

HEY DOC, IS MY CONTRACT ADMISSIBLE?

To be honest, I don't know. It's not possible to give a straight "yes or not" answer to your question. In fact, the correct answer depends on the analysis of each contract. Even though, there are two issues you must consider:

PRIVATE AUTONOMY AND FREEDOM OF CONTRACT

The Article 405 (1), of the Civil Code (under the title *Freedom of contract*) states that within the limits of the law, contracting parties can freely:

- (i) Determine the contents of their contracts;
- (ii) Enter into contracts other than those provided in the Civil Code or in other laws (atypical contracts); and
- (iii) Include on their contracts clauses chosen by them including those provided in the law and others not foreseen in the law;

This Article 405 sets the principle of private autonomy, generally applicable to private contracts and any other related matters. Under the principle of private autonomy, the contracting parties choose and stipulate the contents of their contracts.

Accordingly, any private contract is admissible under the Santomean law, provided they do not infringe any mandatory rule or legal limits established by the law. So, within the legal limits, the contracting parties may:

- (i) Chose to contract or not;
- (ii) Chose the counterparties;
- (iii) Choose the counterparty with whom they want to a contract;
- (iv) Enter into a regulated contract (a contracted provided by the law) or any other contract adopted by them (even if not regulated by the law);
- (v) Merge clauses of several (regulated or not regulated) contracts;
- (vi) Exclude the application, derogate or vary any of the legal effects of non-mandatory rules;
- (vii) Choice the contract's governing law and forum for settlement of disputes in international contracts (i.e., contracts which have any contact with the laws of different legal systems).

One could say in a sentence that private autonomy allows the contracting parties to adapt existing contracts or create new contracts in order to settle their mutual interests.

LEGAL LIMITS

These private autonomy and freedom of contract is not entirely in the hands of the contracting parties. In fact, the Civil Code also provides rules limiting the private autonomy, which are generally applicable to relationships based on private law.

Articles 280 and 281 set out the (general) legal limits of the freedom of contract with reference to the contents of the contracts. Generally speaking the limits are as follows:

- (i) The object or purpose of the contract must be legally and physically possible to perform;
- (ii) The object or purpose of the contract can not offend the Santomean public order (i.e., the mandatory rules, principles and values), or the good customs (i.e., morality) of the Santomean people.

There are some other specific legal limits provided by the law that have to be taken into consideration. Contracts that infringe the legal limits are deemed invalid (null and void), and may even give raise to civil liability.

CONCLUSION

One can paraphrase an old legal saying applicable as a general guiding principle of private law: '*Where the law does not limit contracting parties are free to determine*'. In other words, the contracting parties may determine everything in the contract provided that it fits within the legal limits. In order to do that, the contracting parties have to carefully analyze their contracts (or revise them) to check whether there are legal limits to respect.

For further information on this topic please contact:

Xiluang Tiny, by e-mail to tiny@juristep.com.