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International Arbitration

Cuba – Law & Practice

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Law & Practice

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Contributed by Hispajuris **Authors** Miguel-Julian Mateos Cuesta, Arturo-Mario Fernandez Diaz, Jose Luis Alonso Iglesias, Fernando Escura Seres

Hispajuris offers specialist arbitration and mediation advice to clients seeking to resolve disputes in Cuba, Latin America and Spain. Additional areas of expertise include international law, public law, commercial law and civil law.

Authors

Miguel-Julian Mateos Cuesta is a member of the arbitration department. He specialises in arbitration and litigation, international trade and foreign investments in Cuba, corporate and commercial law and civil law. He is an arbitrator at several courts of arbitration, and a regular speaker at conferences.

Co-manager of the firm and arbitration practice manager for Cuba, **Jose Luis Alonso Iglesias** offers expertise in arbitration, corporate, commercial and litigation. He is a member of numerous arbitral tribunal and courts and lectures on the subject of arbitration at the Antonio de Nebrija University, Madrid and AEADE.

Consultant for Cuba, **Arturo-Mario Fernandez Diaz** has 34 years of experience in civil, administrative and commercial matters in Cuba. He specialises in international arbitration, foreign investment in Cuba and commercial and corporate law. In addition, he is a senior fellow of the Cuban Chapter of the Franco-Latin Jurists Association Andrés Bello.

Head of the corporate and commercial practice **Fernando Escura Seres** has extensive experience in commercial, corporate, M&A, and tax matters. He is an Arbiter of the International European Association AEADE.

1. General

1.1 Prevalence of Arbitration

International arbitration is the prevailing method of resolving disputes in Cuba concerning contractual liability, except in cases of compulsory jurisdiction established by law. The Cuban Court of International Commercial Arbitration (CCACI, in its Spanish acronym) is the body of institutional arbitration for settling contractual and non-contractual disputes voluntarily submitted by the parties. Of particular note is the number of cases submitted to foreign arbitration courts, mainly the court at the International Chamber of Commerce (ICC) in Paris, since it features in the arbitration clause included in both international economic association contracts (joint venture) and the Agreements on Reciprocal Promotion and Protection of Investments signed by Cuba.

The constitution of the Cuban economy favours the routine use of CCACI, since the foreign corporations doing business with Cuba are obliged to contract with the specific Cuban entities legally authorised to engage in import and export transactions. Thus, it is preferable to go to the local court of arbitration because the fundamental obligation of Cuban foreign trade companies in these transactions is to ensure payment of the imported goods. The breaches of contract are generally well-defined and the right to demand payment is guaranteed even with the option to request precautionary measures in order to enforce CCACI awards.

1.2 Trends

In the context mentioned above, the most important issue affecting arbitration is the growing number of cases submitted to CCACI involving international contracts, especially those in which one of the parties is a Cuban foreign trade entity. A recent ruling by the Economic Division of the Supreme Court raised a controversial issue affecting arbitration. It confirmed a lower instance decision preventing the

enforcement of CCACI awards if the losing party has not registered their office or legal address in Cuba.

A significant current trend is the compulsory jurisdiction of the Cuban ordinary courts for settling disputes concerning foreign investments. It was established by the new Foreign Investment Act (Law No 118/2014) published in the Extraordinary Issue No 20 of the *Official Gazette* on 16 April 2014. This trend was hinted at in 2012 by the Decree Law 304 'On the Economic Contracts' and the Decree Law 310 'Types of Contracts', which govern the internal system of contract law but can be applied to international contracts if the parties agree. Although mediated by the autonomy of the parties, Cuban contract law tends to favour the arbitration jurisdiction of the CCACI and the Cuban ordinary courts.

1.3 Key Industries

There is no particular industry that is currently experiencing significant international arbitration activity. Traditionally, this activity has been concentrated in those sectors engaging in foreign investments and foreign trade, including direct selling by foreign suppliers.

1.4 Arbitral Institutions

As noted above, the most frequently used institutions for international arbitration are the CCACI, at the International Chamber of Commerce of the Republic of Cuba, and the International Court of Arbitration at the ICC in Paris.

