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THE WAIVER OF THE ACTION FOR NULLITY AGAINST THE AWARDS OF THE ARBITRATION COURT OF THE CHAMBER OF COMMERCE AND PRODUCTION OF SANTO DOMINGO, INC.

Summary: *The Commercial Arbitration Act and the Chambers of Commerce Act confer on the parties the right to waive, before or after the dispute has arisen, to bring an action for annulment against the domestic award, enforceable and exempt from recognition by the Court of Arbitration, thus enshrining a system of subsequent judicial non-review of the award, whose conformity or not with the guarantees of effective judicial protection, has not yet been judged before the Dominican courts.*

Keywords:

Domestic arbitration, international arbitration, jurisdiction, ad-hoc arbitration, institutional arbitration, arbitration clause, arbitration agreement, uncontested power of attorney, national award, foreign award, enforceability, action for nullity, recognition of award, express waiver, implied waiver, double exequatur, minimum judicial control, effective judicial protection.,

Introduction

1.- This article deals with the waiver of the action for nullity against the national award issued by the Court of Arbitration on the occasion of an institutional domestic arbitration and/or on the occasion of international arbitration in which the parties have agreed to submit to its jurisdiction and to its Arbitration Rules dated July 21, 2011 (RA) and its seat is in the Dominican Republic, by virtue of which, the applicable laws are Law 489-08

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on Commercial Arbitration of December 19, 2008 (LAC) **(1)** and Law 181-09 of July 6, 2009 **(2)** and the award is deemed to have been issued at the seat of the Court of Arbitration, as provided for in Articles 1.1 and 24.1 of the LAC **(3)** and in Articles 1.4 and 19.3 of the (RA):

> *"1.1) **This law shall apply to arbitrations conducted within the territory of the Dominican Republic**, without prejudice to the provisions of international treaties to which the Dominican State is a party or of laws containing special provisions on arbitration."*
>
> *"24.1) The parties are free to determine **the place of arbitration**. If it is not provided for in the arbitration agreement, **it is governed by the provisions of the rules of the arbitral institution, when the arbitration is institutional**, or the arbitrators, in other cases."*
>
> *"1.4.- **The CRC may serve as the host institution of international disputes, whether the parties have directly agreed to submit to its jurisdiction** or as a delegated institution in the Dominican Republic of international dispute settlement organizations."*
>
> *"19.3.- The award shall always be deemed to have **been rendered at the seat of arbitration."***

In this regard, the Supreme Court of Justice has ruled that **(4):**

> "...***the action for nullity is filed only against arbitral awards issued in the Dominican Republic**, since the Court of Appeal does not have jurisdiction to determine the validity or otherwise of the arbitral award issued abroad, **since the action for nullity against the arbitral award must be filed in the country where it has been issued**...": (SCJ, 1st chamber, no.1637, 28 September 2018, unpublished)**.

2.- Numeral 1 of Article 40 of (LAC) **(5)** establishes the prerogative of the parties to abdicate in advance to demand the nullity of the award:

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"40.1) ***If the parties have not previously waived any right to exercise any remedy against the awards****, the court competent to* ***hear the nullity of an arbitral award*** *rendered in the Dominican Republic is the Court of Appeal of the Department corresponding to the place where the award was issued."*

In the same sense, paragraph III of Article 17 of Law 50-87 on Official Chambers of Commerce, amended by Law 181-09 of July 6, 2009 **(6),** corroborates the power of the parties to waive such action:

"Paragraph III.- They are final and not subject to any appeal, ordinary or extraordinary, ***except for the main action for annulment of the award*** *before the Court of Appeal that corresponds to the domicile of the Chamber of Commerce to which the Center in which the award was issued belongs,* ***provided that the parties have not waived such action in their arbitration agreement.*** *(...)"*

For its part, Article 1.9 of the Arbitration Rules of the Court of Arbitration in force since July 21, 2011 (RA), in its final part, provides for the implicit waiver of such action by the parties that empower the Court to settle its answers, in combined application with Articles 4.3 and 23.1 of the LAC **(7)**:

"1.9.- The parties who decide to submit their differences to arbitration governed by these Rules, undertake to comply without objection or delay with any procedural order, award or agreement. ***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 mandatory, of immediate compliance and issued in the sole and final instance."*

"4.3) When a provision of this law refers to the arbitration agreement or any other agreement between the parties, ***in the case of institutional arbitration, all the provisions of the Arbitration rules to which the parties have submitted shall be understood to be included in that agreement."***

"23.1) Subject to the provisions of this Law, the parties shall be free to agree on the procedure to be followed by the arbitral tribunal in

its proceedings, in accordance with the provisions of this Law. ***In the case of institutional arbitration and if the corresponding rules provide for any mandatory procedure, this shall govern****."*

