

**PROVISIONAL ASTREINTES AT THE ALTERNATIVE DISPUTE RESOLUTION
(CRC) CENTRE**

SUMMARY:

Arbitrators have the power to issue provisional astreintes to enforce their awards in arbitral proceedings in the CRC, provided that the pecuniary penalty is in favour of a third party and that the parties to the arbitration have foreseen it in advance.

KEY WORDS:

Arbitration, clause, commitment, act of mission, tacit consent, award, astreinte, pecuniary penalty, indemnity, jurisprudence, precedent, jurisdictio, imperium mixtum, imperium merum, enforceability, sole instance, last instance, forced execution, good faith, bad faith, lex causae, lex fori, liquidation, jurisdiction, third party.

1.- Article 15 of Law 50-87 of June 4, 1987¹, as amended by Law 181-09 of June 6, 2009², confers on the arbitral jurisdiction of the CRC, the so-called "*jurisdictio*", consisting of the power to decide disputes susceptible to compromise that arise between two or more natural or legal persons, members or not of the Chambers of Production of the Republic, who have agreed to submit the resolution of the same to the methods and regulations of said Chambers.

2.- Paragraphs I, II, III and IV of Article 17 of the aforementioned rule 181-09, give the enforceability that judgments in the second degree of jurisdiction have, to the awards issued by the arbitral tribunals of the CRC, making them not susceptible to any ordinary or extraordinary appeal, except for the main action for nullity, in accordance with Article 40 of the Commercial Arbitration Law. Number 489-08, of December 30, 2008.³

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3.- The aforementioned paragraph II of Law 181-09, exempts the awards of the CRC, from carrying out the process of recognition and authorization of execution before the judge of first instance of the place where they are deemed to have been issued, as required by articles 9.4 and 41.1 of the aforementioned Arbitration Law. Article 1.9 of the CRC Arbitration Rules, effective July 21, 2011, provides that awards "*They are mandatory, of immediate compliance and dictated in the sole and last instance*".

4.- Since the awards of the CRC are endowed with the powerful effects of *res judicata* in sole and final instance and immediate enforceability, it remains to be determined (because the provisional *astreinte* is not contemplated in our arbitral legislation), whether the arbitrators have, in addition to the jurisdiction, the *Imperium* that the magistrates of the judicial order have, to impose it at their discretion and even *ex officio*, in order to compel the parties to respect and execute their decisions:

"(a) In the broad sense, *imperium mixtum* is the power of the magistrate that unites the *imperium merum*, the administration of justice, that is, the *jurisdictio*. It belongs in all its fullness only to the superior magistrates, such as the praetors. In a more limited sense, it is the authority necessary for the exercise of *jurisdiction*. Of course, it is understood that the administration of civil justice cannot be ensured without a certain right of coercion, **and the magistrate would only have illusory power in the jurisdiction if he could not enforce the measures he orders.**"⁴

"Whereas, in effect, the *astreinte* is a means of coercion to overcome the resistance opposed to the execution of a sentence, that judges have the **discretionary** power to pronounce **by virtue of their imperium**, and that it is completely alien to

sentences that do not have this purpose, particularly damages."⁵

"Considering that the *astreinte*, as expressed by the Court *a-qua* in the judgment in question, constitutes "a means of pressure imposed by the judges to overcome the resistance" that the debtor of obligations derived from a conviction could assume; that the provisional *astreinte*, as is the case, **is recognized as being an instrument offered rather to the judge for the defense of his decision**, than to the litigant for the protection of his right, since his mission is to constrain the execution of a jurisdictional provision; that, for these reasons, it is acceptable and appropriate in good law that the *astreinte*, a measure of a purely injunction nature, **may be adopted ex officio by the judges, without a motion to do so**, as has happened in the case in which the Court made use of its **sovereign and discretionary power** to impose it in defense of its decision, **by virtue of its imperium**."⁶

5.- It is important to note that the courts may impose provisional *astreintes* to compel the execution of their decisions, even for those that, because they are not issued in the last or only instance, lack such authority. In effect, the provisional *astreinte* ordered to order the execution of a judgment handed down in the first instance, escapes the suspensive effect of the appeal, and the creditor may provisionally execute it at his own expense and risk, before the judgment has acquired the authority of *res judicata*.⁷

