

APPEALS AGAINST ARBITRAL AWARDS OF THE CONCILIATION AND ARBITRATION COUNCIL

By: José de Js. Bergés Martín

1.- Numeral 10 of Article 7, of Law No. 42, which created the Chambers of Commerce, Industry and Agriculture, promulgated on July 17, 1942, attributed to said Chambers the power to: *"resolve as a court of arbitration and in accordance with the conditions established by the parties, the differences that the merchants, industrialists, farmers, ranchers and workers submit to their decision, **provided that the ruling is unappealable**, to which the litigating parties must previously submit in writing"*.

2.- The aforementioned Law No. 42 was repealed and replaced by Law No. 50-87 on Chambers of Commerce, promulgated on June 4, 1987, which in its Article 16, **did not include the unappealable nature of arbitral awards**, limiting itself to stating that they *"shall not be subject, for their enforceability, to the requirements of Articles 1020 and 1021 of the Code of Civil Procedure"*.

3.- Article 17 of the aforementioned Law 50-87, attributed to each Chamber of Commerce the power to prepare *"...a Code containing the rules that will govern its services of amicable composition and arbitration..."*. To this end, the Chamber of Commerce and Production of Santo Domingo, Inc., approved on June 4, 1987, the Arbitration Rules, enshrining only the final and immediate nature of the award in Article 52:

"The award shall be final and immediately binding on the parties and shall not be subject to the requirements of Articles 1020 and 1021 of the Code of Civil Procedure for its enforceability."

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4.- **Appeal in cassation.**- Various authors have maintained that, due to its constitutional rank, any judgment is, in principle, susceptible to it, therefore, "*...It is absolutely clear that the appeal in cassation it should never be prohibited*"*. "*Although it is true that the constitutional canon that enshrines the appeal of cassation among us, prescribes that it must be attempted <in the manner determined by law> or <in accordance with the law> this does not authorize its elimination in certain matters but its pure regulation...*", "*... but it should never prevent it against a judgment that is already unassailable by another means of appeal, since a law with that scope would not only violate the aforementioned constitutional canon, which does not authorize voting on a provision of that nature, but would also alienate from the Supreme Court of Justice the right to say **the last word in the interpretation of both legislative and customary legal norms**...*".**

5.- On the occasion of an appeal for cassation and a lawsuit in suspension filed against an arbitral award, issued by the Council of Conciliation and Arbitration of the Chamber of Commerce and Production of Santo Domingo, of Justice when hearing the lawsuit in suspension, in accordance with Article 12 of the Law of Cassation Procedure, in force to date, it issued 13/2000, on January 26, 2000, judging: la Suprema Cortela Resolución No.

*"In view of the fact that the provisions of Article 12 of the Law on Cassation Procedure **are only applicable** to applications for suspension of execution of judgments in the last or sole instance, subject to appeals in civil, commercial, land and labor matters, issued by the courts of the judicial order; **that since the arbitral tribunals do not belong to the judicial order, nor is there any legal provision that makes their awards or judgments susceptible to the appeal of cassation, the request for suspension in question does not fall within the powers that the Constitution and the laws attribute to the Supreme Court of***

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Justice as the Court of Cassation." (B.J. 1070, p. 451) *Ruiz Tejada, Manuel Ramón, B.J. No. 698, January 1969, pgs. XIII and XIV **Luciano Pichardo, Rafael, Estudios Jurídicos, Vol. IV, 1994. p. 103

Subsequently, the highest court of justice reiterated its opinion more clearly in this regard, through a judgment of the First Civil Chamber, of January 11, 2006:

*"Considering that, in accordance with Article 1 of the Law on Cassation Procedure, the Supreme Court of Justice decides, as the Court of Cassation, whether the law has been properly or incorrectly applied in the final or sole instance judgments of the courts of judicial order, admits or dismisses the means on which the appeal is based, but without knowing in any case the merits of the case; that, consequently, **in order for the decisions of a body such as the one that has issued the award in question, they can be***

A special law must so provide; that in this case, Law No. 50 of 4 June 1987 on Chambers of Commerce and Production, which creates the Council for Conciliation and Arbitration, nor its Regulations, provide that arbitral decisions are subject to appeal in cassation, and moreover, Article 36.3 of the latter, establishes the final and unappealable nature of the arbitral award; Considering that since the contested judgment is an arbitral award issued, as we have seen, by the Conciliation and Arbitration Council of the Chamber of Commerce and Production of Santo Domingo, el Consejo and does not emanate from a court of the judicial order, it cannot be challenged by means of the extraordinary appeal of cassation, because this type of decision, as has been said, they come from a non-judicial body, nor is there any legal provision that determines it..." (B.J. 1142, vol 1, pgs. 111-112)

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6.- **Appeal.**- On the occasion of an appeal filed on July 12, 2001, against an arbitral award issued on July 2, 2001, by the Council of Conciliation and Arbitration of the Chamber of Commerce and Production of Santo Domingo, and Commercial of the Court of Appeal of Santo Domingo, issued its judgment 0046, on December 11, 2003, la Cámara Civil(File 539-01) judging, among other things, that:

a) "**...the fact of submitting to the Arbitral Tribunal of the Chamber of Commerce and Production of the National District (sic) Inc., under the existing and current Regulations for those purposes*, in accordance with Law No. 50-87 of June 4, 1987, cannot be interpreted as a tacit waiver of the appeal, since although said Regulations indicate that the award will be final, binding and executory, it is simply giving it the character of a judgment with the simple authority of res judicata, provisionally enforceable notwithstanding any appeal, and not the character of a judgment with the authority of res judicata...**"

b) "**...in order for the award to be intervened not to be appealable, it is necessary that the parties have provided for it in the corresponding contract; it is not enough to mention that the award will have the effects of a final judgment, since the notion of final judgment, means in the light of the procedure that what has been judged by a jurisdiction disempowers it, it is necessary that the arbitration clause provides that the decision will have the effect of sole and last instance, to clearly establish that the appeal route was closed, as a product of the agreement agreed upon by the parties.**"

c) "**...In this matter of arbitration, it is not possible to appeal if the parties have waived their right to appeal them, either in the arbitration agreement or in the arbitration clause; or if the parties have given the arbitrator or arbitrators the power to decide**

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in accordance with equity, as an amicable compositor, or in cases in which the law prohibits appeal..."

d) "***...the waiver of the appeal may be validly recorded in the Minutes of Mission*** of the arbitrators, since it may be considered as an applicable rule of procedure (Art.) of the Regulations³⁶, g)..."

