

THE MAIN ACTION FOR ANNULMENT AGAINST THE ARBITRATION AWARD OF THE ALTERNATIVE DISPUTE RESOLUTION CENTER (2 OF 2)

José de Jesús Bergés Martín

SUMMARY

The source, legal-procedural nature, scope of application, deadlines and waiver of the action for nullity against the awards of the Dispute Resolution Council of the Chamber of Commerce and Production of Santo Domingo Inc. are analyzed.

KEYWORDS

Law 489-08, commercial arbitration, official chambers of commerce, nullity action, award, forced execution, Presiding Judge Court of Appeal, jurisdiction, 1958 New York Convention, jurisdiction, arbitration commitment, res judicata, enforceability, 2010 Constitution, ordinary and extraordinary appeal, challenge, judicial control, precautionary measures, judicial assistance, term, express and tacit waiver, public order, and due process.

XI. Causes and grounds for annulment.

1.- The causes and grounds for annulment are of a strictly limiting nature (*numerus clausus*) given the rescissory nature of the annulment action that only deprives the award of its enforceability and the force of res judicata (see supra V.1), leaving the merits judged by the arbitrators unaltered. Thus, the empowered Court cannot reject the annulment action based on one of the cases provided, nor accept it outside of these, exceeding the competence that the legislator has conferred on it:

"and not only those that are not foreseen must be rejected, but also those arguments with which it is intended to form the scope of the appeal by resorting to general concepts such as public policy (STC 299/1992 and 31/1992 cited by Merino Mechan, Chillón Medina, op. cit., p. 695, N. 1545)"

2.- To have an idea of the problem posed by the strictly limiting nature of the causes of annulment, it is sufficient to point out that an action for nullity against an award that decreed the validity of an arbitration agreement despite the fact

that the contract to which it was part had been completely annulled by a judicial judgment with the authority of irrevocably res judicata, would be inadmissible. If the claimant in nullity bases his petition on the fact that Article 11.3 of the LAC was violated, which provides in that case "the arbitration agreement shall not subsist" and not, on the fact that the award is contrary to public policy because it disrespects the irrevocable authority of res judicata provided for exhaustively in paragraph f) of Article 39.2 of the LAC, unless the Court, of its own motion, admits the action and annuls the award on this ground, by virtue of the provisions of Article 39.3 of the LAC.

3.- Article 39.2 of the LAC lists six (6) cases of annulment:

"(2) An arbitral award may be set aside only when the party seeking annulment demonstrates:

a) That one of the parties to the arbitration agreement referred to in Article 10 was affected by some incapacity, or that such agreement is not valid under the law to which the parties have submitted it, or if nothing has been done in this regard, under Dominican law.

b) That there has been a failure to observe due process, which has resulted in a violation of the right of defense.

c) That the award refers to a dispute not provided for in the arbitration agreement or contains decisions that exceed the terms of the arbitration agreement. However, if the provisions of the award that relate to the matters referred to arbitration can be separated from those that are not, only the latter may be set aside.

(d) That the composition of the arbitral tribunal or the arbitral proceedings have not been in

ECOVIS VS+B

C/ Federico Geraldino 47, Plaza Jenika, 401, Piantini

Santo Domingo, Dominican Republic

Phone: +1 809 563 3610

Email: j.bergesm@ecovis.do - Web: www.ecovis.com/dominicanrepublic

accordance with the agreement between the parties, unless such agreement was in conflict with a provision of this Act, from which the parties could not depart or, in the absence of such agreement, which have not been in accordance with this Act.

e) That the arbitrators have ruled on issues not subject to arbitration.

f) That the award is contrary to public policy."

4.- Let's examine each of them in detail:

- Incapacity of one of the parties to the arbitration agreement.

The party that has signed the agreement must have the capacity to act and dispose necessary to assume the obligation and execute it and have given its consent unequivocally, free of coercion, without error, fraud or any other vice. If the signatory of the agreement is an attorney or agent, he or she must have an express special power of attorney to submit to arbitration within the limits of the dispute.

"Finally, the fact that submission to arbitration is not only unequivocal but also indisputable can be considered a constitutional requirement and if it is infringed it could lead to a violation of a fundamental right, specifically, to effective judicial protection" (González Sánchez, op. cit. p. 50)

"This requirement of a declaration, in addition to being express and unequivocal in the sense that it does not admit doubt or mistake and its meaning is indisputable, is the consequence that, by means of arbitration, the parties waive a Fundamental Right, which is to obtain full effective protection from the judges and courts - art. 24 CE - by preventing them from hearing the disputed issues, provided that the party to whom it is concerned invokes it by means of an appropriate exception,

ECOVIS VS+B

C/ Federico Geraldino 47, Plaza Jenika, 401, Piantini

Santo Domingo, Dominican Republic

Phone: +1 809 563 3610

Email: j.bergesm@ecovis.do - Web: www.ecovis.com/dominicanrepublic

art. 11 LA 1988, December 5. (SAP Barcelona, 10 May 1996)".

