

THE CIVIL *ASTREINTE* AS AN INCENTIVE MEASURE
IN LITIGATION AND INTERNATIONAL
ARBITRATION PRACTICE IN SWITZERLAND :
IS THERE A NEED FOR INCORPORATION ?

by

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I. Introduction

The *astreinte*¹ is a measure created by French judges during the 19th century.² It is an accessory resolution of a judge rendered in relation to a principal decision that sanctions the lack of compliance with the latter by ordering the payment of a pecuniary amount.³ The lack of compliance may materialise either in a delay in the compliance or in a non-compliance. In sum, an *astreinte* aims at forcing its addressee, under the threat of a pecuniary sanction, to fulfil his obligations deriving from a judicial (or arbitral) decision.⁴ The pecuniary sanction may be a single lump sum or may grow each day, week, month or year.⁵

¹ The French word *astreinte* is translated into German as *Zwangsgeld*, and into Dutch as *Dwangsom*, although the concepts may not be perfectly identical. English speaking scholars could have chosen an English word such as “penalty,” but they appear to make use of *astreinte*, see, e.g., VEEDER, V.V., “*Chronique de jurisprudence anglaise*,” 39 *Revue de l’arbitrage* (“*Rev. arb.*”) 705, 708 (1993). Hence, the present contribution will not attempt to use a potentially misleading translation and will follow the trend of using the original French word.

² See PEYER, Patrick R., *Vollstreckung unvertretbare Handlungen und Unterlassungen*, Zurich, Basel, Geneva, Schulthess, 2006, 206; LÉVY, Laurent, “*Les astreintes et l’arbitrage international en Suisse*,” 19 *Bulletin de l’Association suisse de l’arbitrage* (“*ASA Bull.*”) 21 (2001); GERHARD, Frank, *L’exécution forcée transfrontière des injonctions extraterritoriales non pécuniaires en droit privé*, Zurich, Basel, Geneva, Schulthess, 2000, 234-235; VINCENT, Jean / PRÉVAULT, Jacques, *Voies d’exécution et procédure de distribution*, Paris, Dalloz, 19th ed., 1999, 25. For an historical review, see CRACIUN, Eugène, *Théorie générale de l’astreinte*, thesis, Paris, 1914, 24-48.

³ For instance a court may: “order the defendant to publish, in a visible and clear manner and without any commentary from her part the entire intervening judgment on the home pages of ‘google.be’ and of ‘news.google.be’ for a continuous period of 5 days within 10 days of the notification of the intervening order, under penalty of a daily fine of 500,000.– € per day of delay;” see the dispositive part of the not yet reported judgment of the Brussels Court of First Instance of 5th September, 2006, in the matter of *Copiepresse v. Google*, msl1.mit.edu/furdlog/docs/2006-09-08-copiepresse_v_google.pdf and its confirmation by the same Court of 13th February, 2007 www.copiepresse.be/copiepresse_google.pdf (both last visited on 18th June, 2007).

⁴ See LÉVY (n. 2) at 21; VINCENT/PRÉVAULT (n. 2) at 25; CRACIUN (n. 2) at 18 and 20-23; BRÉSARD, Marc, *Théorie de l’astreinte, évolution-application-critique*, thesis, Lyon, 1901, 7.

⁵ See *infra* Chapter IV.C.

In July 1991, the French legislator enacted the most recent version of a detailed statute on the *astreinte* regime.⁶ In Switzerland, the possibility of issuing an *astreinte* is provided for in a very limited number of Cantonal statutes. However, such statutes provide for “penal” (as opposed to “civil”) *astreintes*.⁷ This study focuses solely on civil *astreintes*.⁸ Only the Canton of Geneva knows of civil *astreintes*. This measure was created *praetor legem* and derives from the French concept of *astreinte*. The *Avant-projet de la commission d’experts relative à la loi de procédure civile suisse, juin 2003* (“AP-CPC”)⁹ provided all civil judges with the power to issue a civil *astreinte*.¹⁰ Unfortunately, according to the *Message du 28 juin 2006 relatif au code de procédure civile suisse* (“M-CPC”),¹¹ the Swiss Federal Council eventually decided to withdraw the inclusion of civil *astreintes* from the *Projet de code de procédure civile suisse* (“P-CPC”).¹²

It seems that the civil *astreinte* could be a useful tool both in litigation and arbitration proceedings held in Switzerland. Consequently, this paper will first draw an *état des lieux* on the evolution of the original concept of civil *astreinte* (see *infra* II.). Then, the current and prospective legal regime of the civil *astreinte* in litigations held in Switzerland will be examined in the light of both foreign and international legal texts on the matter (see *infra* III.). Thereafter, this paper will briefly investigate the potential application of civil *astreintes* in international arbitrations with seat in Switzerland (see *infra* IV.) before concluding on the expediency of including the civil *astreinte* in Switzerland (see *infra* V.).

⁶ The *astreinte* regime is defined at Arts. 33-37 of the *Loi n° 91-650 du 9 juillet 1991 portant réforme des procédures civiles d’exécution*.

⁷ See, e.g., Appenzell A. Rh. Civil Procedure Code (“CPC”) of 27th April, 1980 (Appenzell A. Rh. Systematische Gesetzessammlung [“sGS”], 231.1), Art. 289(4); Glarus CPC of 6th May, 2001 (sGS-GL III C/1), Art. 349; Obwald CPC of 9th March, 1973 (sGS-OB 240.11), Art. 299; Schwyz CPC of 25th October, 1974 (sGS-SZ 232.110), Art. 234; St.-Gallen CPC of 20th December, 1990 (sGS-StG 961.2), Arts. 208(1)(a) and 299(2)(a); Thurgau CPC of 6th July, 1988 (sGS-TG 271), Art. 261; and Zürich CPC of 13th June, 1976 (sGS-ZH 271), Art. 306. “Penal” *astreintes* have a Germanic origin, see TERCIER, Pierre, “Des *astreintes*,” 4 *Baurecht/Droit de la construction* (“BR”) 76, 77 (1982). See also BRUNS, Alexander, “Zwangsgeld zugunsten des Gläubigers – ein europäisches Zukunftsmodell?,” 118 *Zeitschrift für Zivilprozess* (“ZZP”) 3, 9 and for an historical review, 5-7 (2005).

⁸ The difference between “penal” and “civil” *astreintes* resides in the legal basis on which they are underpinned. While “penal” *astreintes* are embedded in CPCs *cum* the authorisation given by statutes dealing with criminal matters, see Art. 335(1) of the *Code pénal suisse du 21 décembre 1937* (“CP;” *Recueil systématique* [“RS”], 311.0); “civil” *astreintes* may be governed autonomously by CPCs and may even exist *praetor legem*, absent any statutory basis, see *infra* Chapters II.A and III.A.2.a).

⁹ www.ejpd.admin.ch/ejpd/fr/home/themen/staat_und_buerger/ref_gesetzgebung/ref_zivilprozessrecht.html (last visited on 18th June, 2007).

¹⁰ See Art. 331(1)(c) of the AP-CPC which reads: “*Lorsque la décision porte sur une obligation de faire, de s’abstenir ou de tolérer, le tribunal d’exécution peut l’assortir notamment d’une astreinte appropriée en faveur de la partie qui a obtenu gain de cause pour chaque jour d’inexécution.*”

¹¹ FF 158/2006 6841, 6992.

¹² FF 158/2006 7019 *et seq.*

II. The Concept of Civil *Astreinte*

A. Origins and Evolution in France

During the 19th century, on the basis of Art. 1142 of the French Civil Code (*Loi 1804-02-07 promulguée le 17 février 1804*), which reads: “*Toute obligation de faire ou de ne pas faire se résout en dommages et intérêts en cas d’inexécution de la part du débiteur*,” French courts have developed *praetor legem* the concept of *astreinte*.¹³ It is only since July 1972 that this measure obtained its own detailed statutory regime.¹⁴ Because of its *praetor legem* nature, French judges had to underpin the *astreinte* on (what they viewed as) a quite similar measure explicitly provided for by statute. Indeed, it would have been quite difficult for French courts to justify and to create a wholly new measure without a statutory basis. That is why, at the outset, the *astreinte* was considered as a sort of damage compensation.¹⁵ Considering that the *astreinte* could not exceed the damage, in practice, boiled down to a lack of threat.¹⁶ Indeed, the violator knew that at worst he would be condemned to repair the damage he caused, emptying the *astreinte* of any interest and usefulness. Thus, this measure corresponded rather to a provisional damage compensation, paid in advance, than to an incentive measure because of the lack of threat. This absence of distinction between the *astreinte* and the damage compensation was acutely criticised.¹⁷

It is only since the end of the 19th century that the *astreinte* was clearly distinguished from damages.¹⁸ However, despite this clear distinction, case-law some-

¹³ See LÉVY (n. 2) at 21; BERRYER, Jacques, *Des astreintes*, thesis, Paris, 1903, 18. See also YENISEY, Kübra Dogan, *La modification du contrat de travail, Etudes de droit suisse et de droit français*, Geneva, Zurich, Basel, Schulthess, 2005, 374.

¹⁴ See *Loi n° 72-626 du 5 juillet 1972 instituant un juge de l’exécution et relative à la réforme de la procédure civile*, which has been replaced by the *Loi n° 91-650* (n. 6). The *astreinte* already existed under French law, see, e.g., Art. 11 of the *Décret n° 71-740 du 9 septembre 1971* dealing with the preliminary provisions of the New French Civil Procedure Code (“NCPC”) and Art. 2 of the *Loi n° 49-972 du 21 juillet 1949 donnant caractère comminatoire aux astreintes fixées par les tribunaux en matière d’expulsion, et en limitant le montant*. See also, PEYER (n. 2) at 209.