The CCACI is by far the most often used institution and the aforementioned legislative trends have reinforced its preponderance. It represents the ICC International Court of Arbitration in Cuba and has signed co-operation agreements with many other arbitral institutions, such as the Court of Arbitration at the Official Chamber of Commerce and Industry of Madrid, the European Arbitration Association (AEADE, in its Spanish acronym), and the Andres Bello Institute and Foundation (Venezuela). However, these co-operation agreements are typically reduced to a level of academic and professional contact only, with no engagement in arbitration processes.

2. Governing Law

2.1 International Legislation

International arbitration in Cuba is not governed by a proper substantive law, but by a 'law of the court', the Decree-Law No 250/2007, which created the CCACI. It was published in the Extraordinary Issue No 37 of the *Official Gazette* on 31 July 2007, and has no basis at all in the UNCITRAL model law.

2.2 Changes to National Law

During the last year, there have been neither significant changes to the arbitration law nor any pending legislation that may affect the arbitration landscape, although there is a growing consensus in the Arbitral Tribunal — the highest deliberative body within the CCACI, formed by all the arbitrators — that the Rules of Procedure should be amended in order to align them with the customs and practices found in other courts, most importantly the Terms of Reference as provided by the ICC Rules of Arbitration.

Another predominant view in the CCACI is the need to enact a substantive arbitration law for a comprehensive conflict resolution appropriate to the new foreseeable trade and economic situation in Cuba.

3. The Arbitration Agreement

3.1 Enforceability

The CCACI — or subsequently an arbitration court formed of either a single arbitrator or three arbitrators, according to the agreement of the parties or the applicable international treaty — is to decide on the matters of both the validity of the arbitration clause and the jurisdiction of the court.

The court complies with the principle of the autonomy of the parties in the drafting of the arbitration clause. The court can also draft its own model clause as indicative for the parties, without prejudice of the agreement between them.

The CCACI defines as international disputes those in which the registered offices or legal addresses of the parties are in different countries or, if in the same state, the natural or legal persons are of different nationalities, or where the place in which the obligation was incurred or is to be fulfilled is located in a state to which the parties do not belong.

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The CCACI is to have jurisdiction on contractual or non-contractual disputes submitted by joint ventures or companies entirely funded by foreign capital which are incorporated in Cuba, in their relations with each other or with natural or legal persons of Cuban nationality, as well as by the parties which are merely involved in agreements of international economic association and other forms of joint business with foreign capital interest.

In all these cases, the court exercises its jurisdiction if there is an agreement between the parties to submit their dispute to that court. Such an agreement could even be construed from procedural acts performed by parties who voluntarily demonstrate their submission to the court.

The court is also to have jurisdiction on those cases in which the parties are required by an international treaty to submit their dispute to the court.

3.2 Approach of National Courts

With respect to the enforcement of arbitration agreements, the approach of the national ordinary courts has been to refrain from exercising jurisdiction if the parties have expressly agreed to refer their disputes to arbitration, unless any party alleges that such an agreement is invalid, ineffective or unenforceable.

The Code on Civil, Administrative, Labour, and Economic Procedure (LPCALE, in its Spanish acronym) was put into force by Law No 7/1977 (Ordinary Issue 417 of the *Official Gazette*, 20 August 1977) and amended by Decree-Law No 241/2006 (Extraordinary Issue No 33 of the *Official Gazette*, 26 September 2006). It provides that the ordinary courts must exercise their jurisdiction, with no option to decline, if any of the litigants is Cuban or if the dispute is related to assets located in Cuba, but excludes cases arising from international trade and those submitted to arbitration, whether explicitly or implicitly, or by virtue of the law or an international agreement.

3.3 Validity of Arbitral Clause

According to standard practice, the arbitral clause may be considered valid even if the rest of the contract is invalid. The full independence of the arbitration clause is not affected by any reason that may invalidate the relevant contract.

4. The Arbitral Tribunal

4.1 Selecting an Arbitrator

The law of the arbitration court (CCACI) granted the parties autonomy in their selection of arbitrators, with a limit of a closed list of twenty-one arbitrators appointed by the Chairman of the Chamber of Commerce. In the so-called 'CCACI Roster of Arbitrators', all the arbitrators are listed with their actual positions, titles of professional and scientific competence, areas of expertise, and places of residence. The arbitrators serve a two-year term, but they may be re-appointed for successive terms.

The parties must each select the arbitrators from the list for claim and defence respectively. Failure to do so will allow the President of CCACI to appoint the arbitrators. The same rule applies when the parties have agreed on a sole arbitrator, but cannot agree on who that arbitrator should be.

