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JUDICIAL PRECAUTIONARY MEASURES PRIOR TO ARBITRATION PROCEEDINGS BEFORE THE COURT OF ARBITRATION OF THE CHAMBER OF COMMERCE AND PRODUCTION OF SANTO DOMINGO INC.

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Summary

After the filing of the arbitral claim with the registry and payment of the advance on the administrative fee and until the arbitral tribunal is constituted, the claimant is entitled to request from the competent courts of the judicial order the precautionary measures that he deems necessary with respect to the subject matter of his claim.

Keywords

Initiation of arbitration proceedings, initiation of arbitration proceedings, precautionary protection, waiver, arbitral tribunal, judicial tribunal, conservatory and provisional measures, bond, claim on the merits, claim in validity, obligation to indemnify.

1.- Article 30.3 of the Arbitration Rules of the Court of July 21, 2011 (RA) confers on the parties the right to request a court of judicial order, prior to the constitution of the arbitral tribunal, to adopt precautionary measures with respect to the subject matter of the dispute:

> *"30.3.- The arbitration agreement shall not prevent any of the parties from requesting* ***a court of the judicial order*** *to adopt conservatory or provisional measures* ***prior to the arbitral proceedings or during their processing****, nor shall the latter grant them, without prejudice to the power recognized to the Arbitral Tribunal to order such measures."*

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2.- The arbitration proceedings begin when the claimant deposits its statement of claim together with the payment of the advance on administrative expenses in the registry of the Court and the arbitration proceedings begin when the Executive Firm of the Court has delivered the file to the appointed and confirmed arbitrators and all the expenses and arbitral fees have been paid, as provided for in Articles 4.1, 4.4 and 18 of the RA:

> *"4.1.- Any party that resorts to arbitration shall deposit its claim and the documents that support it in the Secretariat.* ***The date of acknowledgement of receipt of the application by the Registry is the date of commencement of the proceedings.*** *It shall be the responsibility of the Secretariat to notify the demand for arbitration and the documents accompanying it to the respondent."*
>
> *"4.4 The claimant shall file its demand for arbitration in accordance with the provisions of Article 2.2* ***and shall pay the advance on administrative expenses*** *set out in the Rule of Internal Procedure in force on the date of commencement of the arbitral proceedings."*
>
> *"18.- The Governing Law Firm shall take possession of the file to the Arbitral Tribunal through the Secretariat,* ***after they have been appointed and confirmed as arbitrators and the parties have deposited the entire provision of expenses and arbitrators' fees****."*

3.- Consequently, the claimant who has filed his claim with the registry of the Court together with the payment of the advance on administrative expenses is entitled, from that moment, to request a judicial tribunal for precautionary measures on the subject matter of the dispute and until the arbitral tribunal is constituted and the full payment of the

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administrative fee and arbitration fees, The plaintiff continues to be authorized to request a conservatory measure. Thus, if an arbitrator has been challenged after his confirmation, for a cause that arose or became known after it, preventing the constitution of the arbitral tribunal, the claimant remains with the prerogative to request such a measure.

4.- In practice, before the constitution of the arbitral panel and the provision of administrative expenses and arbitrators' fees, only the claimant has at his disposal the right to request a conservatory measure from a judicial court, since the deposit of the claim that initiates the arbitration proceedings depends only on it. which is still unknown to the defendant and the other parties that could intervene in the arbitration process. In this scenario, the respondent becomes aware of the arbitral claim when the Clerk of the Court notifies it and hears the request for interim measures, if the court deems it appropriate to bring it to its attention and hear its opinion before deciding on it, since such request is submitted by the claimant and is processed before the court unilaterally, without notifying him: in *audita parte*. Naturally, once the Clerk of the Court notifies the defendant of the claim, the defendant may well also request an injunction from the court, in the event that it files a counterclaim against the plaintiff whose object it considers to merit the support of a conservatory measure, all of which, before the court is constituted and the full payment of administrative expenses and arbitration fees has been made.