¹⁵ Initially, the *astreinte* could not be determined independently from the damage and could not exceed it. The scope of Art. 2 of the *Loi n° 49-972* (n. 14) was extended to every *astreinte* and during the 19th century, both expressions “*contrainte*” and “*dommages-intérêts*” were used by French courts to refer to the *astreinte*, see RAYNAUD, Pierre, “*La distinction de l’astreinte et des dommages-intérêts dans la jurisprudence française récente*,” in: *Mélanges Roger Secrétan: recueil de travaux*, Faculté de droit, Lausanne, 1964, 249, 250-251. The *astreinte* was considered as a “condemnation for the future,” see CROISSANT, Ernest, *Des astreintes*, thesis, Paris, 1898, 60-77 and 145.

¹⁶ See CRACIUN (n. 2) at 18.

¹⁷ See RAYNAUD (n. 15) at 252.

¹⁸ See RAYNAUD (n. 15) at 249; CRACIUN (n. 2) at 18; BERNARD, Albert, *Théorie des astreintes*, thesis, Marseille, 1909, 33 and 45-46; BERRYER (n. 13) at 18.

times remained ambiguous in the application of this measure,¹⁹ which was inopportune because these measures do not operate at the same time and thus may have a different purpose, effect and usefulness. In fact, damage compensation is an *a posteriori* measure whereas the *astreinte* is an *a priori* measure that allows acting preventively.²⁰ With its judgment of 20th October, 1959,²¹ the French *Cour de cassation* performed a turnaround and decided to allow judges to set an amount superior to the actual damage at the moment of its liquidation, i.e., at the time where judges define the sum to be paid to the *astreinte* beneficiary.²² This judgment established a clear distinction between *astreinte* and damage compensation.²³ The *astreinte* then became a wholly private penalty recognised by French case-law.²⁴

Currently the *Loi n° 91-650* explicitly provides that an *astreinte* amount is determined independently from any damage.²⁵ Any judge can issue, even *ex officio*, an *astreinte* to reinforce his decisions.²⁶ He may also reinforce the decision of other judges, if necessary.²⁷ The liquidation is performed by the enforcement judge, unless the judge who issued it is still seized by the lawsuit or has explicitly declared he would keep this prerogative.²⁸ Only where the *astreinte* addressee cannot be blamed for non-performance may the *astreinte* be eliminated.²⁹

B. Purpose and Nature

The *astreinte* was created to further the compliance with judicial decisions without recourse to direct enforcement measures.³⁰ It is a measure that aims at inducing the *astreinte* addressee, under threat of a pecuniary sanction, to fulfil his obligations stemming from a judicial decision.³¹ It acts preventively,³² namely before any

¹⁹ Definitive damage compensations were still called *astreintes*, see RAYNAUD (n. 15) at 250 with further references to case-law.

²⁰ See *infra* n. 32 and accompanying text.

²¹ See Cass., 20th October, 1959, 135 Dalloz 537 (1959).

²² Art. 2 of the *Loi n° 49-972* (n. 14) became then an exception, see RAYNAUD (n. 15) at 256-258.

²³ See GERHARD (n. 2) at 237.

²⁴ See RAYNAUD (n. 15) at 257-258.

²⁵ See Art. 34(1) of the *Loi n° 91-650* (n. 6).

²⁶ See Art. 33(1) of the *Loi n° 91-650* (n. 6).

²⁷ See Art. 34(2) of the *Loi n° 91-650* (n. 6).

²⁸ See Art. 35 of the *Loi n° 91-650* (n. 6).

²⁹ See Art. 36(3) of the *Loi n° 91-650* (n. 6). See also BERRYER (n. 13) at 59.

³⁰ See LÉVY (n. 2) at 21; CRACIUN (n. 2) at 151; BERRYER (n. 13) at 14. See also *infra* n. 39 and accompanying text, as well as Chapter IV.A.1.

³¹ The *astreinte* does not aim at furthering the performance of a contractual obligation, but merely at fostering the compliance with the judgment or award that might embed such contractual obligation, see GERHARD (n. 2) at 240; FERREIRÓS, Estela Milagros, *Incumplimiento obligacional: la relación jurídica, derecho y acción, cumplimiento de una resolución judicial, astreintes, valuación convencional del daño, cláusula penal, doctrina y jurisprudencia*, Buenos Aires, La Rocca, 1998, 38; CRACIUN (n. 2) at 37.

³² The *astreinte* has an anticipatory and prospective view of enforcement; it is not retrospective like usual State enforcement proceedings.

damage occurs, in trying to avoid that even the worst non-collaborating party refuses to comply with a judge's (or arbitrator's) decision.

The *astreinte* is a pecuniary, comminatory, accessory, potential and non-compensatory sanction. As a pecuniary sanction, the *astreinte* consists of a sum of money.³³ This sum may be progressive in relation to the duration of the delay.³⁴ Hence, it is argued that no wealth can withstand the continuous and constantly increasing pressure of the *astreinte*.³⁵ As a comminatory measure, the *astreinte* is a threat. It consists of the threat of a punishment in case of disobedience to the judge's (or arbitrator's) order.³⁶ The *astreinte* cannot, in any way, replace the collaboration of the *astreinte* addressee, whose cooperation is still essential to fulfil the obligation.³⁷ The *astreinte* is deprived of any direct constraint. Therefore, the *astreinte* is an incentive measure³⁸ in view of enforcement (“à des fins d'exécution”) deprived of coercive character.³⁹ Indeed, both French and Swiss scholars consider that the *astreinte* is not a *voie d'exécution forcée*.⁴⁰ As an accessory sanction, the *astreinte* cannot exist for itself and its fate follows that of the decision it reinforces.⁴¹ This decision may relate either to a procedural measure or to a judgment on the merits. Thus, an *astreinte* must be issued by way of a judicial (or arbitral) decision. As a potential sanction, the *astreinte* is only due if the *astreinte* addressee does not comply with his obligations. Thus, the *astreinte* addressee who fulfils his obligations on time cannot be sanctioned by an issued *astreinte* because the suspensive condition does not materialise. Then, the *astreinte* is a revocable measure. As a non-compensatory measure, the issuance of an *astreinte* shall be without prejudice to any liability in damages incurred by the party who failed to comply with

³³ See DE BOISSÉSON, Matthieu, *Le droit français de l'arbitrage interne et international*, Paris, GLN Editions Joly, 2nd ed., 1990, 258.

³⁴ See RAYNAUD (n. 15) at 255. See also *infra* Chapter IV.C.

³⁵ See LÉVY (n. 2) at 21; YENISEY (n. 13) at 378; ELBACHA, Farid, “*L'astreinte en droit marocain*,” Master thesis, University of Rabat, 1984, 24; JEANDIDIER, Wilfrid, “*L'exécution forcée des obligations de faire*,” 74 *Revue trimestrielle de droit civil* (“RTD civ.”) 700, 716, § 26 (1976).

³⁶ See DE BOISSÉSON (n. 33) at 258. On the origins of the comminatory nature, see CROISSANT (n. 15) at 145.

³⁷ See LÉVY (n. 2) at 27; VINCENT/PRÉVAULT (n. 2) at 28.

³⁸ See YENISEY (n. 13) at 374.

³⁹ See VINCENT/PRÉVAULT (n. 2) at 25. Incentive measures in view of enforcement have to be distinguished from coercive enforcement measures. Coercive enforcement measures require State authority to force the debtor to perform an obligation, whereas incentive measures tend to convince the debtor to “voluntarily” perform an obligation and thus do not require State authority, see GERHARD (n. 2) at 239.

⁴⁰ See, for *France*: DE BOISSÉSON (n. 33) at 257-258; and for *Switzerland*: GERHARD (n. 2) at 293 and 345.

⁴¹ See GERHARD (n. 2) at 240.

the court (or arbitral) decision.⁴² Although, initially, the *astreinte* was treated as a sort of damage compensation;⁴³ currently, it is defined as a pecuniary penalty that comes in addition to the principal and firm condemnation, i.e., a sort of penalty “for non-compliance.”⁴⁴ Thus, it is not mixed up with damages. The *astreinte* aims at putting pressure on the *astreinte* addressee rather than at compensating the *astreinte* beneficiary.⁴⁵

C. Beneficiary

In several systems an *astreinte* is a pure fine payable to the State,⁴⁶ in others a hybrid between a fine and a private penalty,⁴⁷ and finally a third category of jurisdictions considers that an *astreinte* is a private penalty payable to the opposing litigating party.⁴⁸ Since this study focuses on civil *astreintes* it will deal only with *astreintes* whose exclusive beneficiary is the opposing party.

⁴² See WIEGAND, Christian, “‘Brussels’ and Arbitration Approximation of Judiciary Law within the EU and the Potential Impact on International Arbitration,” 12 *Journal of International Arbitration* (“J. of Int’l Arb.”) 5, 20 (1995).

⁴³ See *supra* Chapter II.A.

⁴⁴ See Final Award in International Chamber of Commerce (“ICC”) Case No. 7895/1994, 11 *ICC International Court of Arbitration Bulletin* (“ICC Bull.”) 66 (1/2000); ELBACHA (n. 35) at 28.

⁴⁵ See, e.g., UNIDROIT Principles of International Commercial Contracts (2004): Art. 7.2.4. reads in pertinent part: “(2) [...] Payment of the penalty to the aggrieved party does not exclude any claim for damages.” See also ZWEIGERT, Konrad / KÖTZ, Hein, *Introduction to Comparative Law*, Oxford, Clarendon Press, 3rd ed., 1998, 478.

⁴⁶ See, e.g., in *Germany*: § 890 of the CPC; and in *Poland*: Art. 1050 of the CPC. See also BRUNS (n. 7) at 8-9; ZWEIGERT / KÖTZ (n. 45) at 477.

⁴⁷ See, e.g., in *Portugal*: Art. 829-A of the Civil Code which provides that the amount of the compulsory pecuniary sanction is for “the creditor and the State in equal parts.” Most of the *astreintes* whose beneficiary is the State treasury (alone or concurrently with a private party) embed a penal nature. See also BRUNS (n. 7) at 11-12 and *supra* n. 8.