The parties may also select an alternative arbitrator in the event of the absence or incapacity of the one initially designated.

4.2 Challenging or Removing an Arbitrator

The provisions governing the challenge or removal of arbitrators are to be found in the aforementioned 'law of court' and its Rules of Procedure (Resolution No 12) which was enacted by the Chairman of the Chamber of Commerce on 13 September 2007.

Both legal bodies recognise the ability of any party to challenge the arbitrators selected by the other or appointed by the president of the arbitration court, in case of doubts regarding impartiality or reasonable grounds for believing that they have direct or indirect personal interest in the decision on the dispute. In all cases, the president of the arbitration court is to resolve the challenge. Notwithstanding, the ordinary courts can intervene in the selection, challenge or removal of arbitrators.

4.3 Independence, Impartiality and Conflicts of Interest

The national law requires that the arbitrators be independent and impartial in the exercise of their duties, and that they cannot be deemed representative of the parties. Any of the listed arbitrators can abstain from intervening in the proceedings as a result of circumstances that may generate doubts regarding

impartiality or allegations of direct or indirect personal interest.

For an individual to be included in the CCACI Roster of Arbitrators, they are required by law to have a high level of professionalism and a recognised standing and experience in legal sciences, international trade relations and other areas of expertise deemed necessary for settling disputes.

5. Jurisdiction

5.1 Matters Excluded from Arbitration

As noted in **section 1**, the new Foreign Investment Act (2014) went further and referred to the Economic Division of the relevant Provincial Court only those disputes arising in connection with the inactivity of the governing bodies of joint ventures, international economic association agreements, and companies funded entirely by foreign capital, including their respective dissolution and liquidation processes, in addition to the disputes in any case of foreign investment related to natural resources, public services and public works. This regulation will also apply to disputes between one or more foreign partners and the joint venture or the company entirely funded by foreign capital to which they belong.

5.2 Challenges to Jurisidiction

The principle of 'competence-competence' is expressly stated in Article 13 of the 'law of court.' The CCACI, or the eventual arbitration court, may rule on the challenge to its own jurisdiction by any party as a direct consequence of its ability to rule on the validity of an arbitration agreement, whether contained in a contract or in a separate document in connection therewith, regardless of the other provisions of the contract. The ordinary courts cannot address issues of jurisdiction of an arbitration tribunal, unless a party alleges that the arbitration agreement is ineffective, unenforceable or not valid.

5.3 Timing of Challenge

The jurisdiction of the arbitral tribunal can be challenged before the ordinary courts at any time. However, it is preferable to challenge when filing the claim or the defence. In accordance with the arbitration agreement, the challenge of jurisdiction should remain with the decision-making body initially chosen.

The grounds of invalidity, ineffectiveness or unenforceability may be invoked before the same arbitration court, if the case was presented to it, or if the case has been filed before an ordinary court and the counterparty alleges an arbitration agreement, the claimant party can argue the same grounds in order to preserve their course of action.

In order to go to court after an award has been rendered, Article 825 of the LPCALE provides an invalidity action before the Economic Division of the Supreme Court, on legal grounds which include the invalidity of the arbitration agreement, the incapacity of the party, and procedural violations.

Thus, the arbitral jurisdiction can be successfully challenged in the judiciary only if the arbitration agreement is deemed 'pathological.' Since the arbitration court is empowered to rule on its own jurisdiction, such a challenge may lead to parallel processes in both jurisdictions.

Nothing prevents a party reluctant to use arbitration from challenging the issued award on the grounds provided by Cuban law or specifically listed in The New York Arbitration Convention (1958), to which the Republic of Cuba is signatory.

5.4 Standard of Judicial Review for Jurisdiction/Admissibility

Unlike other legal systems, the Cuban standard of judicial review for questions of admissibility and jurisdiction excludes the involvement of the judiciary, as in any other arbitration matter, except in the specific instance of a party going to court against an existing arbitration agreement.

5.5 Breach of Arbitration Agreement

The approach of the national judiciary toward a party who commences court proceedings in breach of an arbitration agreement is to rule on its invalidity, ineffectiveness or unenforceability. The same applies to claims for annulling the award. If the claim is not justified, the ordinary courts are consistent with the principle of choice of jurisdiction derived directly from the parties' autonomy.