6.- Given the extraordinary legal attributes (*res judicata in sole and final instance and immediate enforceability*) of the awards of the CRC, and the jurisprudential consecration of the provisional *astreinte* in our country, following a long and ancient French tradition in arbitration⁸, the theory of "*The powers inherent in the judicial function*", originally from the *Common Law*,

adopted by the Paris Court of Appeal in its decisions of 24 May 1991⁹ and October 7, 2004,¹⁰ according to which, although the arbitration clause does not empower arbitrators to impose astreintes, such prerogative is considered as a necessary and inherent extension of their jurisdictional function, to ensure the effectiveness of the arbitral process, unless the parties expressly exclude that power¹¹. In International Court of Arbitration (ICC) arbitrations where the applicable law (*Lex Fori*) is the French, this criterion has been adopted:

*"In this arbitration, there is no agreement by the parties prohibiting the court from ordering an injunction accompanied by a penalty. According to the ICC Rules, (the arbitrator) has the power to order an injunction accompanied by a penalty, unless a French law of procedure, public order, of the place of arbitration, stipulates otherwise. In this sense, the French courts and jurists are in favor of the fact that arbitrators have the power to order injunctions accompanied by a penalty."*¹²

7.- Another theory that has received support in the refereeing field is the one that presumes the *"tacit consent of the parties"*, that the arbitrators have within their jurisdictional powers the power to impose astreintes, even when such a possibility is not contemplated in the arbitration clause or commitment or in the mission act, provided that the *lex causae* (positive law applicable to the contract) allows it:

*"An exception must be made when the lex causae permits astreinte as an accessory measure. Arbitrators may apply the lex causae in its entirety and order an astreinte, but in our view, only to enforce an award as an ancillary measure and not as a procedural order."*¹³

"In France, the second paragraph of Article 1184 of the Civil Code provides that the creditor of a

contractual obligation has the right, if possible, to force the debtor to perform it¹⁴. Moreover, after some hesitation, specifically in relation to promises to sell, the jurisprudence now admits this provisional measure in the event of a breach of the contractual obligation."¹⁵

8.- Due to the origin and purely contractual nature of arbitration and the fact that CRC arbitral awards only concern pre-existing treaty obligations¹⁶ in which the good faith of the contracting parties is presumed, the provisional astreinte has been objected to, because the arbitrators presume in advance the refusal of the party succumbing to enforce the award and therefore, its bad faith. It could be asked: if the arbitral tribunal finds the bad faith of the losing party in the non-performance of the contract or during the arbitration process, would it not be valid and fair to assume its reluctance to enforce the award? Articles 1.9 and 25.4 of the CRC Arbitration Rules provide that the parties who decide to submit their differences to arbitration undertake to comply without objection or delay with any procedural order or award of the tribunal. The party that does not comply with them punctually, without justified cause, would be acting in procedural bad faith.

9.- It should be clarified that the provisional astreinte is not a means of execution, only a measure of constraint, an indirect means of reaching an execution¹⁷:

"In accordance with the prevailing criterion, it is held that the astreinte is, on the contrary, an indirect compulsory procedure consisting of the creation of a new, complementary and conditional obligation that can be the object of an enforcement procedure. Its mere existence is not in itself an enforcement procedure¹⁸."

In this sense, in order to make it definitive, liquidate and enforce it, judicial assistance must be requested from the judge of first instance

of the place where the award is deemed to have been issued, since the *Imperium* that confers on him the *Jurisdiction* The arbitrators are only allowed to order it:

*"In other words, the exercise of a jurisdictional function will always imply that the judge is granted a certain imperium, being the same for an arbitrator. Certain powers of justice, however, are not part of the jurisdictio: the power to execute orders with the aid of the public force is one of those powers. Charles Jarrosson correctly qualifies this power as forcing a party to comply by exercising against him a constraint either directly or through an agent of the state to whom the author of the order has the authority to give instructions as imperium merum, this type of order is not of an arbitral order, since the use of force is an exclusive prerogative of the state."*¹⁹

*"The competent jurisdiction to assess the penalty - a matter that escapes the arbitral tribunal because it does not have jurisdiction to deal with the enforcement of its awards - is, regardless of the jurisdiction in charge of the case, the court of first instance which is also competent in relation to the difficulties of enforcement."*²⁰

10.- The Constitutional Court whose decisions are final and irrevocable and constitute precedents²¹, both in its operative part and in the essential parts of the pleas²², has judged that the astreinte as a pecuniary sanction, not compensation, should not favor the injured party²³, which poses an insurmountable obstacle for the arbitral tribunal to order a provisional astreinte in favour of a third party that has not been a party to the arbitration agreement or participated in the arbitral process, unless the parties expressly agree to it in the arbitration clause or commitment or in the mission certificate.

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