⁴⁸ Among jurisdictions, conventions and principles that provide for a penalty exclusively in favour of the opposing party are: *France*: RAYNAUD (n. 15) at 250-251; *Greece*: Art. 946 CPC; *Benelux States*: Art. 3 of the Benelux Convention on a Uniform Law of Monetary Penalties of 26th November, 1973 ratified by Belgium, Luxembourg and The Netherlands; and UNIDROIT Principles of International Commercial Contracts (2004): Art. 7.2.4. reads in pertinent part: “(1) Where the court orders a party to perform, it may also direct that this party pay a penalty if it does not comply with the order. (2) The penalty shall be paid to the aggrieved party unless mandatory provisions of the law of the forum provide otherwise.” See also BRUNS (n. 7) at 9-11 and 18; BESSON, Sébastien, *Arbitrage international et mesures provisoires*, Zurich, Schulthess, 1998, 317.

III. The Civil *Astreinte* as a Measure in Litigation Proceedings in Switzerland

A. Law in Force

1. Generalities

In Switzerland, the civil *astreinte* is not provided for by Federal law.⁴⁹ As a consequence Federal judges cannot issue any civil *astreinte*. The enforcement measures made available to both Cantonal judges and parties depend on the kind of substantive right to be enforced. The enforcement of pecuniary obligations is exhaustively governed by the *Loi fédérale du 11 avril 1889 sur la poursuite pour dettes et la faillite* (“LP”).⁵⁰ This statute does not provide for the possibility of issuing any civil *astreinte*. Hence, the latter cannot be issued to ensure the respect of a pecuniary substantive right.⁵¹ Regarding non-pecuniary obligations,⁵² their enforcement is provided for by Cantonal laws. Thus, in Switzerland, there are twenty-six different enforcement regimes, which are not necessarily uniform. Only the Canton of Geneva allows for the use of civil *astreintes*, which are explicitly mentioned in its case-law.⁵³

2. In Geneva

a) Origins and Evolution

Influenced by French case-law, Geneva courts created *praetor legem* the *astreinte*.⁵⁴ The Geneva legislator never enacted a specific statute on the issue. The Swiss Federal Tribunal never contested the concept of *astreinte* and considers it as a kind of enforcement measure related to a future damage.⁵⁵ Thus, this measure does not

⁴⁹ See Arts. 74-78 of the *Loi fédérale du 4 décembre 1947 de procédure civile fédérale* (RS 273) which exhaustively deal with enforcement do not mention any *astreinte*. See also HABSCHIED, Walther J., *Schweizerisches Zivilprozess- und Gerichtsorganisationsrecht*, Basel, Frankfurt am Main, Helbing & Lichtenhahn, 2nd ed., 1990, 588.

⁵⁰ RS 281.1. See Art. 97(2) of the *Code des obligations du 30 mars 1911* (“CO”; RS 220).

⁵¹ See GERHARD (n. 2) at 359-360.

⁵² Namely, obligations to do (specific performance) or to abstain (injunction).

⁵³ See unreported ATF 5P.252/2003 of 18th March, 2004, § 2 and 6; 105 Semaine judiciaire (“SJ”) 598, 600 (1983); ATF 95/1969 II 461, 464; 89 SJ 193, 198 and 201 (1967); 67 SJ 337, 348-349 (1945); 62 SJ 7, 8 (1940); ATF 43/1917 II 660, 664-665; 8 Revue suisse de la propriété intellectuelle, de l’information et de la concurrence (“sic”) 479, 484 (2004). See also PEYER (n. 2) at 213.

⁵⁴ See PEYER (n. 2) at 214; BERTOSSA, Bernard / GAILLARD, Louis / GUYET, Jacques / SCHMIDT, André, *Commentaire de la loi de procédure civile du canton de Genève du 10 avril 1987, III (Art. 320 à 519)*, Chancellerie de l’Etat de Genève (December 1993), ad Art. 462, § 2; TERCIER (n. 7) at 77.

⁵⁵ See ATF 90/1964 II 158, 163; 67 SJ 337, 348 (1945); 62 SJ 7, 8 (1940).

constitute a private penalty, which is in absence of a statutory provision prohibited by Swiss law,⁵⁶ but a provisional advance on compensation for a potential future damage.⁵⁷ Therefore, the total *astreinte* amount may not exceed the effective damage.⁵⁸ Thus, an *astreinte*, in its end result, is identical to damage compensation.⁵⁹ In addition, to ensure the liquidation of the *astreinte*, the *astreinte* beneficiary must in any case prove his damage.⁶⁰ In such circumstances, the *astreinte* seems to constitute a damage compensation measure rather than an enforcement measure, the purpose of which it should strictly pursue.⁶¹ The Federal Tribunal considered that an *astreinte* does not contravene the *numerus clausus* of damage compensation measures as long as it is not a condemnation to compensate a damage that has already occurred,⁶² or a definitive condemnation to compensate a future and undetermined damage.⁶³

In 1982, the Geneva CPC was modified. *Astreinte* having not been explicitly provided for in these modifications, Geneva courts temporarily considered that the legislator purportedly decided not to include such measure (“*silence qualifié de la loi*”).⁶⁴ This position was criticised.⁶⁵ Some scholars considered that “*la question peut rester ouverte s’agissant d’un silence qualifié ou non*” and that without the availability of an *astreinte* the creditor would dispose of too few effective measures to ensure the respect of his rights, in particular those deriving from specific performance (“*obligation de faire*”) and from injunctions (“*obligation de ne pas faire*”).⁶⁶ Even if Arts. 97 and 101 CO already provide for a protection of the creditor, these provisions only set an explicit regime about damage compensation. Nevertheless, the creditor has often a greater interest in the completion of the performance in

⁵⁶ See 67 SJ 337, 349 (1945).

⁵⁷ See 67 SJ 337, 348 (1945); 62 SJ 7, 7-8 (1940); ATF 43/1917 II 660, 664. See also TERCIER (n. 7) at 77.

⁵⁸ In one case, a party required the cumulative condemnation to the payment of an *astreinte* and of damage compensation, but the latter was refused by the court, which did not clearly approve or refuse the addition of an *astreinte* to damage compensation, see Arrêt de la Cour de justice de Genève (“ACJ”), 89 SJ 193, 196, 198 and 201 (1967). In the current state of the Swiss legal system, it seems that an *astreinte* may not be added to damage compensation, see TERCIER (n. 7) at 77.

⁵⁹ Although it has no damage compensation nature or purpose, see *supra* n. 45 and accompanying text. Besides, the judge can always condemn the *astreinte* addressee for the damage compensation, if the *astreinte* remained without effect on its addressee. The *astreinte* is then limited in its legal consequences, see 67 SJ 337, 348 (1945); ATF 43/1917 II 660, 664.

⁶⁰ See 67 SJ 337, 349 (1945).

⁶¹ See 67 SJ 337, 348 (1945); 62 SJ 7 (1940); ATF 43/1917 II 660, 664.

⁶² See ATF 90/1964 II 158, 163.

⁶³ See 67 SJ 337, 349 (1945) *a contrario*; 62 SJ 7, 8 (1940); ATF 43/1917 II 660, 664. See also PEYER (n. 2) at 214; HABSCHIED (n. 49) at 588.

⁶⁴ See 104 SJ 439, 441-442 (1982).

⁶⁵ See TERCIER (n. 7) at 76 *et seq.* See also BERTOSSA/GAILLARD/GUYET/SCHMIDT (n. 54), *ad* Art. 462, § 2.

⁶⁶ See TERCIER (n. 7) at 76.

kind than in obtaining damage compensation.⁶⁷ In 1986, Geneva courts have confirmed the existence of *astreintes*, but have decided not to issue such a measure, because the claimant had not demonstrated that it was justified.⁶⁸ Since then, the existence of *astreintes* was once again confirmed by the *Cour de Justice* of Geneva, but it also stated, without explanation, that such measure cannot be issued in relation to interim or conservatory measures.⁶⁹

In sum, current Geneva law seems to allow the use of *astreintes*. However, in the absence of more detailed recent case-law about *astreintes*, the latter seem to have to be assimilated to provisional advances on compensation for a potential future damage and not to private penalties. Therefore, in practice, the *astreinte* lacks threatening power. Its incentive capacity then seems inefficient.

b) *Regime*

The regime of the *astreinte* is unclear. As of the 1982 judgment which declared that an *astreinte* may not be issued under Geneva law, no posterior judgment ever clearly dealt with the *astreinte* regime. Hence, it is quite difficult to determine the current *astreinte* regime under Geneva law.

i) *Astreinte* Request and Issuance

The *astreinte* seems always to have been requested by the parties,⁷⁰ so that Geneva courts were never entertained with the issue of whether they may issue an *astreinte ex officio*. Besides, the *astreinte* seems to be issued simultaneously to the order it supports and to be integrated in the same decision. Thus, the competent authority is the court that issued the decision containing the order to be supported.

ii) Types of Decisions that may be Reinforced by an *Astreinte*

Because of the exhaustiveness of the LP,⁷¹ the *astreinte* may only be issued to reinforce an order for specific performance, or an injunction.⁷² This order must be contained in a judicial decision that may be reinforced by an *astreinte*.

⁶⁷ Because more often than not damage compensation does not actually fully make up for the detriment suffered and also because any compensation (whether full or not) happens late anyway, see BELLET, Pierre, “*La justice civile en question*,” 95 SJ 609, 620 (1973). See also TERCIER (n. 7) at 77.

⁶⁸ See 2 *Revue suisse de la propriété intellectuelle* (“RSPI”) 267, 271 (1986). In 1983, the *astreinte* was already mentioned in a lawsuit, but the court was not entertained with the validity of this measure, see 105 SJ 598 (1983).

⁶⁹ See unreported ACJ 4/1998 of 8th January, 1998, § 3 *in fine*; JACQUEMOUD-ROSSARI, Laura, “*Reddition de comptes et droit aux renseignements*,” 128 SJ, II, 23, 26 (2006).