The ordinary court cannot of its own volition determine whether or not it lacks jurisdiction. The claim is to be communicated to the other party in order

to establish whether an arbitration agreement precludes the case from going before the judiciary. If the defendant contests the claim by challenging such an agreement, the ordinary court will declare the claim inadmissible; if not, the case is tacitly admitted and the court proceeds to deal with it.

5.6 Right of Tribunal to Assume Jurisdiction

Once an arbitration court has been set up for a case, national law allows the inclusion, if necessary, of individuals or entities that are neither party to an arbitration agreement nor signatories to the contract in which it is contained, where specifically provided for in the arbitration agreement or the contract or if they have a defined interest as a third party.

The inclusion can be decided at the request of any party or ex officio by the arbitration court, when it is deemed appropriate or necessary to settle the dispute. The arbitral court will maintain its composition without prejudice to the rights of the third party to challenge the arbitrators.

6. Preliminary and Interim Relief

6.1 Types of Relief

The arbitral tribunal is permitted to award preliminary and interim relief at the request of both the claimant and defence parties. The panoply of measures from the 'law of the court' and the default rules of the LPCALE include attachment orders, seizure of contested property, preventive notes in public registers, temporary storage of goods, preservation of evidence, cessation or suspension of certain activities or behaviour, and any other measure intended to ensure the effectiveness of the arbitration process.

6.2 Role of Courts

Any party to the arbitration process can also go to court to seek preliminary or interim relief, either before filing the arbitration claim or during the arbitral proceedings, without preventing them from continuing. The Economic Division of the relevant Provincial Courts are bound by law to provide assistance to the international commercial arbitration (Article 739 LPCALE). Accordingly, any party in the arbitration process can seek a Cuban injunction from the relevant court of the defendant's domicile (Articles 799-800).

6.3 Security for Costs

Both the ordinary courts and the arbitration courts are empowered to order security for costs. If this injunction is sought from the ordinary court prior to the filing of the arbitration claim, the latter must be filed within 30 days, following the request for the precautionary measures. The ordinary court may grant them under the condition of bail or bond in an amount related to the effect of the request.

For the arbitral jurisdiction, the Chairman of the Chamber of Commerce issued Resolution 19/2007 on Regulation of Arbitration Fees, Procedural Costs and Expenses of the Parties. Its Article 9 provides that the arbitration court may require that the claimant party make a deposit in advance for costs of the proceedings, which is also required of any party who asks for any step or measure they deem necessary.

7. Procedure

7.1 Governing Rules

The procedure of arbitration is governed by another resolution enacted by the Chairman of the Chamber of Commerce, ie the aforementioned Resolution No 12/2007 on the CACCI proceedings. The LPCALE is the default standard for them.

7.2 Procedural Steps

In the arbitration proceedings, there are particular procedural steps required by law. The basics include claim and defence [if a counterclaim is brought, the original claimant party can contest it], preliminary hearing, preliminary relief [previously requested of an ordinary court or directly requested of the arbitration court], the taking of evidence, and an arbitration trial. An arbitration panel or judge takes the decisions, which are issued as orders or awards.

7.3 Legal Representatives

No special qualifications are required for the legal representatives of the parties in the arbitration proceedings. According to the Rules of Procedure, the parties are entitled to appear in their own right or by proxy or duly authorised attorneys. For representation, it is enough to grant a notarised legal power. In the case of a foreign notary, the legal power must comply with the requirements of legalisation by Cuban law in order to take effect.

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8. Evidence

8.1 Collection and Submission of Evidence

The general approach of CCACI to the collection and submission of evidence is that the burden of proof falls upon the party alleging the fact to be proven. Without distinction, each party is obliged to prove the facts on which their arguments are based. Only when the arbitration court has deemed it advisable or necessary for establishing the facts may the burden of proof be reversed.

Accordingly, the arbitration court is to examine the evidence requested by the parties that is relevant and legally admissible. At any stage of the proceedings, the arbitration court may request ex officio that the parties submit evidence that is required or deemed necessary in order to take a decision.

The rules of procedure set the standards for submitting evidence, starting with the legal requirement that the pleadings must be filed with the proposals of evidence by means of which the parties intend to prove their allegations. The parties may also provide supplementary evidence in the preliminary hearing, at the request of the arbitration court.

This dynamic process excludes the so-called 'discovery' and is mainly governed by the complementary LPCALE rules adjusted to the arbitral jurisdiction.