5.- It is important to clarify here that although the final part of article 30.3 of the RA, when referring to the precautionary measures ordered by the judicial court before the constitution of the arbitral tribunal, states: "... *without prejudice to the power granted to the Arbitral Tribunal to order such measures*", does not mean that the arbitral panel enjoys that prerogative, since it has not yet been constituted, and therefore, only the court of the judicial order of the place where the measure is to be enforced

or where the assets or object of the dispute are located or where it must be effective, have competence and power to order them, in accordance with numeral 3 of article 9 and the first part of article 13 of the Commercial Arbitration Law number 489/98 of December 30, 2008 (LA), **(1)** applicable to such measures before the formation of the arbitral tribunal:

> *"Article 9.3.-* ***The court of the place where the award is to be enforced and, failing that, the court of the place where the measures are to be enforced, or where the assets on which the measures are to be taken are located, in accordance with the provisions of Article 48 of the Code of Civil Procedure,*** *shall have jurisdiction for the judicial adoption of precautionary measures."*
>
> ***''ARTICLE 13.- Agreement on Arbitration and Adoption of Provisional Measures by a Judicial Court.*** *It shall not be inconsistent with an arbitration agreement for a party, either* ***prior to or during*** *the arbitral proceedings****, to request a court of*** *order to adopt interim measures or for the court to grant such measures, without prejudice to the power of the arbitral tribunal to order such measures in accordance with the rules set out in Article 21 (...)*

This has been corroborated by our Supreme Court of Justice **(2)** and our most authoritative doctrine **(3):**

> *"14) In this regard, it is verified from the contested ruling that the appellate court erroneously retained that it had the power to order the suspension of the arbitral process, since although it based its decision on* ***art. 13 of the reference rule, which establishes that ordinary courts may adopt provisional measures prior to arbitral proceedings or during their course,*** *ignored the provisions of Article 8 that*

delimits the measures to be taken within the limit of its power, ***because although it is true that within these the adoption of precautionary measures is established,*** *it is no less true that the suspension of the arbitral process does not fall within that classification, since the measures issued as a result of an arbitral process, persist only while the process is being processed and a ruling is issued, so that if the suspension of the process is ordered, the very essence of arbitration would be distorted, since in principle* ***the spirit of the legislator in allowing judicial intervention is to offer support to arbitration in its development phase, or to offer the means that facilitate and ensure its successful completion, respecting the principles of agility and efficiency that govern the arbitration route***".

"***Before his appointment occurs, this power is the exclusive and absolute domain of the judges of the State***, *but nothing prevents the parties, when organizing their ad hoc arbitration, or the arbitral institutions in the development of their internal rules, from inserting a clause providing for the election of a third party expressly empowered to hear the relevance or otherwise of these measures and whose jurisdiction would cease as of the formal appointment of arbitrators.''*

6.- With regard to the possibility that the parties to institutional arbitration before the Court may waive, either in the promissory agreement or in the arbitration agreement, before any litigation, to request precautionary measures prior to the arbitration claim from judicial courts, although the aforementioned Article 13 of the LAC *(see paragraph 6*) establishes that: " ***It shall not be inconsistent with an arbitration agreement*** *for a party, either prior to or during the arbitral*

proceedings, to request from a court the adoption of interim measures... (...)," Article 30.3 of the RA already transcribed (*see paragraph 1*), dismisses it under the mandatory formula: "*The arbitration agreement* ***shall not prevent*** *any of the parties from requesting a court of the judicial order to adopt conservatory or provisional measures to the arbitral proceedings or during their pending...*". this regulatory provision has a mandatory nature recognized by the final part of Article 23.1 of the LAC: "(...) *In the case of institutional arbitration and if the rules provide for any mandatory procedure* **, this will govern."** Consequently, any clause that the parties agree to in the arbitration agreement or agreement that has the effect of preventing them from requesting precautionary protection from the court of the judicial order, before the formation of the arbitral tribunal, would be null and void. French jurisprudence **(4),** national doctrine **(5)** and Spanish **doctrine (6)** support coinciding criteria in this regard:

> *"The existence of an arbitration clause* ***cannot, in case of duly verified urgency, ruin the exercise of the powers of the referencing judge****"*
>
> *"****What does not seem to be permitted is the waiver of precautionary protection in court,*** *unless, in doing so, the parties allow this power to subsist on the side of the arbitrators, which is justified because* ***measures of this nature represent an important manifestation of the effective judicial protection recognized in art. 69 of the CD and always, as BARONA VILAR says, a precautionary route must be offered to the parties****. 4. It is even a matter of common sense, if you will: As long as the possibility of adopting precautionary measures, whether judicial or arbitral, is offered to the parties, effective protection will be respected and, at the same time, the parties will be allowed to make use of the autonomy of the will that is recognized to*

them to configure the arbitration in accordance with their interests. ***Therefore, it is not possible for the parties to waive a priori the possibility of requesting any type of precautionary measure****."*

"In response to the first question, it must be said that the LA, conversely, allows the parties to exclude from the powers conferred in the arbitration agreement, the power of the arbitrators to grant interim measures, ***however, this option when it comes to jurisdictional bodies must be, in our opinion, rejected****. In the same way that the parties cannot by mutual agreement entrust the enforcement of the arbitral award to a subject other than the courts,* ***they cannot exclude the jurisdiction of the courts for the adoption of interim measures. These are matters of public policy that cannot be left under the sphere of decision of the parties.*** *The Law expressly recognizes the power of the latter to address both judges and arbitrators in request for precautionary protection,* ***an agreement that prevents this appeal, we insist, even if it is ratified by the mutual agreement of the parties, renders the agreement null and void because it is a matter of jus cogens that cannot be made available to the parties and that would vitiate the agreement of nullity and could be challenged through of paragraph a) of art. 41.1 LA".***

7.- Article 13 of (LA) provides that the court has the power to require or not the applicant to provide security when it grants the precautionary measure prior to the constitution of the arbitral tribunal and

has the duty to require him to deposit the claim with the arbitral tribunal within 60 days of the order of such measure:

> *"**ARTICLE 13.- Agreement on Arbitration and Adoption of Provisional Measures by a Judicial Court.** It shall not be inconsistent with an arbitration agreement for a party, either **prior to or during** the arbitral proceedings**, to request an** interim court to take interim measures or for the court to grant such measures, without prejudice to the arbitral tribunal's power to order such measures in accordance with the rules set out in Article 21. **In the event that the court of the judicial order agrees to them, it must require the applicant to file the claim before the arbitral jurisdiction, within a period of no more than sixty (60) days from the date on which it issues the corresponding authorization**. **The court of the judicial order may require the provision of a bond**. In the event that a decision of the arbitral tribunal already constituted orders the suspension or lifting of the measures ordered by the court of judicial order, **the decision of the arbitral tribunal shall be recognized and imposed."***

It should be noted that the legal text just transcribed expressly confers competence on the arbitral tribunal to hear and judge the merits of the interim measure ordered by the court and also, in its final part, confers jurisdiction on the arbitral tribunal if it has already been constituted at that time, to decide on the suspension or lifting of said measure as well as its modification, although it does not provide for it exhaustively, since if it can lift it it also has the power to modify it. In the event that the arbitral panel is not yet formed at the time circumstances arise that justify the modification, suspension or lifting of the measure or the applicant has not filed his claim on the merits within 60 days, the

affected party may empower the judge of the referrals to request such remedies, since when the conservatory measures are ordered by a court of the judicial order, Prior to the formation of the arbitral tribunal, the procedure and the courts competent to decide on it are the judicial courts. Likewise, as explained above, (*see paragraph 3*), the applicant for the measure whose time limit for filing a claim has expired, is entitled to request it again from the court, if the arbitral tribunal has not yet been constituted**(7)**:

> *"331. What has been said in the previous paragraph means that, if the request is successfully submitted to the ordinary judge ante causam, that is,* ***at a time when the appointment of the arbitrators has not yet taken place, and that period of time has elapsed without there being an arbitral panel, the interested party may apply to the judge of the referrals to demand the lifting of the measure immediately***. ***Nothing, however, prevents the original petitioner from reintroducing his request*** *and obtaining for the second time the caution that had already been granted to him."*

When the measure authorizes a retentive attachment, our Supreme Court of Justice has established the criterion that the arbitral tribunal can only hear the claim for collection but not the claim for validity of the attachment, because it has as its object its enforcement against a third party, who is not a party to the arbitration agreement and therefore, the resulting award could not be imposed on him, regardless of the fact that the attribution jurisdiction that governs it is of strict public policy, non-arbitrable and not susceptible to settlement **(8),** as provided for in Article 3 of the LAC:

"5) It is necessary to specify that the object of the lawsuit filed by the respondent today is limited to the validity of a retentive attachment blocked by it; That, by virtue of the considerations set forth by the Court a qua in the decision appealed, the arbitral jurisdiction has competence to settle the aspect related to the collection of pesos, by virtue of the arbitration clause transcribed in the previous part of this decision, a claim that by its nature can be ventilated in arbitration, in accordance with the will of the contracting parties. (6) ***However, the subject matter jurisdiction to hear the validity of a retention attachment rests with the court of first instance, which excludes that of any other court, as well as the use of any other procedure other than civil proceedings; that the rules of procedure, especially those relating to the jurisdiction of jurisdictional attribution, are of strict public policy and as such cannot be subject to of extension****. 7) It has been judged that for a judge to be able to validate a retentive attachment, when it is not based on a certain, liquid and enforceable claim contained in an enforceable title, it is necessary that the fund has previously been sued in payment of the credit and only once the payment of the credit has been ordered by decision can the retention attachment be validated 4; that in the species it is only noted that the party now appealed has demanded the validity of the retentive attachment, but not* ***the collection of the credit, an issue that is undoubtedly within the competence of the arbitral tribunal, by virtue of the arbitration clause signed between the parties.*** *8) In this sense, as established by the appeal, the validity of the* ***retentive attachment is a forced execution procedure subject to jurisdictional validity***

that has the purpose of enforcement against a third party who is not a party to the arbitration contract and on whom an arbitration award cannot be imposed*; therefore, by its nature it is not a matter of free disposition and falls within the grounds not susceptible to transaction and public order provided for in art. 3 of Law 489 of 2008 on Commercial Arbitration*".

"ARTICLE 3-. ***Matters excluded from Arbitration.*** *The following may not be subject to arbitration: 1.* ***Disputes relating to the civil status of persons, gifts and legacies of food, accommodation and clothing, separations between husband and wife, guardianships, minors and those subject to interdiction or absenteeism.*** *2. Causes that concern public order. 3. In general, all those* ***conflicts that are not susceptible to settlement****"*

8.- Everything related to the ordering, execution, suspension, modification or lifting of the precautionary measures issued by the judicial tribunal at the request of any of the parties after the arbitration claim and before the formation of the arbitral tribunal, in the institutional arbitration of the Court, by virtue of the combined application of articles 30.3 of the RA and 13 of the LAC, transcribed above (*see paragraphs 1 and 6),* are subject to the common law regime instituted by Articles 48, 49, 50, 51, 52, 53, 54 and 55 of the Code of Civil Procedure (*conservatory attachment of movable property, retentive attachment, attachment in claim, registration of judicial mortgage on real estate*) as expressly provided for in the aforementioned Article 9.3 of the LAC, in its final part:

"The court of the ***place where the award is to be enforced and, failing that, the court of the place where the***

measures are to be enforced, or where the assets on which the measures are to be taken are located, are competent *for the judicial adoption of interim measures, in* ***accordance with the provisions of Article 48 of the Code of Civil Procedure."***

Naturally, the parties may also request a judicial tribunal, by virtue of Articles 109, 110 and 111 of Law 834 of July 15, 1978, until the arbitral tribunal has been constituted, **(9)** "... *all kinds of preventions, measures or remedies before causam, if the person invoking them, before the formal implementation of the power of attorney of the arbitrators, alleges and proves reasons of urgency or manifest utility*". **(10)** Hernández Medina cites some of the safeguards offered by the Model Law **(11),** by way of example:

:*"(a) orders maintaining or restoring the status quo pending the resolution of the dispute;*

(b) those that require the parties to take measures to prevent any actual or imminent harm or impairment of the arbitral proceedings;

(c) those that order the parties to refrain from certain acts that may cause damage or impairment to the arbitral proceedings; (d) those that provide a means of preserving property to enable the enforcement of any subsequent award;

d) those that preserve elements of evidence that may be relevant or pertinent to the controversy."

9.- Finally, it is worth asking whether Article 30.5 of the RA, which establishes the power of the arbitral tribunal already constituted, to sanction the party that has not complied with them, with compensation in favor of the party that was harmed due to their non-compliance, is

applicable to the precautionary measures issued by the judicial courts before the constitution of the arbitral panel:

> ***"**30**.**5.- Failure to comply with a **conservatory measure** or a provisional award could entail the obligation to compensate the party who fails to comply with it."*

It should be noted here that articles 1.9 and 25.5 of the RA, do not expressly include judicial conservatory measures, among those that the parties must comply with without objection or delay under penalty of the imposition of compensation, but only "*... procedural ordinances...,""... procedural order, award or agreement...*" issued or approved by the arbitral tribunal:

> *"1.9.- The parties who decide to submit their differences to arbitration governed by these Rules, undertake to comply without 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 that may be validly waived: The **awards** issued are binding, immediately enforceable and issued in the sole and final instance.''*
>
> *"25.5.- The parties undertake to comply with all **procedural ordinances issued by the arbitral tribunal**. Failure to comply with an **arbitral ordinance** could entail the obligation to compensate the party who fails to comply with it."*

However, it should be taken into account, in the first place, that the final part of Article 23.1 of the LAC states: "*In the case of institutional arbitration **and if the corresponding rules provide for a mandatory procedure, this shall govern."*** And, since the obligation to compensate for the damage caused by the breach of the arbitral tribunal's

precautionary measure is a mandatory procedure established in article 30.5 of the RA, it also applies to the disregard of the judicial conservatory measure. Secondly, the final part of Article 13.3 of the LAC expressly establishes that the decisions made by the arbitral tribunal already constituted must prevail over the precautionary measures taken by the judicial tribunal:

> *(...)" In the event that a decision of the arbitral tribunal already constituted orders the suspension or lifting of the measures ordered by the court of judicial order,* ***the decision of the arbitral tribunal shall be recognized and enforced****."*

This prevalence necessarily implies its power to sanction the party that did not execute the judicial conservatory measure, compensate the party that was harmed by such cause and at the same time guarantee the efficiency and effectiveness of the precautionary protection and the arbitration process in its charge. Indeed, the arbitral tribunal is mandated by Article 9 of RA to investigate the case *"... **as soon as possible with efficiency and effectiveness..."*** in accordance with the spirit and motives of the expeditious private justice legislator expressed in its *FIRST RECITAL: "That arbitration is a legal figure of great importance in the commercial field, since it constitutes a real alternative to prevent and **solve in an adequate, rapid and definitive manner** the conflicts that arise in national and international commercial transactions."*

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