⁷⁰ See 105 SJ 598, 600 (1983); 104 SJ 439, 440 (1982); ATF 95/1969 II 461, 464; 89 SJ 193, 196 (1967); 67 SJ 337, 338 (1945); 62 SJ 7 (1940).

⁷¹ See *supra* Chapter III.A.1.

⁷² See 105 SJ 598, 600 (1983); ATF 95/1969 II 461, 464; 89 SJ 193, 196 (1967); 67 SJ 337, 338 (1945); 62 SJ 7 (1940); ATF 43/1917 II 660, 661. But see ACJ 4/1998 (n. 69).

iii) Setting of the *Astreinte* Amount

Geneva law seems to be attached to the former French *astreinte* concept.⁷³ The *astreinte* is considered as a provisional advance on compensation for a potential future damage, so that its amount cannot exceed the damage amount⁷⁴ and should then be determined in consideration of this latter amount.⁷⁵ The *astreinte* should begin to run as of the moment the *astreinte* addressee does not comply with an authority's order⁷⁶ and should be due until the fulfilment of the authority's order, or until it is established that the authority's order can no longer be performed by the *astreinte* addressee. If the non-performance, or the lateness, is not due to the *astreinte* addressee, the *astreinte* should be wholly or partially cancelled.⁷⁷

iv) *Astreinte* Liquidation

The *astreinte* liquidation must be requested by its beneficiary. The materialisation of the *astreinte* gives birth to a pecuniary obligation, whose creditor is the *astreinte* beneficiary and whose debtor is the *astreinte* addressee. This pecuniary obligation should be handled as with any other pecuniary obligation. Therefore, state courts should be competent both to determine the existence and to set the amount of this obligation. Enforcement shall depend on the LP.

The liquidation of an *astreinte* may only be definitively set once it is established that the *astreinte* will never deploy its effects,⁷⁸ or once the *astreinte* has definitively stopped.

B. Draft of a New Swiss Civil Procedure Code

The AP-CPC explicitly provided for the *astreinte*. “Civil” and “penal” *astreintes* were clearly distinguished. The “civil” *astreinte* was called “*astreinte*” and the “penal” *astreinte* “*amende d'ordre quotidienne*.” However, the Federal Council decided not to include the *astreinte* in the current version of the *Projet de code de procédure civile* (June 2006); only the *amende d'ordre quotidienne* was saved from deletion.

⁷³ Pre-1959 concept, see 62 SJ 7, 8 (1940); ATF 43/1917 II 660, 664.

⁷⁴ See also *supra* n. 58.

⁷⁵ The *Rapport accompagnant l'avant projet de la commission d'experts, Loi de procédure civile suisse* (“RE AP-CPC”) also gives great deference to damage amount as reference, www.ejpd.admin.ch/etc/medialib/data/staat_buerger/gesetzgebung/zivilprozess.Par.0007.File.tmp/vn-ber-f.pdf at 156 (last visited on 30th November, 2006).

⁷⁶ Therefore, an *astreinte* may only start running as of the moment the decision it reinforces takes effects.

⁷⁷ Like in *France*, see Art. 36(3) of the *Loi n° 91-650* (n. 6).

⁷⁸ Because, for instance, the addressee has complied with the judge's order. In such cases, the *astreinte* has never started and, because of its potential nature, has never become efficient. It is stillborn.

1. *The Avant-projet de la commission d'experts relative à la loi de procédure civile suisse*

The *astreinte* shared the same general provision with the “penal” *astreinte*.⁷⁹ The former *astreinte* would then no longer be underpinned *praetor legem*, but based on a statutory provision allowing any court to issue it so as to ensure the compliance with specific performance or injunctions. Concerning the setting of the *astreinte* amount, the AP-CPC provided that the daily amount must be appropriate and is paid in favour of the *astreinte* beneficiary.⁸⁰ There was neither any legal maximum amount nor an amount determination regime.⁸¹ The RE AP-CPC only specified that the amount must be determined in compliance with the principle of proportionality and with regard to the potential damage.⁸² Despite this mention of damage and the opinion of the “*Ordre des avocats fribourgeois*”⁸³ which may lead to consider that the *astreinte* still remains at its “Geneva” perception, the *astreinte* of the AP-CPC should be considered as a private penalty. Indeed, the RE AP-CPC declaration encompasses both *astreinte* and *amende d'ordre quotidienne*; hence, both measures have a punitive purpose⁸⁴ as opposed to a compensatory aim. Furthermore, the introduction of an *astreinte*'s statutory regime must not be used to create a (useless) measure that adjudicators were already able to underpin *praetor legem*, but must be used to introduce a wholly new efficient incentive measure needing an explicit statutory basis to exist.

2. *Civil Astreinte exclusion from the Projet de Code de procédure civile suisse*

a) *Motives*

Surprisingly, the Federal Council considers that the *astreinte* is unknown in Switzerland.⁸⁵ Indeed, Swiss German Cantons know of “penal” *astreintes*, which are germane to “civil” *astreintes* and Geneva has had recourse to civil *astreintes* for a long time, although their regime is irresolute. A Federal regime for the civil *astreinte* would then prove beneficial.

⁷⁹ See Art. 332(1) AP-CPC.

⁸⁰ See Art. 332(1)(c) AP-CPC.

⁸¹ See the critics in *Classement des réponses à la procédure de consultation: Avant-projet relatif à une loi fédérale sur la procédure civile suisse* (“AP-CPC consultation results”), 2004, www.ejpd.admin.ch/etc/medialib/data/staat_buerger/gesetzgebung/zivilprozess.Par.0004.File.tmp/ve-ber.pdf at 774-775 (last visited on 18th June, 2007).

⁸² See RE AP-CPC (n. 75) at 156.

⁸³ See AP-CPC consultation results (n. 81) at 774.

⁸⁴ Like the current French concept of *astreinte*.

⁸⁵ See FF 158/2006 6841, 6992.

The absences of a maximum amount and of a clear regime about the setting of the *astreinte* amount also lead the legislator to exclude this measure.⁸⁶ A clear *astreinte* regime was lacking in the improvable AP-CPC. Shaping a legal regime concerning the setting of the *astreinte* amount is not impossible⁸⁷ and the judge's obligation to respect the principles of proportionality and arbitrariness prohibition may prevent the ordering of excessive *astreinte* amounts.⁸⁸ The Swiss regime should find inspiration in the current French concept and regime of *astreinte*. The need for some extra effort in clarifying amendments to the AP-CPC – in order to create an efficient *astreinte*, as recognised by the RE AP-CPC itself⁸⁹ – should not amount to its mere rejection in the P-CPC.

It is argued in the M-CPC that the *astreinte*, because of its great efficacy, may lead to a rapid deterioration of the financial situation of the debtor and may indirectly harm the financial situation of the creditors of the *astreinte* addressee.⁹⁰ It seems that, similarly, the obligation reinforced by an *astreinte* might be of great importance to the *astreinte* beneficiary. Hence, without the *astreinte*, it is the decision beneficiary, and indirectly his own creditors, who might end up in a financially deteriorated situation. It is actually not the decision beneficiary who should bear the risk of the non-collaborating intention (over which he has no control⁹¹) of the decision addressee. The *astreinte* allows transferring this risk to its only main probable cause: the decision addressee.

The M-CPC declares that the *astreinte* is a disputed measure in European States.⁹² Such statement seems inappropriate. Although details may differ, several jurisdictions and international texts deal with such measure. If *astreinte* were actually a clearly disputed measure, it would surely not be as well anchored both in foreign States⁹³ and in international instruments.⁹⁴

⁸⁶ *Ibidem*.

⁸⁷ See, e.g., the legal regime of the different States, surrounding Switzerland, that have recourse to the *astreinte*, such as Belgium, France, Luxembourg, and The Netherlands.

⁸⁸ See GERHARD (n. 2) at 256-258.

⁸⁹ See RE AP-CPC (n. 75) at 155-156.

⁹⁰ See FF 158/2006 6841, 6992.

⁹¹ Control that the decision beneficiary might partly gain through an *astreinte*.

⁹² See FF 158/2006 6841, 6992.

⁹³ See jurisdictions cited *supra* n. 87, as well as Greece and Portugal which have also integrated *astreintes* in their statutes, see *supra* n. 48.

⁹⁴ For instance, the Lugano Convention of 16th September, 1988 (“CL”; RS 0.275.11) and the Brussels Convention of 27th September, 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters embed a specific provision on *astreintes* (Art. 43 of both Conventions); the Benelux Convention (n. 48); the UNIDROIT Principles of International Commercial Contracts (n. 48); and the May 2004 ALI/UNIDROIT Principles of Transnational Civil Procedure (Principle P-17.3 and comment P-18C), www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf (last visited on 30th November, 2006).

b) *De Lege Ferenda*

As recognised by the AP-CPC, the *astreinte* is an efficient measure.⁹⁵ The fact that the other litigating party is the beneficiary of the *astreinte* should not create a problem pursuant to the Swiss legal system.⁹⁶ The only problem is related to the absence of a clear setting regime concerning the amount of the *astreinte*. However, as seen, this absence might be brushed up.⁹⁷ Besides, the *astreinte* is the only measure capable of exerting pressure on large and wealthy corporations to ensure respect of their obligations.⁹⁸ Enforcement measures are not always available to ensure the performance of an obligation and the *astreinte* addressee has more interest in the completion of specific performance than in damage compensation.⁹⁹ The usefulness of incentive measures such as *astreintes*, which are effective against large corporations, is undeniable. Therefore, a uniform regime for the *astreinte* within Switzerland is highly desirable.

IV. The Civil *Astreinte* as a Measure in International Arbitration Proceedings in Switzerland

As seen, state judges already have some measures at their disposal to ensure the respect of their decisions.¹⁰⁰ The power to issue *astreintes* is considerably helpful to arbitrators, who are deprived of state authority and, hence, cannot issue coercive measures to ensure adherence to their decisions.¹⁰¹ This measure gives them the

⁹⁵ See RE AP-CPC (n. 75) at 155-156.

⁹⁶ See, e.g., Art. 160 CO.

