI INTER-AM. L. REV. 35, 36(1974) (with references to Honduras, Costa Rica, El Salvador, Guatemala, Nicaragua and Panama).

<sup>65</sup> Central American Free Trade Agreement, U.S.-D.R., art. 20.22, Aug. 5, 2004, 43 I.L.M. 514:

1. Each Party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area. 2. To this end, each Party shall provide appropriate procedures to ensure observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards in such disputes. 3. A Party shall

to distribution contracts by eliminating the exclusive jurisdiction of State Courts. Taking the example of Costa Rica, which assumed the following commitments in Annex 11.3 revolved around the principle of party autonomy and promotion of arbitration:

“1. Costa Rica shall repeal articles 2 and 9 of Law No. 6209, entitled Ley de Protección al Representante de Casas Extranjeras , dated 9 March 1978, and its regulation, and item b) of article 361 of the Código de Comercio, Law No. 3284 of 24 April 1964, effective on the date of entry into force of this Agreement.

2. Subject to paragraph 1, Costa Rica shall enact a new legal regime that shall become applicable to contracts of representation, distribution, or production, and:

(a) Shall apply principles of general contract law to such contracts;

(b) Shall be consistent with the obligations of this Agreement and the principle of Freedom of contract;

(c) Shall treat such contracts as establishing an exclusive relationship only if the Contract explicitly states that the relationship is exclusive;

(d) shall provide that the termination of such contracts either on their termination dates or in the circumstances described in subparagraph (e) is just cause for a goods or service supplier of another Party to terminate the contract or allow the contract to expire without renewal; and

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be deemed to be in compliance with paragraph 2 if it is a party to and is in compliance with the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the 1975 Inter-American Convention on International Commercial Arbitration [ . . ].

(e) Will allow contracts with no termination date to be terminated by any of the parties by giving ten months advance termination notice.

3. The absence of an express provision for settlement of disputes in a contract of representation, distribution, or production shall give rise to a presumption that the parties intended to settle any disputes through binding arbitration. Such arbitration may take place in Costa Rica. However, the presumption of an intent to submit to arbitration shall not apply where any of the parties objects to arbitration.

4. The United States and Costa Rica shall encourage parties to existing contracts of representation, distribution, or production to renegotiate such contracts so as to make them subject to the new legal regime enacted in accordance with paragraph 2.

5. In any case, the repeal of articles 2 and 9 of Law No. 6209 shall not impair any vested right, when applicable, derived from that legislation and recognized under Article 34 of the Constitución Política de la República de Costa Rica.

6. Costa Rica shall, to the maximum extent possible, encourage and facilitate the use of arbitration for the settlement of disputes in contracts of representation, distribution, or production. To this end, Costa Rica shall endeavor to facilitate the operation of arbitration centers and other effective means of alternative resolution of claims arising pursuant to Law No. 6209 or the new legal regime enacted in accordance with paragraph 2, and shall encourage the development of rules for such arbitrations that provide, to the greatest extent possible, for the prompt, low-cost, and fair resolution of such claims.

7. For purposes of this Section:

(a) Contract of representation, distribution, or production has the same meaning as under Law No. 6209; and

(b) Termination date means the date provided in the contract for the contract to end, or the end of a contract extension period agreed upon by the parties to the contract.

Costa Rica fulfilled those commitments by modifying Art.7 of Law n°6209 de Protección al Representante de Casas Extranjeras.<sup>66</sup> In the old Art.7, the exclusive competence of Costa Rican courts was established in addition to the imperative character of the substantive rules relating to distribution contracts. According to the new provision, arbitration is allowed despite the fact that the substantive rules that govern distribution contracts are imperative. Thereby recognizing an important principle in arbitration: the imperative character of the rules is not an obstacle for the settlement of disputes through arbitration.<sup>67</sup>

#### CONCLUSION: NO NEED TO LIMIT PARTY AUTONOMY IN

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<sup>66</sup> The modification took place by *Modificación De La Ley De Protección Al Representante De Casas Extranjeras, N° 6209, Y Derogación Del Inciso B) Del Artículo 361 Del Código De Comercio, Ley N° 3284, Ley No. 8629, Nov. 11, 2007 (Costa Rica)*, available at <http://www.crecex.com/asesoria-juridica/legislacion-consulta/repre-casas-ext/Ley8629.pdf>.

<sup>67</sup> *Modificación De La Ley De Protección Al Representante De Casas Extranjeras, N° 6209, Y Derogación Del Inciso B) Del Artículo 361 Del Código De Comercio, Ley N° 3284, Ley No. 8629, Art.7 Law n°6209 Nov. 11, 2007 (Costa Rica)* states that:

Los derechos del representante, distribuidor o fabricante, por virtud de esta Ley, serán irrenunciables. La ausencia de una disposición expresa en un contrato de representación, distribución o fabricación para la solución de disputas, presumirá que las partes tuvieron la intención de dirimir cualquier disputa por medio de arbitraje vinculante. Dicho arbitraje podrá desarrollarse en Costa Rica. No obstante, la presunción de la intención de someter una disputa a arbitraje no se aplicará cuando una de las partes objete el arbitraje.