8.2 Rules of Evidence

Article 26 of the much-quoted Decree-Law No 250/2007 establishes the LPCALE as the default law for arbitral proceedings. The LPCALE rules of evidence (Articles 244-353) apply to the practice and appreciation of the parties' depositions, documents and books, expert opinions, recognitions and reproductions, witness testimonies, and even to legal assumptions.

8.3 Powers of Compulsion

For ordering the production of documents or requiring the attendance of witnesses before or at the hearing, the arbitrators are empowered to receive court assistance if they encounter any refusal or resistance or cannot otherwise obtain the evidence. Such powers of compulsion may be exercised not only upon the parties, but also upon third parties involved, or not, in the proceedings, provided that the evidence is crucial to the settlement of the case.

9. Confidentiality

Historically, the confidentiality of the proceedings and arbitration rulings is strictly observed; legally, the confidentiality of the proceedings is established as an integral duty for the arbitrators, along with independence and impartiality, as well as a condition of the arbitration trial, by the Rules of Procedure (Articles 1 and 27).

Ensuring both privacy and confidentiality is a widespread practice in the CCACI, reinforced by the Code of Ethics for Arbitrators (Articles 11 and 12), and issued by the Chairman of the Chamber of Commerce (Resolution No 19/2007). Except for the notices to the parties, the arbitration court does not make public its orders or awards in any way.

The Rules of Procedure further require that the original or certified documents of permanent value be returned to the parties within the 30 days following the notification of the order or award ending the arbitration process. Once the delivery period has elapsed, the arbitration court may proceed with the destruction of the remaining documents, retaining only the award or order and the pledges submitted by the parties.

10. The Award

10.1 Legal Requirements

Under Article 38 of the Decree-Law No 250/2007, an arbitral award must be founded, simple and exhaustive in resolving the issues of the case. The formal legal requirements include:

a) the designation of the court;
b) the place and date of rendering;
c) the names of the sole arbitrator or of all arbitrators in the panel, stating in each case who acted as presiding arbitrator and as award-rapporteur;
d) the names and addresses of the parties and their representatives;
e) the form of order sought by the parties;
f) the statements of facts;
g) the evidence proposed by the parties and evaluation thereof;
h) the legal grounds on which the decision is based;
i) the ruling;

j) the statement on costs and expenses incurred by the arbitrators in the process; and
k) the signature of the acting sole arbitrator or arbitrators.

The awards are rendered to decide the merits of the case or to approve, at the request of the parties, a deal agreed by them. The award is to be rendered and the parties notified within the 30 days following the arbitration trial or, if a trial was not held, the declared date of the closing of the file.

10.2 Types of Remedies

There are no limits on the types of remedies that an arbitral tribunal may award. As provided by the Rules of Procedure, the ruling of the arbitration court must decide on damages, rectifications, injunctions, and the other issues raised by the parties. Although punitive damages are not recognised by the legal system, the parties are to agree financial penalties and other penalty clauses that may be considered and applied by the arbitration court.

10.3 Recovering Interest and Legal Costs

The parties are entitled to recover interest and legal costs on the basis of a request additional to the main claim, especially in cases which concern obligations to pay certain amounts resulting from a breach of contract. The interest accrued from the date of default may be added in addition to the arbitration fees incurred by the prevailing party, as standard practice in awards ordering to pay. For calculating the applicable interest, the arbitration court takes the LIBOR rate in force at the date of the award.

Each party bears their own expenses and the proceeding costs generated by the arbitration. As an exception to this rule, the arbitral tribunal may require one party to compensate the other for the costs resulting from unnecessary or bad faith acts, particularly from any unjustified delay to the proceedings.

11. Review of an Award

11.1 Grounds for Appeal

Neither the Rules of Procedure nor the LPCALE establish on what grounds the parties are entitled to appeal an arbitral award. This award is understood to be final and incontestable.

However, the parties are entitled to request a clarification of the award on well-founded grounds. The request must be filed within the 30 days following the notification of the award, and the arbitral court may render a complementary award to examine the motion and correct the shortcomings, if any, of the original award. If necessary, the arbitral tribunal may even order a new hearing and the taking of evidence, if requested, for rendering a clarifying award.

Original awards may be also amended at the request of the parties or ex officio, within the same timescale. In this event, the arbitral tribunal may issue an explanatory order to correct any error or to clarify any issue where deemed necessary.

Both the complementary award and the explanatory order are to be considered an integral part of the original award. In both cases, the date of the complementary award and the explanatory order will be the effective date of the final award.