Our legal system defines this cause as a substantive irregularity that affects the validity of the act (Art. 39 Law 834, July 15, 1978).

- Non-existence or invalidity of the arbitration agreement.

The arbitration agreement may not deal with disputed matters that have already been previously resolved by judicial or arbitration, nor with matters not susceptible to arbitration or those that have an unlawful cause according to the terms of article 1133 of the Civil Code.

- Failure to observe due process causing defenselessness.

When it results in a violation of the right of defense (Art. 39.2 b), LAC). The Spanish constitutional court, whose guidelines in this regard have been followed *pari passu* by the courts responsible for the judicial control of arbitral activity¹, has defined "*constitutionally relevant defencelessness*" as:

"... which, normally in breach of a procedural rule by the judicial body in the course of the proceedings, prevents a party from exercising the right of defence, depriving or limiting either its power to allege or justify its rights or interests in order to have them recognised, or to dialectically reply to opposing positions in the indispensable exercise of the adversarial principle, producing an effect and real impairment of the right of defense..." (SSTC 35/1989, 14 February; 52/1989, 22 February; 91/2000, 30 March) (STC 681/2002, of 21 March)."

¹ Merino Merchan and Chillón Medina, op. cit., p. 700, no. 1556.

Article 37 of the Dominican Code of Civil Procedure punishes with nullity due to defect of form, any procedural act affected by the failure to comply with a substantial formality or public order and requires the person invoking it to prove the injury that has been caused. Article 39.3 of the LAC confers on the Court the power to assess ex officio the existence of this infringement.

- Award refers to a dispute not provided for in the arbitration agreement.

By virtue of the principle of immutability of the dispute, the arbitrators must limit themselves to deciding on those issues expressly provided for by the parties in the mission report, otherwise the principle of adversarial proceedings, enshrined in Article 22.1 of the LAC, would be violated. Articles 39.2.c) and 39.4 of the LAC provide for the possibility of separating for annulment purposes, when possible, the extra *petita part* or the part not submitted to the arbitrators, from the other provisions of the ruling not affected by such defect. Article 24.1 of the RA of the CRA prohibits new claims or the introduction of new claims, main or counterclaimed, other than those stipulated in the mission report, after the approval and signature of the mission.

When the arbitrators fail to rule on some claims of the parties contained in the mission report, the appropriate thing to do is to request the award provided for in Article 38.1.c) of the LAC:

"The complement of the award with respect to petitions formulated and not resolved in it".

Articles 37.4 and 37.5 of the RA of the CRA also contemplate this situation, conferring on the parties the power to request the arbitral tribunal to "*issue an additional award with respect to claims made in the arbitral proceedings but omitted from the award*".

ECOVIS VS+B

C/ Federico Geraldino 47, Plaza Jenika, 401, Piantini

Santo Domingo, Dominican Republic

Phone: +1 809 563 3610

Email: j.bergesm@ecovis.do - Web: www.ecovis.com/dominicanrepublic

- Irregularity in the composition of the court or in the procedure.

Any omission or negligent action by the court or the secretariat of the institutional body, in the process of selection or challenge of arbitrators, in the notifications of documents, among others, that violate the principles of equality and contradiction enshrined in article 22.1 of the LAC and that also cause a lack of defense is a cause for annulment of the award:

"The parties must be treated equally and each of them must be given a full opportunity to assert its rights." (Art. 22.1 LAC)

- The arbitrators have ruled on issues that are not subject to arbitration.

Article 3 of the LAC expressly excludes:

"(1) Conflicts relating to the civil status of persons, gifts and legacies of food, lodging and clothing, separations between husband and wife, guardianship, minors and persons subject to interdiction or absenteeism.

2) Causes that concern public order.

3) In general, all those conflicts that are not susceptible to settlement."

Article 39.3 of the LAC confers on the Court the power to assess ex officio the existence of this infringement. Likewise, Article 39.4 provides for the annulment of the judged aspect not susceptible to arbitration, provided that it is possible to separate it from the others.

- Award contrary to public policy.