3.- The waiver of the action for nullity against the national award of the Court may intervene in two procedural stages:

a) Before the dispute has arisen, expressly stipulated, either in the arbitration agreement or in any writing or means of electronic, optical or other means of communication or incorporated therein, as provided for in numerals 1, 2 and 3 of article 10 of LAC **(8)** and article 1.2 of the RA:

"(1) The "Arbitration Agreement" is an agreement by which the parties decide to submit to arbitration certain or all disputes that have or ***may arise between them,*** *with respect to a certain legal relationship, contractual or non-contractual. The Arbitration Agreement may take the form of an arbitration clause included in a contract or the form of a separate agreement."*

"2) The Agreement to Arbitrate ***shall be in writing****. The agreement shall be understood to be written when it is recorded in a document signed by the parties or in an exchange of letters, faxes, telegrams, e-mails or other means of telecommunication that record the agreement and is accessible for subsequent consultation in electronic, optical or other media."*

"3) The arbitration agreement that ***appears in a document*** *to which they have referred in any of the forms established in the previous section is considered to be incorporated into the agreement between the parties".*

"1.2.- The agreement to submit to the Arbitration Rules of the CRC (hereinafter the "Rules") may be agreed upon by the parties ***before the dispute arises, by means of an arbitration clause...*** *(...)"*

b) After the conflict arises, through an express arbitration agreement or implicitly through the filing before the Court of the arbitration claim and the defense brief, an uncontested power of attorney, in accordance with the

combined application of numeral 4 of article 10 of LAC (**9),** and articles 1.2 of the RA:

> *10."4) A written agreement shall be considered to exist when it is recorded in an* ***exchange of statements of claim and defense within the arbitration process in which the existence of the agreement is affirmed by one party and not denied by the other."***
>
> *"1.2 The agreement to submit to the Arbitration Rules of the CRC (hereinafter the "Rules") may be agreed by the parties before a dispute arises, by means of an arbitration clause,* ***or after the latter has been intervened, through an arbitration agreement or agreement****"*

4.- It is important to highlight here two aspects of supreme and singular importance in the arbitral universe: on the one hand, the national awards of the Court, issued in accordance with the institutional arbitration governed by the RA, have the enforceability of judgments issued in the second degree of jurisdiction and are not subject, for their enforceability, to the recognition process required by Articles 41 et seq. of the LAC**, (10)** Pursuant to Article 17(II) of the aforementioned Law 181-09 **(11):**

> *" **Paragraph II.- The awards of the Alternative Dispute Resolution Centers of the Chamber of Commerce are not subject, for their enforceability, to the recognition process provided for** in Articles 41 et seq. of the Law on Commercial Arbitration, No. 489-08, dated December 19, 2008 and **shall have the same enforceable force as judgments issued in the second degree of jurisdiction.** "*

The renowned Dominican author, Magistrate Edynson Alarcón comments that such a dispensation on the part of the legislator: *"... gives rise to an exceptional phenomenon, out of the ordinary and perhaps unique in the world..."*. **(12).**

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On the other hand, the awards issued in the Dominican ad-hoc arbitration are subject to the "double exequatur" system, so described by national doctrine, because they involve two successive trials in court on the award: one regarding the action for nullity and the second on obtaining the exequatur **(13)** as established in articles 39.1 and 43 of the LAC **(14):**

> *"39.1) An arbitral award may be appealed to* ***a court only by means of a motion for annulment****, in accordance with paragraphs (2) and (3) of this article."*
>
> *"43. The party requesting* ***the obtaining of an exequatur*** *for the enforcement of an award must lodge by application,* ***before the corresponding court,*** *an original of the award and the arbitration agreement and the contract containing it."*

In addition to this duplication of procedure, it should be added that the respective causes of nullity of the award and the grounds for refusal of its recognition or enforcement established by LAC in its articles 39 and 45 for ad-hoc arbitration are identical: incapacity of the contracting parties or invalidity of the arbitration agreement, violation of due process, infra or extra petita ruling, irregular composition of the court, non-arbitrability, contrariety of public order, all of which is counterproductive to the arbitration principles of minimum judicial intervention and procedural efficiency.