⁹⁷ See, e.g., the absence of shocking judgments related to a disproportioned *astreinte* amount of the different States surrounding Switzerland that have recourse to the *astreinte*. Research uncovered no case-law quashing a disproportionate *astreinte* amount. Therefore, the Swiss legislator should feel at ease in adopting an *astreinte* inspired on the legal systems of neighbouring jurisdictions.

⁹⁸ Art. 292 CP which reads: “*That who did not comply with a duly notified decision of an authority under the threat of the present provision will incur a fine or detention,*” is ineffective against companies or corporations because it may only threaten an individual, see, e.g., ATF 131/2005 IV 32; see also the unreported version of the same ATF (6S.124/2004) of 10th November, 2004, § 1 containing explanations not excerpted in the reported version. Besides, “penal” *astreintes* are limited to a maximum daily amount of CHF 1,000 (Art. 341(1)(b) P-CPC) and to a total amount of CHF 40,000 (Art. 48(1) CP *cum* Art. 333(1) CP) which proves not to be incisive enough to “convince” a (wealthy) recalcitrant party.

⁹⁹ See *supra* n. 67.

¹⁰⁰ See CRACIUN (n. 2) at 37. See, e.g., in *Switzerland*: Art. 292 CP, *supra* n. 98, whose sanctions (imprisonment and fine) are totally different from those of the *astreinte*, which although being a pecuniary sanction (like a fine) has the peculiarity to grow as long as the violation lasts and is paid to the opposing litigating party.

¹⁰¹ Arbitrators sitting in Switzerland may not issue any Art. 292 CP threat because they are not a state authority, see BERTI, Stephen V., in: BERTI (Gen. Ed.), *International Arbitration in Switzerland*, Basel, Helbing & Lichtenhahn, The Hague, Kluwer, 2000, *ad* Art. 183 PILA, § 11.

ability to threaten a reluctant party to bend to their rulings without the help of state judges.¹⁰² Arbitrators can thereby act in a more independent manner and reinforce their position *vis-à-vis* the parties¹⁰³ by ensuring the respect of their task¹⁰⁴ and of their resulting decisions. Indeed, an international arbitral award does not automatically comprise the “self-executing” character of a national court judgment in the country of enforcement. Where a losing party fails to voluntarily comply with the award, the winning party must have recourse to national courts, through *exequatur* proceedings, to enforce his award. The necessity of such additional judicial stage to bend the bad will of the losing party is well remedied by the empowerment of the arbitrator to issue an *astreinte*, thereby considerably increasing the chances of voluntary compliance with the award.

As arbitration is consensual by nature, the crux of the matter resides in the power of arbitrators to issue an *astreinte* (see *infra* A.). Besides, the specificity of arbitration requires a few comments on the nature of the decision issuing an *astreinte* (see *infra* B.), on the temporal component of the *astreinte* (see *infra* C.), on its liquidation (see *infra* D.) as well as on its enforcement (see *infra* E.).

A. Sources and Limits of the Arbitrators’ Powers to Issue an *Astreinte*

I. *Jurisdictio and Imperium*

The power to render justice may be divided up into two distinct abilities: *jurisdictio* and *imperium*. *Jurisdictio* consists of the power to deliver a judgment and *imperium* represents the ability to make use of state authority in order to socially impose the judicial truth embodied in a judgment. French courts maintain that the *imperium* notion touches upon constraint and use of the force, whereas the *jurisdictio* does not only cover the function of passing judgment (*dire le droit*) because judging is not limited to rendering a decision on antagonistic views, but also encompasses the concrete efficacy of the solution retained to solve the dispute. Hence,

¹⁰² The Swiss International Arbitration Act embedded in Arts. 176-194 of the *Loi fédérale du 18 décembre 1987 sur le droit international privé* (“PILA”; RS 291) refers to state courts to support the arbitrators in the performance of their task. See, e.g., Art. 183(2) which reads: “If the party concerned does not voluntarily comply with [provisional and conservatory measures], the Arbitral Tribunal may request the assistance of the state judge, the judge shall apply his own law.” See also Art. 184(2) which provides: “If the assistance of state judiciary authorities is necessary for the taking of evidence, the Arbitral Tribunal or a party with the consent of the Arbitral Tribunal, may request the assistance of the state judge at the seat of the Arbitral Tribunal; the judge shall apply his own law;” and Art. 185 PILA: “For any further judicial assistance the state judge at the seat of the Arbitral Tribunal shall have jurisdiction.”

¹⁰³ Parties would be induced to “voluntarily” comply with the arbitrators’ rulings.

¹⁰⁴ The “*jurisdictio*,” i.e., the power to pass judgment, see *infra* Chapter IV.A.1.

French scholars,¹⁰⁵ approved by Swiss commentators,¹⁰⁶ have more precisely defined the different aspects of the power to render justice, which is composed by both the *jurisdictio* and the *imperium lato sensu*, the latter containing the *imperium stricto sensu*. The *imperium lato sensu* is connected to the power to issue an order. This power not only concerns orders that require state authority, but also orders that are accessory to ensure the regular performance of the *jurisdictio*, for instance, organising the arbitral procedure (hearing dates, deadlines for the submission of briefs, etc.), ordering interim or conservatory measures, etc.¹⁰⁷ Measures that require state authority are exclusively part of the *imperium stricto sensu*, also called *imperium merum*. That means that the *jurisdictio* and the grey zone, called *imperium mixtum*, which covers the part of the *imperium lato sensu* excluding the *imperium merum*, do not require state authority. Therefore, arbitrators should not only enjoy the *jurisdictio*, but also the *imperium mixtum*.¹⁰⁸ Indeed, *jurisdictio* would be illusory and useless, if the arbitrators were not able to issue orders. French courts attach the power to issue an *astreinte* to the *jurisdictio/imperium mixtum* and distinguish its intimidation and penalty aspects from the *imperium merum*.¹⁰⁹ Some commentators have also shown that the *astreinte* has nothing to do with *imperium merum*, because there is no state constraint.¹¹⁰ Most French scholars approve the method;¹¹¹ only a minority believes the *astreinte* forms part of the judge's *imperium merum* and thus may not be issued by an arbitrator.¹¹² A concrete

¹⁰⁵ See JARROSSON, Charles, "Réflexions sur l'imperium," in: *Etudes offertes à Pierre Bellet*, Paris, Litec, 1991, 245, 260, § 32 and 271, § § 65 et seq.

¹⁰⁶ See, e.g., POUURET, Jean-François / BESSON, Sébastien, *Droit comparé de l'arbitrage international*, Bruxelles, Bruylant, Paris, LGDJ, Zurich, Schulthess, 2002, 494, § 540; BESSON (n. 48) at 59, § 67.

¹⁰⁷ Some scholars consider that the power to issue an *astreinte* is a consequence of the judges' power to give orders, see BERNARD (n. 18) at 15.

¹⁰⁸ See CHAMPAUD, Claude, "Le juge, l'arbitre, l'expert et le régulateur au regard de la jurisdictio," in: *Etudes offertes à Jacques Béguin – Droit et actualité*, Paris, Litec, 2005, 71, 105; LÉVY (n. 2) at 22; BESSON (n. 48) at 58. As enforcement requires *imperium merum*, only state authorities enjoy the power to enforce an award, see BERTOSSA/GALLARD/GUYET/SCHMIDT (n. 54), ad Art. 462, § 1. See also *infra* Chapter IV.E.

¹⁰⁹ It is very valuable for an adjudicatory body to enjoy the power of issuing an *astreinte* to ensure the voluntary performance of its decisions, especially if such adjudicatory body may not control enforcement of its decisions, see, e.g., in French labour law: *Prud'hommes* courts, R. 516-36 of the Labour Code; LEPANY Franceline, "Les pouvoirs du juge et les voies procédurales," 52 *Le Droit Ouvrier, Revue juridique de la confédération générale du travail* 115, 120 (1999); YENISEY (n. 13) at 375. An analogy may be drawn with arbitrators who have no control over the enforcement of their awards. See also *supra* n. 108.

¹¹⁰ See HORSMANS, Guy, "La loi belge du 19 mai 1998 sur l'arbitrage," 45 *Rev. arb.* 475, 530, § 72 (1999).

¹¹¹ See various authors cited in BESSON (n. 48) at 318, § 537.

¹¹² See ROBERT, Jean, *L'arbitrage: droit interne, droit international privé*, Paris, Dalloz, 6th ed., 1993, 151, § 175; LOQUIN, Eric, "Les pouvoirs des arbitres internationaux à la lumière de l'évolution du droit de l'arbitrage international," 110 *Journal du droit international* ("JDI") 293, 308, § 28 (1983); TGI Beauvais (Ord. réf.), 9th April, 1998, *Fertalge Euromade v. S.A. Kaltenbach Thuring*,

assessment of the arbitrator's power may only lead to admitting his competence to issue an *astreinte*.¹¹³ Since the *astreinte* is considered as being part of the jurisdictional function (*jurisdictio/imperium mixtum*), and not a *voie d'exécution forcée* depending on the *imperium merum* that the arbitrator does not enjoy, the *astreinte* is a prerogative of the arbitrator.¹¹⁴ In sum, as an *astreinte* does not require state authority, it is not an *imperium merum* measure, but it is located, depending on purely theoretical considerations, either in the "grey zone" of the *imperium mixtum*,¹¹⁵ or at the confluence between *jurisdictio* and *imperium*.¹¹⁶ Pursuant to this source, arbitrators enjoy, in theory, the power to issue an *astreinte*,¹¹⁷ unless legal considerations, such as a potential public policy (*ordre public*) violation, prohibit it in a univocal manner.¹¹⁸

2. Swiss Legal System

a) *Astreinte as a Potential Violation of Public Policy*

In some circumstances the Swiss legal system authorises judges to issue an *astreinte*.¹¹⁹ As seen, arbitrators, in theory, enjoy the power to issue an *astreinte*. But, in practice, could the issuing of an *astreinte* by an arbitral tribunal sitting in Switzerland violate public policy under current Swiss law?