The Civil Chamber of the French Court of Cassation has established that the violation of public order is not subordinate to the violation of a particular text of law and that the courts in each case are sovereign to determine whether the object of the convention is contrary to the needs of the public order in force at that time (Cas. 4 December 1929, D.H. 1930.50).

ECOVIS VS+B

C/ Federico Geraldino 47, Plaza Jenika, 401, Piantini

Santo Domingo, Dominican Republic

Phone: +1 809 563 3610

Email: j.bergesm@ecovis.do - Web: www.ecovis.com/dominicanrepublic

In Spain, the country of origin of our arbitration legislation, the Provincial Courts, through their jurisprudence, are responsible for specifying the extension of the content of public policy with a view to their allegation as a ground for annulment of the award. The SAP of Valencia (Section 11), in its judgment of March 31, 2006, states:

"The broad and imprecise nature of the notion of public order advises a cautious application of its concept to specific cases, the cause of annulment being integrated, basically for the violation of the fundamental rights and public freedoms constitutionally guaranteed through Article 24 of the Magna Carta" (cited by González-Montes Sánchez, El control judicial del arbitraje, p.109)

Article 39.3 of the LAC confers on the Court the power to assess ex officio the existence of this infringement.

XII.- Procedure before the Court of Appeal.

1.- The law is mute in this regard, it only states in article 39.1 of the LAC that "a petition for nullity" must be formalized, which we understand must be duly motivated, signed by the plaintiff or by his special attorney, accompanied by the documents on which it is based, which must be notified to the counterparty to make it contradictory.

2.- The empowered Court must hold one or more hearings in order to hear the parties and take any investigative measures that it deems appropriate, since Article 40.2 of the LAC speaks of the "nullity process".

XIII. Effects of the exercise of the action in nullity.

(a) With respect to the incidental award on jurisdiction:

1.- The filing of the claim for nullity against the incidental award that deals with the objection of lack of jurisdiction based on the incapacity of one of the parties to the arbitration agreement, the non-existence or invalidity of the same, issued before discussing the merits (See supra VI.1.a) does not suspend the arbitration proceedings, when the arbitrators have rejected this exception, as provided for in Article 20.3 of the LAC.

*"The arbitral tribunal may decide on the exceptions referred to in this article in advance before deciding on the merits. The decision of the arbitrators can only be challenged by bringing an action to annul the award in which it was made. **If the decision is to dismiss the exceptions, the exercise of the action for nullity does not suspend the arbitration proceedings.**"*

2.- In order to suspend the execution of the award that has dismissed the objection of lack of jurisdiction, it is necessary to request it from the president of the competent Court of Appeal, in reference, by providing a bond. The notification of the suspended claim provisionally suspends the execution of the award until the day of the hearing, by virtue of the provisions of Article 40.2 of the LAC.

*"During the nullity process, the award remains enforceable, unless it is suspended by the President of the competent Court of Appeal, acting as Judge of the Referrals. **Between the notification of the application in suspension and the holding of the first hearing before the President of the Court, the award shall be considered as suspended by operation of law. In any case, the arbitration proceedings shall continue.**"*

3.- It is important to point out here that this legal text is applicable to incidental awards issued in the course of arbitration, since it expressly states that

"In any case, the arbitration procedure will continue.", which means that the final award that necessarily disempowers the arbitrators of the dispute has not yet been issued.

4.- It should also be added that the awards issued by CRA on the occasion of arbitrations initiated prior to the entry into force of LAC, as of December 20, 2008, are subject to suspension by the President of the Court in Reference, in accordance with the provisions of Article 46 of LAC:

*"But, although transitory Article 46 of Law 489-08 on Commercial Arbitration of December 19, 2008 establishes that its provisions shall not apply to "arbitration proceedings initiated before" the entry into force of the law, it must be understood by this provision that the proceedings referred to refer to those that take place before the Conciliation and Arbitration Council of the Chamber of Commerce and Production of that it is **not the procedure for suspension of the arbitration award**, regulated by the current commercial arbitration law" (Ordinance No.20 of March 10, 2009, President of the Civil Chamber of the National District Court of Appeal)*

5.- Finally, the application for suspension must be based on one of the cases established in the New York Convention of 1959 and those prescribed by Article 39 of the LAC:

*"That, in order to determine whether a claim for suspension of an arbitral award should be accepted, the President of the Civil Chamber (of the Court of Appeal) acting as judge of the referrals, **must verify, in accordance with the provisions of the 1959 New York Convention and Law 489-08 on commercial arbitration**, whether the award has been rendered: a) there is an incapacity of one of the parties; b) in contravention of Dominican law to which the*