5.- The double exequatur scheme of ad-hoc arbitration contrasts markedly with the system of absence of subsequent judicial control of the Court's institutional arbitration, whose national awards are enforceable and do not merit recognition, and the parties may also renounce in advance to bring an action for nullity against them and even if the lawsuit has been filed, its filing does not suspend the execution of the award. but from the moment it is empowered in Referral to the presiding judge of the competent Court of Appeal, during the brief period between the notification of the application in suspension and the holding of the first hearing. Here it is worth asking

whether this system, absent of minimum subsequent judicial control, would be in accordance with the guarantees enshrined in Article 69 of the Substantive Charter. Judge Alarcón considers the power of resignation as *"... an intolerable abdication of the fundamental right to effective judicial protection and its corollaries of accessibility to jurisdiction, defense and due process..."* **(15)** and with respect to the action for nullity, it states that it constitutes *"... a plus of legitimacy of the arbitration procedure..."*. **(16)** In the same vein, Dr. Jose Maria Chillón Medina, in the presentation of the first edition of this work, warns of the need for a limited final control **(17):**

> *"And as a correlative of this jurisdictional power, by force of the autonomy of the will of the parties,* ***the balanced and coherent organization of arbitration must contemplate, in its most strictly guaranteeing function, the final control, albeit limited and assessed, of the awards rendered****."*

Guillermo Hernández Medina, in his study "Arbitration Comparative Perspective" **(18),** maintains a similar criterion of minimum surveillance:

> *"The waiver is justified for reasons of speed and efficiency. However, and despite the fact that in many cases the shielding of the award may seem desirable, it should not be forgotten the convenience of a minimum vigilance that contributes to the strengthening of the arbitral institution, making it more reliable.* ***For this reason, the power of prior waiver cannot be absolute; it cannot, for example, cover actions for nullity based on the violation of public order, material or procedural, or on the non-arbitrability of the dispute because it refers to unavailable issues."***

The treatise writers Chillón Medina and Merino Merchán, when examining articles 45 et seq. of the previous arbitration law 36/88 of December 7, 1988, which regulated the annulment of the award, have maintained the inalienable nature of said remedy because it constitutes the *"... instrument to control the organization of the arbitration process, as well as the limits in which the arbitrators must operate to guarantee those who attend this process*.**(19)**

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Rengel Núñez, narrates the instructive Belgian experience that originally eliminated the main action in nullity and later had to reinstitute it **(20):**

> *"This author makes an anecdotal reference to the fact that, in Belgium, with the naïve intention of increasing the attractiveness and effectiveness of international arbitration and avoiding delaying manoeuvres by the losing party, in 1985 the remedy of annulment of the arbitral award in disputes between foreign parties was eliminated from the law. Later, in 1998, the Belgian legislator recognized that the measure had been an error since there were few international arbitrations and consequently approved a reform to recontemplate the appeal for annulment. In addition, it tells us that well-known authors of arbitral law maintained that the initial measure contributed more to dissuade the parties from choosing Belgium as their arbitral venue than to encourage them. A similar case has also been cited with the arbitration law of Malaysia, which did not provide for any judicial review of awards, and which, as it did not attract users to choose that arbitral seat, was consequently reformed in 2005. In short, in arbitration there must necessarily be some control mechanism, which does not necessarily imply an exhaustive review of the case, it is not necessary to have an appeal to review the merits of the case,* ***but it is also not admissible to dispense with a minimum review mechanism because it could not be admitted that there are jurisdictional acts exempt from control****. It is necessary to find that "Aristotelian" middle ground, and in arbitration that fair balance has been found through the appeal for annulment of the award, as a balance between the need to control the power of the arbitrators and that of guaranteeing the greatest effectiveness of the arbitral procedure."*

6.- The Supreme Court of the country of our legislation of origin, ruled on March 10, 1986, during the old Civil Procedure Law (LEC), that an agreement between the contracting parties waiving the right to challenge the award in court violates due process **(21):**

"Certainly a stipulation such as the one transcribed ***disregards the fundamental "right to trial", in the civil jurisdictional order, preventing the right to obtain effective protection,*** *recognized in article 24.1 of the constitution, and, therefore, to go to court to reach a well-founded resolution."*

With regard to Article 40 of the Arbitration Law in force No. 60/2003, of December 26, 2003, Iberian jurisprudence has considered that the rules governing the action for nullity are non-derogable by the will of the parties **(22)**:

"(...) The action for annulment of the award is therefore configured as an extraordinary means of challenge, with reasons assessed, among them, public policy that must be considered as that set of principles, general guiding rules and fundamental rights constitutionalized in the Spanish legal system, ***its basic legal rules being non-derogable by the will of the parties,*** *(SAP Las Palmas (Sect.4), no. 111/2009, of 23 March (JUR 2009, 248636)."*

7.- With regard to Article 6 of the aforementioned Arbitration Law No. 60/2003, which provides for the tacit waiver of the power to challenge, when the party does not denounce the violation of the law or the procedure within the time stipulated, by virtue of the principle of own acts and procedural good faith, the Spanish courts have judged said legal text inapplicable when the unreported infringement involves a violation of public policy or due process, such as equality, hearing, or adversarial proceedings: **(23)**

"Article 6.- If a party, knowing of the violation of a provision of this law or of any requirement of the arbitration agreement, does not denounce it within the period provided for it or, failing that, as soon as possible, it shall be considered that they renounce the powers of challenge provided for in this law."