No Swiss statute does explicitly prohibit the *astreinte*. On the contrary, the Swiss legal system knows of incentive measures such as *astreintes*¹²⁰ and even provides

48 Rev. arb. 993 (2002) which seems badly decided because in the case at stake the arbitral tribunal had not yet been constituted, under such circumstances the arbitrator(s) could obviously not issue an *astreinte*.

¹¹³ See BESSON (n. 48) at 318, § 537; JARROSSON (n. 105) at 273.

¹¹⁴ See note RACINE, Jean-Baptiste on Cass., 6th May, 2003, *SOPIP v. Aresbank*, 50 Rev. arb. 311, 327 (2004); note MOITRY, Jean-Hubert / VERGNE, Catherine on CA Paris, 8th June, 1990, *Hoche Friedland v. Le Grand Livre du Mois*, 36 Rev. arb. 917, 919 (1990); GELSI BIDART, Adolfo / PEIRANO FACIO, Jorge, *Les astreintes*, Montevideo, Acali, 1981, 19; JARROSSON (n. 105) at 245. *Contra*, see VAN COMPERNOLLE, Jacques, "L'arbitrage dans les relations commerciales internationales: questions de procédure," 66 *Revue de droit international et de droit comparé*, 101, 117-118 (1989), and HOHL, Fabienne, *La réalisation du droit et les procédures rapides, Evolution et réformes*, Fribourg, Editions Universitaires, 1994, 324, who both consider an *astreinte* as a coercive measure, but it seems that an *astreinte* is an incentive measure which does not have recourse to State authority. Therefore, an *astreinte* is restricting, but not coercive. See also scholars cited *supra* n. 40.

¹¹⁵ See LÉVY (n. 2) at 23; BESSON (n. 48) at 317, § 535.

¹¹⁶ See POUURET/BESSON (n. 106) at 494, § 540. Hence, the issue is to know in which measure the particular jurisdiction is willing to amalgamate an arbitrator with a judge.

¹¹⁷ See GERHARD (n. 2) at 254-255.

¹¹⁸ A thorough investigation of the *lex arbitri* and the *lex causae* as well as of the law of the potential jurisdiction where enforcement will be sought is advisable. See *infra* Chapter IV.A.2.a).

¹¹⁹ See *supra* Chapter III.

¹²⁰ *Ibidem*.

for the obligation to enforce foreign decisions condemning to *astreintes*.¹²¹ Besides, the AP-CPC explicitly proposed the introduction of *astreintes* in a Federal statute.¹²² Therefore, the *astreinte*, may not constitute a public policy violation pursuant to Art. 190(2)(e) PILA, which provides for such violation as a potential ground for vacating an arbitral award.¹²³ In fact, if the law of the seat of the arbitration or of the enforcement State, or, if the law applicable to the merits of the dispute contains provisions favourable to the *astreinte*, the argument of a public policy violation at the appeal or *exequatur* level should fail.¹²⁴ Indeed, in Switzerland, the legislator's will is to allow appeal of awards only under restrictive circumstances.¹²⁵ Hence, public policy violations materialise only in violations of widely recognised fundamental principles,¹²⁶ which lead to an unbearable violation of the sense of justice and of fundamental values of the rule of law.¹²⁷ Absence of award motivation¹²⁸ or the violation, even arbitrary, of a procedural rule agreed by the parties or set by the arbitrators¹²⁹ is not considered as a public policy violation.¹³⁰ The Swiss Federal Tribunal considers that only a serious and clear violation of a fundamental right or a violation of a procedural rule essential to ensure "procedural loyalty" should constitute a public policy violation.¹³¹ Besides, such violation would not, in itself, be sufficient to annul an award: the party who invokes the public policy violation must also demonstrate that the award, in its result, is contrary to public policy.¹³² In addition, the *bona fide* principle requires a party to immediately complain of a due process violation. A belated complaint amounts to a waiver of the violated right.¹³³ Under

¹²¹ See Art. 43 CL. See also unreported ATF 5P.252/2003 of 18th March, 2004, § 6.

¹²² See Art. 332(1)(c) AP-CPC and RE AP-CPC (n. 75) at 155-156. The mere existence of a draft statute intending to include *astreintes* shows the non-shocking character of an *astreinte* in the Swiss legal system. Besides, the non-inclusion of the *astreinte* in the P-CPC is not due to public policy concerns, but to practical considerations, see *supra* Chapter III.B.2.a).

¹²³ See, for a similar approach in *Belgium*: HORMANS (n. 110) at 530, § 72. See *supra* Chapter IV. A.1.

¹²⁴ See Art. V(2)(b) of the New York Convention of 10th June, 1958 on the recognition and enforcement of foreign arbitral awards (RS 0.277.12); and in *Switzerland*: Art. 190 (2)(e) PILA.

¹²⁵ See CORBOZ, Bernard, "*Le recours au tribunal fédéral en matière d'arbitrage international*," 124 SJ, II, 1, 30 (2002).

¹²⁶ See CORBOZ (n. 125) at 25.

¹²⁷ See ATF 117/1991 II 604, 605-607 = 11 ASA Bull. 54 (1993); ATF 116/1990 II 634, 636-637. See also DUTOIT, Bernard, *Droit international privé suisse, Commentaire de la loi fédérale du 18 décembre 1987*, Basel, Geneva, Munich, Helbing & Lichtenhahn, 4th ed., 2005, *ad* Art. 190, § 8; CORBOZ (n. 125) at 28.

¹²⁸ See ATF 116/1990 II 373, 375; DUTOIT (n. 127), *ad* Art. 190, § 8.

¹²⁹ See CORBOZ (n. 125) at 29.

¹³⁰ See unreported ATF 4P.277/98 of 22nd February, 1999; ATF 121/1995 III 331, 333; ATF 119/1993 II 386, 390; 113 SJ 12, 13 (1991); ATF 115/1989 II 102, 105.

¹³¹ See CORBOZ (n. 125) at 28-29.

¹³² See ATF 117/1991 II 604, 606; ATF 116/1990 II 634, 637 = 140 Journal des Tribunaux ("JdT"), I, 63 (1992). See also CORBOZ (n. 125) at 26; DUTOIT (n. 127), *ad* Art. 190, § 8.

¹³³ See ATF 126/2000 III 249, 253-254; ATF 119/1993 II 386, 388; CORBOZ (n. 125) at 29.

such conditions, it might be actually difficult to consider that an arbitrator who issues an *astreinte* violates public policy, if the law of the seat of the arbitration or that of the place where enforcement of the award is sought, or the *lex causae* contain provisions concerning *astreintes*.¹³⁴ In sum, an arbitral award ought not to be quashed by the Swiss Federal Tribunal on public policy grounds merely because the arbitral tribunal incidentally issued an *astreinte* together with its main ruling.

b) *Lex Arbitri*

The *lex arbitri* defines the legal frame of the arbitration, hence it defines the prerogatives that the parties may modulate.¹³⁵ In some jurisdictions, the *lex arbitri* explicitly provides for the possibility for arbitrators to issue *astreintes*.¹³⁶ In other jurisdictions, the *lex arbitri* explicitly prohibits *astreintes*.¹³⁷ A third category of legal systems, such as the Swiss one, do not deal with *astreintes* in their arbitration acts, so that the arbitrators cannot specifically underpin their power to issue an *astreinte* on any topical provision of such statutes.

Regardless of the type of jurisdiction under review (authorising or explicitly excluding the *astreinte*, or not dealing with it), the *lex arbitri* must be carefully examined in order to correctly interpret the scope of the authorisation or exclusion as well as the meaning of the absence of any topical provision in the arbitration act (see *infra* ii]). The same attention must be dedicated to the parties' agreement(s) to determine whether they validly empower or explicitly prohibit the arbitrators from issuing an *astreinte* (see *infra* i]).

¹³⁴ The law of the seat of the arbitration, i.e., the whole legal system of the State hosting the seat of the arbitration proceeding is not to be confused with the *lex arbitri*, which is the applicable arbitration law determined by the seat of the arbitration proceedings. And the latter is not to be confused with the *lex causae*, i.e., the law applicable to the merits of the dispute, or the more limited notion of the *lex contractus*, i.e., the law applicable to the contract.

¹³⁵ See LÉVY (n. 2) at 23.

¹³⁶ See, e.g., in *Belgium*: The Belgian 1998 Arbitration Act comprises Arts. 1676-1723 of the Belgian Judicial Code ("BJC"), Art. 1709^{bis} BJC reads in relevant part: "*The arbitrators may impose a fine on a party for non-compliance;*" and in *The Netherlands*: The Netherlands 1986 Arbitration Act is composed of Arts. 1020-1076 of the Civil Procedure Code ("WBR") and provides for the power of the arbitrators to order *astreintes* at an equal level with national courts, see Art. 1056 WBR which reads in relevant part: "*The arbitral tribunal has the power to impose a penalty for non-compliance in cases where the court has such power [...].*"

¹³⁷ See, e.g., in *Sweden*: The possibility to order an *astreinte* is expressly excluded by the 1999 Arbitration Act (Art. 25[4]). See criticism by JARVIN, Sigvard, "*La nouvelle loi suédoise sur l'arbitrage,*" 46 *Rev. arb.* 27, 59-60 (2000). But, such restriction seems to apply only to the administration of evidence which is the subject matter of Art. 25 of the 1999 Act. The door seems to remain open for an *astreinte* issued in combination with a final award on the merits, thus outside of the scope of Art. 25 prohibition.

i) Agreement Between the Parties

The PILA provides that the parties,¹³⁸ subsidiarily the arbitral tribunal,¹³⁹ are competent to organise the arbitral procedure. Such organisation, notably the power to issue an *astreinte*, may be directly provided for in the arbitration agreement (or terms of reference where applicable¹⁴⁰), or indirectly in the rules the arbitration institution under the auspices of which the arbitration proceedings will be conducted.¹⁴¹

In some administered arbitration proceedings, notably in ICC practice, the power to issue the *astreinte* is recognised but cannot be exercised if nothing is said in the terms of reference as to such measure.¹⁴² However, arbitrators in an ICC case have held that the issue of their power to issue *astreintes* as requested by one party is separate from the issue of their competence.¹⁴³ Other institutional arbitration rules (the parties may choose) indirectly provide for the power of arbitrators to issue an *astreinte*.¹⁴⁴ Nevertheless, such approach does not constitute a trend because a survey made on the arbitration rules of twenty-five arbitral institutions active in France shows that none has enacted any provision as to the possibility for the arbitrators to issue an *astreinte* in an order for the production of documents.¹⁴⁵ There

¹³⁸ See Art. 182(1) PILA reads: “*The parties may, directly or by reference to rules of arbitration, determine the arbitral procedure; they may also submit the arbitral procedure to a procedural law of their choice.*” The choice of the parties binds the arbitrators, see LALIVE, Pierre / POUDRET, Jean-François / REYMOND, Claude, *Le droit de l'arbitrage interne et international en Suisse*, Lausanne, Payot, 1989, *ad* Art. 182, § 1.