## ARBITRATION

The comparison of the different approaches to deal with arbitration in relation to distribution contracts shows that the protection of a weaker party is the basis for limiting party autonomy in arbitration. However, such a general principle ought to be scrutinized against the different types of distribution contracts and even against each and any of the individual contracts since it is clear that not all, or even many, of the distribution contracts show an unequal bargaining power. Furthermore, if one were to consider that the principle of protection of the weaker party is the basis for limiting party autonomy in arbitration, then such a justification ought to be applied to any commercial contract in which such a disparity is to be observed. However, such an unbearable extension of this principle would raise more problems than it would tend to solve, among others, the need to specify the scope of its application.

It is true that certain pathologies might exist in few cases by the abuse of one of the contracting parties, but general rules on arbitration and contract law are enough to solve this problem without the need to adopt excessive rules prohibiting arbitration or limiting arbitrability of the dispute.

On the contrary, arbitration is considered an important factor in the development of investment and trade. The more the restrictions to party autonomy, the less attractive a country is for trade and investment.

The application of international mandatory rules is not enough to exclude arbitrability as shown by Spanish or Costa Rican Laws. In fact, even if the contract is silent, Costa Rica, when assuming an implied arbitration agreement, reinforces the value of arbitration as being contractual in nature and the normal way to solve commercial disputes.<sup>68</sup>

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<sup>68</sup> See Pilar Perales Viscasillas, *Contratos de distribución internacional y arbitraje*, in *DISTRIBUCIÓN COMERCIAL Y DERECHO DE LA COMPETENCIA* 70 et seq. (Jorge Viera González & Joseba Aitor Echevarría Sáenz eds., 2011); Pilar Perales Viscasillas, *La presunción legal de sometimiento al arbitraje*, in *TRATADO DE DERECHO ARBITRAL*, TOMO II EL CONVENIO ARBITRAL 145-164 (Carlos Alberto Soto ed., 2011); Pilar

Traditionally, it was held that matters subject to national mandatory rules of law were non-arbitrable. Unlike the field of commercial contracts where the will of the parties prevails as a general rule, in the area of distribution contracts certain rules are considered to be mandatory. This traditional position has been rejected in favour of a modern view of arbitrability. In modern arbitration practice, it is clear that even if a matter is subject to mandatory rules, it might be subject to arbitration.

As far as public policy and its relation to arbitrability is concerned, some arbitration laws consider that public policy issues cannot be subject to arbitration.<sup>69</sup> But even in those systems, new trends are also applicable: public order is no longer considered a limitation to arbitrability, but rules of that character have to be respected by the arbitrators in order to have an enforceable award.<sup>70</sup> Public policy, however, in certain situations can operate as a limit to arbitrability. Whether the public order impedes the submission of a dispute to arbitration is usually a question to be decided by the law.

The well-known second look doctrine in arbitration will provide for the appropriate remedy: the arbitrators should respect mandatory provisions of the relevant country –when they are to be considered as relevant and truly international<sup>71</sup> and not extravagant

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Perales Viscasillas & David Ramos Muñoz, *CISG & Arbitration*, 10 SPANISH ARB. REV. 63-84 (2011); PRIVATE LAW: NATIONAL - GLOBAL - COMPARATIVE: Festschrift for Ingeborg Schwenzer on the occasion of her 60th birthday 1355-1374. (Andrea Büchler; Markus Müller-Chen ed., 2011).

<sup>69</sup> CODE CIVIL [C. CIV.] art. 2059, 2060 (Fr.).

<sup>70</sup> See, e.g., Pilar Perales Viscasillas, *Arbitrabilidad de los Derechos de la Propiedad Industrial y de la Competencia*, 6 ANUARIO DE JUSTICIA ALTERNATIVA, DERECHO ARBITRAL 11-76 (2005) (for further references in the area of competition law).

<sup>71</sup> See HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (HCCH), THE DRAFT HAGUE PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL COMMERCIAL art. 11 (2014), available at [http://www.hcch.net/upload/wop/gap2014pd06rev\\_en.pdf](http://www.hcch.net/upload/wop/gap2014pd06rev_en.pdf) (Overriding mandatory rules and public policy (ordre public)):

1. These Principles shall not prevent a court from applying overriding mandatory provisions of the law of the forum which apply irrespective of the law chosen by the parties.

rules<sup>72</sup> and thus the Courts will assess at the post-award stage if mandatory rules were respected by the arbitrators.<sup>73</sup>

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2. The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law.

3. A court may exclude application of a provision of the law chosen by the parties only if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy (*ordre public*) of the forum.

4. The law of the forum determines when a court may or must apply or take into account the public policy (*ordre public*) of a State the law of which would be applicable in the absence of a choice of law.

5. These Principles shall not prevent an arbitral tribunal from applying or taking into account public policy (*ordre public*), or from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so.

<sup>72</sup> See Kleinheisterkamp, *supra* note 26, at 11 et seq.; see also Kröll, *supra* note 18, at 16-63, 16-63, 16-77, 16-79.

<sup>73</sup> Peter Schlosser, *Arbitration and the European Public Policy*, in *L'ARBITRAGE ET LE DROIT EUROPÉEN* 87, (Bruylant, 1997); Fabio Bortolotti, *International Commercial Agency Agreements and ICC Arbitration*, 10 *INT'L COURT ARB. BULLETIN* 48, 53-55, 59 (2001); Patrick M. Baron & Stefan Liniger, *A Second Look at Arbitrability*, 19 *ARB. INT'L.* 27-54 (2003); Case C-126/97, *Eco Swiss v. Benetton*, 1999 E.C.R I-1.