7- It is important to add here that the Supreme Court of Justice, in a judgment of June 23, 2004, on the occasion of an appeal filed before said great court, on November 9, 2003, against arbitral award No. 38-2003, dated December 3, 2003, of the Conciliation and Arbitration Council of the Chamber of Commerce and Production of Santo Domingo Inc., Decided:

*"... the lack of jurisdiction of this Supreme Court of Justice to hear the appeal filed" and that "**...the court competent to hear and rule on the matter is and Commercial Court of the Court of Appealsla Cámara Civil** of the National District..."* (B.J. 1123, vol. 1, p. 105).

It is appropriate to recall here that the Rules in force on the date on which the arbitration that culminated in the award appealed before the highest court of justice was initiated, was the version of June 4, 1987, whose Article 52 only established that: "*...The award shall be final and binding immediately...*"

8- In view of the foregoing, the Chamber of Commerce and Production of Santo Domingo, Inc., amended its Arbitration Rules on June 12, 2003, to make the award unappealable:

*"The award disempowers the arbitrators of the controversy they have resolved. The award shall be final, **unappealable** and immediately binding on the parties and shall not be subject to the requirements of Articles 1020 and 1021 of the Code of Civil Procedure, as established*

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in Article 16 of Law 50-87 on Chambers of Commerce and Production."

9- In the revised and corrected edition of the Arbitration Rules dated May 6, 2005, the character "... *definitive, unappealable and mandatory*" remained intact.

10.- It is now worth asking: Are the awards issued by the arbitral tribunals of the CCA, on the occasion of arbitrations initiated **after the entry into force of the Arbitration Rules of June 12, 2003**, which established the non-appealable nature of the awards, appealable before the Civil Chambers of the Courts of Appeal? The answer has been given by the Supreme Court of Justice, in its decision of January 11, 2006, cited above (see *Infra* No. 4), when it considered the extraordinary appeal of cassation inadmissible, on the grounds that Article 36.3 of the Rules of Procedure "...establishes the final and **unappealable nature** of the arbitral award."

11.- **Claim for nullity.** 1.- The recently enacted Law 489-09 on Commercial Arbitration, (LAC) of December 19, 2008, suggests in several of its provisions, that the parties who submit to the arbitration institution of the CCA, have the power to previously waive to exercise an action for nullity against the award.

2.- In effect, Article 1 of the LAC limits its application "... to arbitrations conducted within the territory of the Dominican Republic, **without prejudice of the established**", "**in laws containing special provisions on arbitration**", as is the case of Law 50-87 of June 4, 1987, whose articles 15, 16 and 17 confer on the Chambers of Commerce and Production the power to "... to establish a Conciliation and Arbitration Council in their respective jurisdictions" regulated by a Regulation, Article 1.4 of which provides:

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"Such a decision to submit to arbitration shall be deemed to imply **a waiver of any of the remedies which they may validly waive.**"

3.- If we add to the above that Article 40 of the LAC provides that "**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", and paragraph 5) of Article 4 proclaims that "the autonomous expression of the will of the parties **must prevail**, except when it is contrary to the exclusive regulations of this law" and likewise, paragraph 1) of Article 23 expressly states that "in the case of institutional arbitration and if the corresponding rules provide for any mandatory procedure, **This will govern**", everything seems to indicate that it is not possible to validly exercise an action for nullity against the awards of the CCA, given that according to Article 1.4 of the Regulation "the decision to submit to the arbitration of the CCA, **implies waiver of any of the remedies that they may validly waive**".

4.- However, an analysis of the legal cases that open the lawsuit for nullity exhaustively listed in Article 39 of the LAC, leads inexorably to the conclusion that the parties cannot waive validly to its exercise, as required by Article 1.4 of the CCA Regulations cited above (See Infra N. 2). See:

A) One of the parties was affected by some **inability** to agree on the arbitration agreement, which is discovered after the award, is equivalent to absence of consent and therefore, to the non-existence of the agreement. In this case, the parties cannot validly waive in advance to sue for nullity on such grounds. Articles 9.1 and 9.3 of the CCD Rules provide that "arbitration is not admissible" or "may not be conducted", when such incapacity is revealed before or during the arbitration.

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B) If there has been a failure to observe due process, which has resulted in a violation of the right of defense, the early waiver of the right to demand nullity is considered non-existent, as it contravenes Article 8 (2) subsection J. of the Constitution.

C) When the **award refers to a dispute not provided for in the arbitration agreement (extra petita) or exceeds it (ultra petita)**, it is equated to an absence of consent of the parties to submit to arbitration what was decided by the arbitrators, and therefore, in an absence of arbitration agreement, which renders null and void the anticipated waiver of the parties to demand the nullity of the award.

D) **Award decides on matters not susceptible to arbitration or settlement or contrary to public policy.** Article 6 of the Civil Code considers as unwritten the particular conventions, by which the right to sue for the nullity of matters that touch public order is waived. Article 3 of the LAC expressly prohibits arbitration on such matters.

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