¹³⁹ See Art. 182(2) PILA reads: “*If the parties have not determined the procedure, the Arbitral Tribunal shall determine it to the extent necessary, either directly or by reference to a statute or to rules of arbitration.*”

¹⁴⁰ The “terms of reference” in ICC arbitration is a document signed by both parties in dispute and the arbitral tribunal which aims at defining early the parties’ respective positions, the issues to be decided and the main procedural rules to be used in the proceedings, see Art. 18 of the 1998 ICC Rules of Arbitration.

¹⁴¹ This agreement between the parties should be possible as long as the arbitral tribunal is still seized of the case.

¹⁴² See Final Award in ICC Case No. 7895/1994, 11 ICC Bull. 66-67 (1/2000); see also SCHWARTZ, Eric A., “*The Practices and Experience of the ICC Court*,” ICC Publication No. 519, *Conservatory and Provisional Measures in International Arbitration*, Paris, ICC Publishing, 1993, 57-58.

¹⁴³ See excerpts of the ICC award as reprinted in CA Paris, 11th June, 1998, *Ferring AB v. Debiopharm*, 48 Rev. arb. 149, 150 (2002). If followed by the Swiss Federal Tribunal, Art. 190(2)(b) PILA would then constitute no grievance against the issuing of an *astreinte*.

¹⁴⁴ See, e.g., in *Belgium*: Art. 28 of the Centre belge d'arbitrage et de médiation (“CEPANI”) Arbitration Rules which reads: “*Unless otherwise agreed by the parties, all issues that are not specifically provided for herein shall be subject to Chapter VI of the Belgian Judicial Code.*” The empowering is “indirect” because this general reference embedded in the CEPANI Arbitration Rules to Part VI of the BJC, whose Art. 1709^{bis} itself redirects to Arts. 1385^{bis} to 1385^{octies} BJC which entail that arbitrators may order the payment of an *astreinte*. See also FOUSTOUCOS, Anghelos C., “*CEPANI: Révision des règlements*,” 45 Rev. arb. 895, 896 (1999).

¹⁴⁵ See PELLERIN, Jacques, “*Les droits des parties dans l'instance arbitrale*,” 36 Rev. arb. 395, 404 (1990).

seems to be no tendency reversal although scholars recommend issuing the production of documents in combination with an *astreinte* wherever possible.¹⁴⁶

Under Swiss law the power to issue *astreintes* must comply with public policy and must ensure the respect of the principle of equality between the parties and their right to be heard.¹⁴⁷ As seen, the *astreinte* does not violate public policy,¹⁴⁸ and an arm's length agreement between the parties may not violate equality among them or their right to be heard. Besides, as parties cannot transfer more than what they actually hold,¹⁴⁹ they may not transfer to arbitrators powers whose implementation requires state authority (*imperium merum*). Since the *astreinte* does not require state authority, the power to issue it can be transferred by the parties to the arbitrators.¹⁵⁰ Therefore, parties are able to empower the arbitral tribunal to issue *astreintes* on the basis of their agreement.

ii) Consequences of the Absence of Provisions on *Astreinte*
in the Swiss *Lex Arbitri*

In case neither the parties nor the *lex arbitri* empower arbitrators to issue an *astreinte*, may arbitrators nevertheless reinforce their orders or awards with this measure? Arbitral practice shows that even where the parties request the issuance of an *astreinte* arbitrators tend to have cold feet and do not follow up.¹⁵¹ This cautious approach may derive from the fact that, concerning the form of consent, Swiss scholars are not unanimous. Some of them consider that arbitrators may issue an *astreinte* if authorised by the parties, tacit consent being sufficient.¹⁵² Whereas others require the written form because the power to issue an *astreinte* would be a

¹⁴⁶ See HANOTIAU, Bernard, "Quand l'arbitrage s'en va-t-en guerre: les perturbations par l'état de la procédure arbitrale - Les états dans le contentieux économique international, I. Le contentieux arbitral," 49 Rev. arb. 807, 825 (2003).

¹⁴⁷ Art. 182(3) PILA reads: "Regardless of the procedure chosen, the Arbitral Tribunal shall ensure equal treatment of the parties and the right of both parties to be heard in adversarial proceedings." Any violation of such rule could be remedied pursuant to Art. 190(2)(d) PILA which provides that the arbitral award may be annulled: "if the principle of equal treatment of the parties or the right of the parties to be heard was violated."

¹⁴⁸ See *supra* Chapter IV.A.2.a).

¹⁴⁹ "La volonté des parties trouve sa limite dans ce qui fait l'essence du pouvoir juridictionnel," see note JARROSSON on CA Paris, 19th May, 1988, *Torno S.p.a. v. Kagumai Gumi Co. Ltd.*, 45 Rev. arb. 601, 619 (1999).

¹⁵⁰ Pursuant to party autonomy, contrary language of the parties amputates the arbitrators powers to issue an *astreinte*, see note PELLERIN, Jacques on CA Paris, 11th October, 1991, *Fleury v. Bien-aimé*, 38 Rev. arb. 625 (1992).

¹⁵¹ See, e.g., in *Switzerland*, the factual segment of the unreported ATF 4P.114/2001 of 19th December, 2001.

¹⁵² See LÉVY (n. 2) at 29 with further references in footnote 18. For a similar approach in *Germany*, see RAESCHKE-KESSLER, Hilmar / BERGER, Klaus Peter, *Recht und Praxis des Schiedsverfahrens*, Köln, RWS, 3rd ed., 1999, 141, § 589.

special power,¹⁵³ neither derived from Art. 182(1) PILA nor based on Art. 183(1) PILA.¹⁵⁴ However, both admit that where the *lex causae* provides the *astreinte* as accessory sanction the arbitrator may issue it without a written provision authorising it. It seems that the contradiction between these two views would be moot as soon as the power to issue an *astreinte* amounts to a general principle of law,¹⁵⁵ or is considered as part of the *lex mercatoria*.¹⁵⁶ However, today, despite the mention of the *astreinte* in international texts resulting from the harmonisation of views between the existing legal families,¹⁵⁷ the power to issue an *astreinte* is not yet so universally accepted that its *lex mercatoria* quality can be affirmed.

On the other hand, Art. 182(2) PILA¹⁵⁸ provides for the power of the arbitrators to take necessary procedural dispositions, either in advance or as one goes along the arbitral procedure.¹⁵⁹ Accordingly, the argument could well be made that the power to issue an *astreinte* is “an inherent and necessary extension” of the *jurisdictio* of the arbitrator, and hence such power does not depend on a mandate by the parties, but is only linked to the power to judge (*jurisdictio*).¹⁶⁰ Therefore, an arbitrator should be empowered to issue an *astreinte*, even *ex officio*. Besides, any appeal

¹⁵³ Like the power to interpret the arbitral award, ATF 126/2000 III 524, 527 = 19 ASA Bull. 88 (2001).

¹⁵⁴ See POUURET/BESSON (n. 106) at 495, § 540. Besides, Art. 183(1) PILA only concerns the general competence to order interim or conservatory measures. An *astreinte* is not an interim or conservatory measure but an incentive measure. *Contra*, see SCHWARTZ (n. 142) at 57-58 who argues the power to issue an *astreinte* derives from the general power of arbitrators to grant interim or conservatory measures in ICC arbitrations: Art. 23(1) of the 1998 ICC Rules reads in relevant part: “Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate.” A similar provision existed already in the 1988 version of the ICC Rules (Art. 11).

¹⁵⁵ See, e.g., in *France*: BERNARDINI, Piero, “Des mesures spécifiques: les astreintes, les mesures conservatoires,” in: Centre français de droit comparé (Ed.), *Les arbitres internationaux – Colloque du 4 février 2005*, Paris, Société de législation comparée, 2005, 145, 151. See also Conseil d’Etat, 10th May, 1974, 31 L’actualité juridique. Droit administratif (“AJDA”), No. 126, 545 (1974); 73 RTD civ. 353, 354 (1975) with note NORMAND.

¹⁵⁶ See the similar reasoning concerning provisional measures adopted by BESSON (n. 48) at 263-264, § § 442-443 and at 273, § 460.

¹⁵⁷ See, e.g., the ALI/UNIDROIT Principles of Transnational Civil Procedure (n. 94).

¹⁵⁸ For the text of Art. 182(2) PILA, see *supra* n. 139.

¹⁵⁹ See DUTOIT (n. 127), *ad* Art. 182, § 3; LALIVE/POURET/REYMOND (n. 138), *ad* Art. 182, § 3.