Article 821 of the LPCALE provides that an award is final and enforceable after ten days from the notification to the parties without request of invalidity by the obliged party or once that request has been dismissed by the competent court.

The legal causes for invalidity are prescribed in Article 85, which reproduces those established by the Geneva Convention on International Commercial Arbitration (1961), of which Cuba is a signatory, except the cause of public order.

The invalidity of an award rendered by CCACI or by international arbitration held in Cuban soil can also be requested of the Economic Division of the Supreme Court within ten days from the notification, by virtue of the invalidity of the arbitration agreement, the inability of the parties to act, violation of the proceedings for setting up the arbitral tribunal or notifying its appointment, procedural flaws leading to the inability of any party to present and defend allegations, and decisions on matters unrelated to the arbitration agreement or exceeding its terms. If the competent court rules in favour of the annulment, this ruling is to be final, with neither an appeal nor a review process allowed.

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11.2 Excluding/Expanding the Scope of Appeal

The parties cannot agree to exclude or expand the scope of appeal or challenge, because there is a strict closed number of grounds for invalidity under the national law. Article 41 of Decree Law No 250/2007 expressly provides that the parties cannot agree to waive their action for annulment.

11.3 Standard of Judicial Review

The standard of judicial review of the merits of the case is the invalidity requested by a party because of arbitral decisions on matters unrelated to the arbitration agreement or exceeding its terms. According to the principle of independence and exclusion between both jurisdictions, there is no other kind of judicial intervention in the substance of the cases submitted to arbitration. The approach of the national law to the grounds for annulment of arbitral awards does not allow a decision on the merits of the case. The competent court is to limit any ruling of invalidity. Neither an appeal nor a review process may be granted, as provided by Article 828 of the LPCALE.

12. Enforcement of an Award

12.1 New York Convention

The Republic of Cuba subscribed to the New York Convention (1958) *on the Recognition and Enforcement of Foreign Arbitral Awards* on 30 December 1974, and ratified it on 30 March 1975, with the reservation that it would apply only to disputes arising from legal relationships, whether contractual or not, considered to be commercial under Cuban law, and only to recognition and enforcement of awards rendered in the territory of another signatory state; in the case of non-signatory states, it is to be applied only to the extent to which these states grant reciprocal treatment. Prior to the New York Convention, Cuba signed the European Convention on Commercial Arbitration (Geneva, 1961).

12.2 Enforcement Procedure

The LPCALE establishes the procedures and standards for enforcing an arbitral award. The prevailing party may so request to the Economic Division of the Provincial Court corresponding to the domicile of the obliged party. This rule has become controversial, since an obliged party may have neither legal domicile nor registered office in Cuba. The alternative criterion on which to establish the competence of the ordinary court is the place where the obliged party has property or interests.

The request to enforce an arbitration award must be submitted within the year following its effective date, that is, ten days after its notification without any claim of invalidity or by the time this claim was dismissed by the competent court.

For the purposes of enforcement, arbitration awards are equivalent to ordinary court rulings and follow the same path of compulsory execution. The same rule is applied to orders approving an agreement between the parties in the conciliatory stage of the arbitration.

12.3 Approach of the Courts

Apart from the case of annulment of the award, the general approach of the ordinary courts toward the recognition and enforcement of an arbitration award is set by the aforementioned LPCALE rule. The only distinction between an award dictated by the CCACI or international arbitration held in Cuba, and the arbitral award rendered abroad, consists in the exequatur required for the preliminary recognition of the latter by the Economic Division of the Supreme Court.

Generally, international awards by CCACI are enforced directly and smoothly. However, the Provincial Court in Havana recently denied the enforcement of an award on the basis that the losing foreign party had no legal domicile or representation in Cuba. The ruling was appealed to the Supreme Court, which ratified it, opening a debate on the inconsistencies in the principles of both the voluntary submission to and the effective protection of the parties by the courts, as well as the adherence of Cuba to the New York Convention.

Hispajuris
c/Orense, 6,12.
Madrid
Spain
28020
tel: +34 914260576
fax: +34 914174676
email: secretariado@hispajuris.es
web: www.hispajuris.es

HISPAJURIS

C/ Orense, 6. Pl. 12ª.
28020. Madrid. España.
Tel: + 34 91 556 44 85
secretariado@hispajuris.es
www.hispajuris.es