"It is true that by application of the principle that prevails in this matter known as "kompetenz-kompetenz" It is the arbitrators who decide on

their jurisdiction and that according to article 22 LA it is not only referred to the objective and functional jurisdiction in the knowledge of the conflict but also to all those that refer to and are connected with the existence or validity of the arbitration agreement (pfo 1 of article 22 LA) ***which must be put in relation to Article 6 LA that covers the tacit presumption of the powers of challenge although, as has been pointed out by the most authoritative doctrine, this does not apply with respect to the facts of which there is either no availability by the parties or there is some element contrary to public order. And it is in this area that the second ground for annulment is developed for being the side contrary to public policy by lacking due independence and impartiality,*** *as stated above. It should be borne in mind that arbitration is an equivalent to jurisdiction and independence and impartiality is a presupposition and basis of this, so it must also be so in arbitration, since, otherwise, the arbitral institution would not be favoured if its integrity and the assurance of a fair process were not ensured" (STSJ Catalonia, Civil and Criminal Chamber, SCCC.1, no. 29/2012 of May 10 RJ 2012, 6368)"*

"It is also alleged by the party against the nullity that, in any case, the principle of tacit waiver by the parties of the powers of challenge contained in Article 6 of the Arbitration Law would operate..."(...)(… What happens is that the procedural provision of Article 29 LA to which we have been referring cannot be considered a dispositive rule in terms of the existence of a phase of allegations (a different issue would be its form or content) ***insofar as the principles that it seeks to give effect to (equality, equality, hearing and contradiction), therefore, the tacit waiver of Article 6 LA cannot be applied, which is only applicable, as expressly indicated, to norms that have that dispositive character****. (SAP Palencia (Secc 1) num 53/2011 7 March (JUR 2011, 129920)"*

8.- In the Dominican Republic, the legislator enshrined in Article 7 of the LAC, **(24)** that there is no implicit waiver of the right to challenge when it is a matter

of a substantial formality that causes a grievance or a violation of public order and our highest court of justice has corroborated this **(25):**

> *"If a party, knowing of the violation of any provision of this law, from which it may depart or of any requirement of the arbitration agreement, does not formulate its objection within the period or time provided in each case, it shall be deemed to have waived its powers of challenge,* ***except when it is a substantial formality and the grievance is proven, or it is a violation of public order."***
>
> "*Tacit waiver* ***is not presumed*** *when it is a violation relating to a matter of public policy or a substantial formality that causes a grievance*"

Article 26 of the RA provides for similar treatment:

> *"Covered Nullities 26.1.- When in the course of the proceeding any requirement or formality provided for in these Rules is not met, the party who continues with the arbitration without filing within thirty (30) days after having become aware of the alleged nullity, shall be deemed to have waived his right to file that objection. 26.2.- In the event that the objection has been filed, the Arbitral Tribunal enjoys the broadest powers to remedy the omission or reject objections of a merely formalistic nature or that* ***have not entailed an injury to the right of defense****, in the opinion of the Arbitral Tribunal."*

9.- To date, neither the Supreme Court of Justice nor the Constitutional Court have ruled on the conformity or not with the Constitution of the power of the parties to waive the action for nullity, enshrined in Articles 40 of the LAC and 17 of Law 50-87 cited above **(26)**:

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22. Arbitration Law, Codes with jurisprudence, Thomson 2015 art 40 p. 149.
23. Arbitration Law, Codes with jurisprudence, Thomson 2015 art 6 p. 54.
24. Official Gazette 10502, of December 30, 2008.
25. SCJ, 1st Chamber, no. October 28, 2015, B.J. 1259, pp. 570-580.
26. Note: In their work *"Commercial Arbitration System in the Dominican Republic",* Editorial Funglode, 2013, the authors José Carlos Fernández Rozas and Nathanael Concepción, state on pages 360 and 361: *"In the Dominican case, articles 7 and 40.1 of Law 489-08 provide for the availability of the parties to waive this remedy of annulment. As we have seen, this possibility has been recognized by the Judgment of the First Civil and Commercial Chamber of the Supreme Court of Justice in the case of Industria Zanzíbar, S.A. and comp. Vs. OI Puerto Rico STS, inc. and comp. Of August 1, 2012."* However, what the aforementioned decision recognized was the power of the parties to waive in advance the right to appeal: *Whereas, by virtue of the aforementioned arbitration clauses agreed in the agreements referred to above, the a-qua court determined that the parties "agreed to waive the right to appeal in any court in connection with any matters of law arising in the course of the arbitration or with respect to the arbitral award," whence it concluded that the exequatur granted is not subject to appeal by agreement of the parties; that, as the a-qua court rightly states, the parties have the power to waive in advance the right to appeal, as they did in the terms indicated above."*

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