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PROCEDURAL ORDERS AT THE CRC

SUMMARY:

Procedural orders are characterized by their preparatory and provisional nature, without the authority of res judicata, reviewable by the arbitrators themselves, of immediate and mandatory compliance under penalty of compensation and not susceptible to be challenged by the action for nullity.

KEY WORDS:

Procedural order, ad-hoc arbitration, institutional arbitration, preparatory, provisional, precautionary measures, incidents, award, costs, nullity action.

1.- The expression "procedural order" in *ad-hoc arbitration* suggests the idea of an indication given by the arbitral panel aimed at the organization and conduct of the process, especially in the investigation and evidence phase. Curiously, our Law 489-08 on Commercial Arbitration (LAC) does not contemplate them, it only provides in its articles 23.2 and 30.1 that, in the absence of agreement between the parties regarding the procedure that will govern, the arbitral tribunal will conduct it *"... in any way you see fit..."* including "*...decide on the admissibility, pertinence, value and usefulness of evidence*." (1)

2.- In the institutional arbitration of the CRC, the Arbitration Rules (RA) provide indistinctly for the "*procedural order*" (2), "*procedural measures*" and "*procedural ordinances*" to be ordered by the arbitral tribunal and complied with by the parties without objection or delay under penalty of compensation (3) by means of which *"... the arbitral*

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tribunal shall conduct the case as soon as possible efficiently and effectively..."[(4).] The most common OPs deal with:

- the seat of arbitration;
- the place of meeting and deliberation;
- submission of documents and acceptance in a different language;
- deadlines, extensions and modalities for depositing documents;
- personal appearance of the parties;
- hearing of witnesses, isolation, form of interrogation, written testimony;
- recording and filming of hearings;
- expert report, examination of experts;
- performances in a different language;
- Moving and inspecting places and objects;
- admissibility, presentation, form, relevance and basis of evidence;
- Closing and reopening of debates;
-Protection of industrial secrets and confidential information.

3.- The question relating to the preparatory/provisional nature of the procedural orders cited above is peaceful, which by themselves **do not** resolve an incident involving the disempowerment of the arbitrators (*jurisdiction*); the extension of the litigation *(new claims, forced or voluntary intervention of third parties*); the annihilation of the right (*means of inadmissibility*);); or the partial or total final decision on the merits (*partial, provisional, final, additional award)*.

4.- In Title III, paragraph a, of the Guidelines for Arbitrators in the Conduct of the Arbitration Process (LACPA) adopted by the Board of Directors of the CRC on December 1, 2011, the precautionary measure was erroneously included as a procedural order not subject to action for nullity or suspension [(5):]

> "*The arbitrator or arbitral tribunal shall issue such procedural orders as may be necessary for the organization of the proceedings. Procedural orders are used to grant or set deadlines, require the filing of briefs or briefs, appoint experts,*

*hear witnesses, issue **interim** measures, close debates, and other procedural issues. These orders are provisional or purely preparatory to the process and their nature is not that of an award, so they are not challengeable or subject to any appeal. The court shall not suspend its execution in any case.*"

This conservatory measure, although it is provisional in nature, does not address the merits, nor does it definitively decide on an incident or exception that produces the disempowerment or termination of the proceedings of the arbitrators, it is likely to temporarily place its beneficiary in a privileged situation vis-à-vis its counterpart, which in turn leads to requiring the provision of the corresponding security as a way of balancing the positions of the parties [(6)], which implies an appreciation *in law* of such premises, and therefore, the need to issue an award. In view of this, Article 30.2 of the RA indicates that only "...*may be established in an **interim** award*..." y "… to require **sufficient guarantees** from the applicant." For its part, Article 21.2 of the LAC expressly establishes in this regard that: "...***whatever form they take, the rules on annulment are applicable to them...".** The most authoritative doctrine understands that arbitrators must assess *in law* the relevance and timeliness of the measure restricting the right to property and the need to require the corresponding guarantee to respond to the damages that may arise from it, which forces them to conclude that it cannot be ordered by means of a procedural order. but by means of an award that may be challenged in nullity:

> *"Regardless of the obligation of the arbitrator to assess the existence of a situation of danger (periculum in mora) and whether the obligation invoked appears justified in principle (appearance of good law or fomus bonis iuris), it also highlights the power recognized to the arbitrator to require the applicant to provide appropriate security in connection with such measures."* [(7)]

5.- With regard to the decisions that deal with the *forced production of documents under penalty of astreinte, dismissal, validity of an expert's report, legitimacy of a translation,* the First Chamber of the Civil and Commercial Chamber of the National District has considered them as: *"... authentic procedural orders, without the effect of res judicata, reviewable by those who have issued them...", "... not subject to the primary control of the action for nullity of Articles 39 and 40 of the LAC."* *(8)*

6.- In accordance with Article 37 of the LAC, the proceedings of the arbitrators end, in principle, with the final award. However, this text also provides for the possibility that their functions may end when there is a withdrawal accepted by the other party, the parties agree to terminate the process or the arbitral tribunal finds that it is impossible or unnecessary. It is worth asking here: what form should the court's decision in this regard take: award or procedural order? LAC is silent on these aspects. Article 34 of the RA provides for *an award by consensus* only when the parties reach a partial or total settlement of the dispute. In the remaining two cases, an award must be issued if the court has to decide on costs, as provided for in Article 38.5 of the RA: "*The final award shall fix the costs corresponding to the parties taking into consideration the decision rendered and the conduct of the parties in the proceedings.*" If, on the other hand, the litigants have also agreed on costs, the majority of the authors are inclined to an order of insolvency proceedings (9).

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Bibliography

1.- Official Gazette number 10502 of December 30, 2008

2.- Article 1.9 of the (RA)

3.- Article 25.5 of the RA

4.- Article 25.1 of the RA

5.- According to Hernández Medina, G., in his work Arbitration Comparative Perspective, pp. 171 et seq., 1st edition, 2015 International Legal Bookstore, when referring to the contradiction between the LACPA, article 30.2 of the RA considers that: *"... it is only justifiable by virtue of an interpretation that is too bold..."*;

6.- Mallandrich M., Nuria, Precautionary Measures and Arbitration p. 135, 1st edition, 2010, atelier, Barcelona;

7.- Alarcón, Edyson, Comments on the Commercial Arbitration Law of the Dominican Republic, p. 191, 1st edition, Santo Domingo, 2012, International Law Bookstore;

8.- File No. 026-02-2016-ECIV-00379, sent. No. 026-02-2017-SCIV-00245, of April 7, 2017.

9.- Molina Caballero, Ma., Termination of Arbitral Proceedings, Studies on Arbitration, pp. 143 et seq., 1st edition, 2008, La Ley, Spain.

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