ECOVIS VS+B

C/ Federico Geraldino 47, Plaza Jenika, 401, Piantini

Santo Domingo, Dominican Republic

Phone: +1 809 563 3610

Email: j.bergesm@ecovis.do - Web: www.ecovis.com/dominicanrepublic

parties have submitted; c) failing to observe due process; d) violating the right of defense; e) ruling on a controversial point not provided for in the arbitration agreement; f) failing an arbitration agreement; g) not knowing the composition of the arbitral tribunal; h) ignoring the arbitration process; i) ruling on matters not subject to arbitration; j) violating provisions of public order; k) ruling on matters not susceptible to compromise" (Ordinance No. 20, cited)

6.- LAC does not provide for an action in nullity against the arbitral award that accepts the exception of lack of jurisdiction, probably because the arbitrators are disempowered by the controversy or in any case, the arbitration cannot continue.

b) With respect to the provisional award ordering interim measures:

1.- Article 21.2 of the LAC expressly provides that: "*the judge of the referrals shall not have jurisdiction to suspend arbitral decisions of this type*". However, we have seen that the power to suspend awards rendered in the course of arbitration corresponds to the president of the Court of Appeal competent in referral, a judicial court different from the judge of the referrals, for which reason it is necessary to admit that the party who brings the action for nullity against an award that has ordered an interim measure, may apply to the President of the Court of Appeal to obtain the suspension, in accordance with the provisions of Article 40.2 of the LAC (See supra XIII.a.1), even if said award comes from an arbitration initiated prior to the entry into force of the LAC, on December 20, 2008. (See supra XIII.2)

c) With respect to the award on the merits:

1.- The award remains enforceable during the nullity process, unless it is suspended in accordance with the provisions of Articles 40.2 and 40.3 of the LAC

ECOVIS VS+B

C/ Federico Geraldino 47, Plaza Jenika, 401, Piantini
Santo Domingo, Dominican Republic

Phone: +1 809 563 3610

Email: j.bergesm@ecovis.do - Web: www.ecovis.com/dominicanrepublic

(see supra XIII.b.1), even if said award comes from an arbitration initiated prior to the entry into force of the LAC, on December 20, 2008. (See supra XIII.2).

2.- It is important to point out that the ordinances issued by the president of the Court of Appeal competent, in reference, in matters of suspension of execution of award, are not subject to appeal in cassation, as enshrined in Article 40.4 of the LAC:

*"Judgments on the nullity of the award may be appealed in cassation, however, **those Ordinances issued by the President of the Court, on the suspension cannot be the subject of such an appeal**"*

XIV.- Appeal against the judgments issued during the nullity process.

1.- Article 40.4 of the LAC provides that the judgment issued by the competent Court of Appeal, empowered by an action for annulment against an arbitral award, whether incidental, provisional, partial or substantive, is subject to appeal in cassation.

XV.- Admissibility of the appeal in cassation.

1.- If the judgment handed down by the Court of Appeal on the occasion of the action for nullity filed against the award judges the merits and the amount involved exceeds the amount of 200 minimum wages of the highest established for the private sector in force at the time the appeal is filed, it is admissible, in accordance with paragraph II, of Article 5 of Law 491-08 of December 19, 2008.

2.- An appeal for cassation filed against a preparatory judgment, conservatory or precautionary measure issued by the Court in the course of the

nullity action is inadmissible. Such an appeal must be filed together with the final judgment, in accordance with the aforementioned Article 5 of Law 491-08.

*"An appeal in cassation may not be filed, without prejudice to other legal provisions that exclude it, against: a) preparatory judgments **or those that provide for conservatory or precautionary measures, but in conjunction with the final judgment, but the execution of these, even if voluntary, is not enforceable as a means of inadmissibility...** c) Judgments containing sentences that do not **exceed the amount of two hundred (200) minimum wages** of the highest established for the private sector, in force at the time the appeal is filed. If the amount of the same has not been fixed in the application, but there are sufficient elements to determine it, **the appeal will be admitted if it exceeds the amount indicated above.**"*

XVI.- Effects of the appeal in cassation.

1.- Article 12 of the aforementioned Law 491-08 establishes the suspensive effect of the execution of the judgment of the Court, except when the dispute is of a labor nature. However, the award challenged in nullity remains enforceable, unless it is suspended by the President of the Court of Appeal, in referral. (See supra XIII)

XVII.- Shipment.

1.- In the event that the sentence is annulled, the Supreme Court of Justice will send the matter to another Court of Appeal. In the event that the judgment handed down by the Supreme Court is annulled for the same reason as the first, the latter must be strictly in accordance with the decision of the Supreme Court of Justice, on the point of law judged by it, except for the exceptions established by law, as provided for in Article 20 of Law 491-08. already indicated.

ECOVIS VS+B

C/ Federico Geraldino 47, Plaza Jenika, 401, Piantini
Santo Domingo, Dominican Republic

Phone: +1 809 563 3610

Email: j.bergesm@ecovis.do - Web: www.ecovis.com/dominicanrepublic

XVIII.- Appeal against awards.

1.- Although it is true that paragraph III of Article 17 of Law 181-09 of July 6, 2009 expressly rules out the ordinary appeal against awards, it is no less true that appeals filed before the entry into force of the aforementioned Law 181-09 of July 6, 2009, The following are admissible and valid, unless the parties have expressly waived such a remedy, in the arbitration clause or commitment or in the mission report:

*"... in accordance with the legal system on the matter established in the country of origin of our legislation, **arbitral decisions may be challenged by appeal or by an action for nullity, which is recognized by the appellant, the latter being possible only when the parties to the arbitration agreement have waived the appeal or when it is a case of cases in which an amicable arbitrator intervenes**" (SCJ, March 11, 2009, www.suprema.gov.do/.../SmithEnronVs.HoteleradelAtlántico.pdf)*

2.- The appeal would be inadmissible if the arbitration was held in accordance with the Rules of the Conciliation and Arbitration Council of the Chamber of Commerce and Production of Santo Domingo, Inc., in force as of May 6, 2005, whose articles 1.4 and 36.3 provide:

*"The parties that decide to submit their differences to institutional arbitration governed by these Rules undertake to comply without delay with any award issued or agreement that is reached. **Such a decision to submit to arbitration shall be deemed to imply a waiver of any of the remedies to which they may validly waive. The awards issued are enforceable, of immediate***

compliance and issued in the sole and final instance" (Art. 1.4 RA)

*"The award disempowers the arbitrators of the controversy they have resolved. The award shall be final, **unappealable** and immediately binding by the parties, and shall not be subject to the requirements of Articles 1,020 and 1,021 of the Code of Civil Procedure, as established in Article 16 of Law 50-87 on Chambers of Commerce and Production" (Art. 36.3 RA)*

XIX.- Appeal and action for annulment against awards.

1.- In the event that the appeal against the award is admissible (see supra XVIII. 1) and an action for nullity has also been filed, on similar grounds, the latter will be dismissed by the appeal, since it is impossible for both to coexist, in order to avoid contradiction of judgments:

*"... In accordance with the legal system on the subject established in the country of origin of our legislation, arbitral decisions may be challenged by appeal or by an action for nullity, which is recognized by the appellant, the latter being possible only when the parties to the arbitration agreement have waived the appeal or when it is a case of cases in which an amicable arbitrator intervenes, **but that, once the appeal has been exercised in the appropriate cases, the route of nullity is ruled out**; that, "mutatis mutandi", as in the present case the appellant filed an appeal against the arbitral award and a main action for annulment of the same, whose objectives and support obviously coincide, it must be admitted that such procedural actions cannot coexist, because it is at risk and danger of contradictory rulings..." (SCJ, March 11, 2009,*

ECOVIS VS+B

C/ Federico Geraldino 47, Plaza Jenika, 401, Piantini
Santo Domingo, Dominican Republic

Phone: +1 809 563 3610

Email: j.bergesm@ecovis.do - Web: www.ecovis.com/dominicanrepublic

BIBLIOGRAPHY

STC 35/1989, 14 February; 52/1989, 22 February; 91/2000, 30 March) (STC 681/2002, of 21 March) cited by González-Montes Sánchez, El control judicial del arbitraje, p.109.

Merino Merchan and Chillón Medina, op. cit., p. 700, no. 1556.

Ordinance No. 20 of March 10, 2009, President of the Civil Court of Appeal of the National District.

SCJ, March 11, 2009, [www.suprema.gov.do/.../
SmithEnronVs.HoteleradelAtlántico.pdf](http://www.suprema.gov.do/.../SmithEnronVs.HoteleradelAtlántico.pdf)

ECOVIS VS+B

C/ Federico Geraldino 47, Plaza Jenika, 401, Piantini
Santo Domingo, Dominican Republic

Phone: +1 809 563 3610

Email: j.bergesm@ecovis.do - **Web:** www.ecovis.com/dominicanrepublic