¹⁶⁰ See, in *France*: notes DERAÏNS, Yves on ICC Case No. 8694/1996, 124 JDI 1056, 1060 (1997) and on CA Paris, 10th March, 1995, *Tardivel v. S.A. Cejibe*, 42 Rev. arb. 143, 145-146 (1996); and note PELLERIN (n. 150). See also in the *United Kingdom*: s. 41 of the 1996 Arbitration Act which deals with the opportunity of the arbitral tribunal to use its default powers for the proper and expeditious conduct of the arbitration proceedings (s.40). Powers conferred by the 1996 Act on an arbitral tribunal subject to any contrary agreement of the parties include the taking of steps where a party fails to comply with a peremptory order. See also VEEDER (n. 1) at 708 where the author leaves the door open for a light injunction similar to a monetary penalty such as an *astreinte*.

lodged on *ultra petita*¹⁶¹ grounds against the award should not succeed.¹⁶² In fact, the *ultra petita* argument deals with the merits of the case whereas issuing an *astreinte* pertains to the procedural level. Such lack of *ultra petita* sanction of the issuance of an *astreinte* by arbitrators combined with the potential failure of a public policy argument¹⁶³ entails that today in Switzerland the issuance of an *astreinte* is part of the default powers of international arbitrators. Even, if one would consider, in theory, that the above considerations may not explicitly and clearly underpin the arbitrator's implicit power to issue an *astreinte*,¹⁶⁴ they nevertheless anticipate the outcome an appeal to the Swiss Federal Tribunal might have and demonstrate that, in practice, an arbitrator issuing an *astreinte* in Switzerland, even absent both any request of a party and a specific provision allowing it, should run no risk of *vacatur* by the Swiss Federal Tribunal.

B. Nature of the Decision Issuing the *Astreinte*

In Switzerland, the only limit for judges seems to be that an *astreinte* can only reinforce a judge's order related to specific performance or to an injunction, as opposed to money judgments.¹⁶⁵ However, arbitrators are not limited to the measures

¹⁶¹ See Art. 190(2)(c) PILA provides in relevant part that an arbitral award may be annulled: "if the Arbitral Tribunal's decision went beyond the claims submitted to it [...]"

¹⁶² See as to the same opinion for France: Art. 1502(3) NCPC; CA Paris, 24th May, 1991, *Fleury v. Bienaimé*, 38 Rev. arb. 625 (1992) with note PELLERIN, where the arbitrator does not go outside his mission if he orders an *astreinte* even though the parties did not request it. But see note MOITRY/VERGNE (n. 114) at 919.

¹⁶³ An arbitrator's issuance of an *astreinte* does not violate public policy in Switzerland, because it does not constitute in its results an unbearable violation of the sense of justice and of fundamental values of the rule of law, see *supra* Chapter IV.A.2.a).

¹⁶⁴ France seems to be one of the rare countries to expressly admit the arbitrator's implicit power to order an *astreinte* through case-law, see CA Paris, 10th March, 1995, *Tardivel v. S.A. Cejibe*, 42 Rev. arb. 143, 145-146 (1996) with note DERAIS; CA Paris, 24th May and 11th October, 1991, *Fleury v. Bienaimé*, 38 Rev. arb. 625 (1992) with note PELLERIN; CA Paris, 8th June, 1990, 36 Rev. arb. 917 (1990) with note MOITRY/VERGNE; CA Paris, 12th February, 1985, *S.A. Immobilière Balzac v. Etude Sinclair*, 32 Rev. arb. 459 (1986) with note RONDEAU-RIVIER; CA Rennes, 26th September, 1984, *Auvinet S.A. v. S.A. Sacomi and Poirier*, 32 Rev. arb. 441 (1986) with note ANCEL, confirming an old *Cour de Cassation* decision: Cass., 25th July, 1882, 39 Sirey, I, 345 (1883), so that recent case-law does not mention contestations on such power, see CA Paris, 25th January, 2001, *Gromelle v. SA Institut international des techniques d'organisation*, 47 Rev. arb. 559 (2001) with note LEGROS; see also unreported CA Paris decision of 7th October, 2004, *S.A. Otor Participations v. S.A.R.L. Carlyle (Luxembourg)*; BENSUADE, Denis, "S.A. Otor Participations v. S.A.R.L. Carlyle (Luxembourg) Holdings 1: Interim Awards on Provisional Measures in International Arbitration," 22 J. of Int'l Arb. 357 (2005).

¹⁶⁵ See *supra* Chapter III.A.2.b)(ii), notably n. 72. See also in neighbouring countries where the *astreinte* may as well sanction an obligation to do, e.g., the employer must issue a certificate of employment and does not (Cass., 29th June, 1966, *Clouzet v. Le Forban*, Bulletin civil des arrêts de la Cour de cassation ("Bull. civ.") 1966, IV, No. 641, 534) or to abstain, e.g., a party to a distributorship agreement should abstain from selling products of the other party in a certain territory and does it anyway (Final Award in ICC Case No. 7895/1994, 11 ICC Bull. 66 [1/2000]).

judges of the seat of the arbitration or of the enforcement State may use.¹⁶⁶ Hence, arbitrators may issue an *astreinte* to reinforce any of their decisions. Therefore, an arbitral tribunal sitting in Switzerland should be able to issue an *astreinte* to reinforce any of its orders, even those concerning pecuniary obligations.¹⁶⁷ In addition, such power to issue an *astreinte* ought not to be limited to decisions on the merits, but ought to also apply to provisional¹⁶⁸ and procedural measures, such as an order to produce documents.¹⁶⁹ Besides, decisions issuing *astreintes* should not take the shape of non-appealable procedural orders, because of the effect *astreintes* have on their addressees.¹⁷⁰ Therefore, they should be issued in the form of interim awards,¹⁷¹ for which immediate challenge is open pursuant to Art. 190(3) PILA, if the ground for setting aside relates to the constitution or jurisdiction of the arbitral tribunal,¹⁷² or final awards. Due process considerations command that an *astreinte* be issued in a decision which may be appealed, i.e., an award, because the *astreinte* may begin to run as soon as notification of the decision embedding it takes place.¹⁷³

C. Temporal Component of the *Astreinte*

The arbitral tribunal should set the amount of the *astreinte* as a single lump sum, or by reference to periods of time, or to individual instances of non-performance

¹⁶⁶ The fact that the text of both Arts. 183(2) and 184(2) PILA specify that the state judge applies its own law shows that arbitrators' measures can be different in nature and derive from a different legal basis than those the *juge d'appui* may potentially apply. See LALIVE/POUDRET/REYMOND (n. 138), *ad* Art. 183, § 7.

¹⁶⁷ Cantonal procedural law at the seat of the arbitral tribunal may not be analogously applied to the arbitral proceedings, see SCHNEIDER, Michael E., in: BERTI (n. 101), *ad* Art. 182 PILA, § 2.

¹⁶⁸ See, e.g., in *Switzerland*: LÉVY (n. 2) at 31; and in *France*: unreported CA Paris decision of 7th October, 2004, *S.A. Otor Participations v. S.A.R.L. Carlyle (Luxembourg)*; see BENSUADE (n. 164) at 357; FOUCHARD, Philippe / GAILLARD, Emmanuel / GOLDMAN, Berthold, *Traité de l'arbitrage commercial international*, Paris, Litec, 1996, 713, § 1274.

¹⁶⁹ See, e.g., in *Belgium*: Article 1709^{bis} BJC; HANOTIAU, Bernard / BLOCK, Guy, "The Law of 19 May 1998 Amending Belgian Arbitration Legislation," 15 *Arb. Int.* 97, 98 (1999).

¹⁷⁰ Indeed, procedural orders issuing *astreintes* would be much more incisive to their addressees than those dealing with the arbitral tribunal hearing planning. Nevertheless, the issue is of pure academic nature because the appeal authority will qualify the decision regardless of the title it carries (as defined by the arbitrators) and will check if what looks formally like a procedural order is not in reality an award, see unreported ATF of 14th June, 1990, 12 ASA Bull. 226 (1994). See also FOUCHARD/GAILLARD/GOLDMAN (n. 168) at 737, § 1352.

¹⁷¹ See VON SEGESSER, Georg / KURTH, Christoph, "Chapter 5 – Interim Measures," in: KAUFMANN-KOHLER, Gabrielle / STUCKI, Blaise (Eds.), *International Arbitration in Switzerland – A Handbook for Practitioners*, Zurich, Schulthess, 2004, 86-87.

¹⁷² In all other cases, the purportedly aggrieved party must wait until the end of the arbitral proceedings where the final award has been rendered to challenge such award before the Swiss Federal Tribunal. Alternatively, the purportedly aggrieved party may, however, request the arbitrators to reconsider their order.

¹⁷³ See *infra* Chapter IV.C.

of the award.¹⁷⁴ While the setting of the *astreinte* amount is subject to the same limits as those applicable in litigation proceedings,¹⁷⁵ the temporal component is more problematic in arbitration. As seen, the *astreinte* is not due until the decision it reinforces deploys its legal effects.¹⁷⁶ Logically, the *astreinte* is not due (and hence does not run) before the decision which established it has been served upon to the *astreinte* addressee.¹⁷⁷ Concerning arbitration, two conditions seem to be essential: the existence of an award and the notification of the same. Liability to pay cannot be incurred until after notification to the party affected by the award and by which such liability is imposed.¹⁷⁸ The precise time the *astreinte* begins to run should be left to the arbitrator's discretion. Whether arbitrators decide the starting point is the day after the award may no longer be appealed or already the day after the award was notified remains within their discretion stemming from their *jurisdictio*. It is suggested that the very essence of an *astreinte* only prevents the arbitrators from defining a starting point prior to the date of the award notification. Besides, the lodging of an appeal before a national court that would be granted a suspensive effect should logically freeze the running of the *astreinte* while the appeal is pending.¹⁷⁹ There is not much case-law on this point. Research uncovered only one Belgian decision which held that if an *astreinte* was issued in an award, the *exequatur* will have the effect that the *astreinte* will begin to run.¹⁸⁰ However, contrary to the judicial *astreinte* which requires the violation of a binding authority's order to begin, the arbitral *astreinte* should be able to begin once the arbitral tribunal has delivered the award containing its issuance. That means that the award should not need to be *exequaturred* to permit the *astreinte* to begin to run.¹⁸¹ Indeed, in having recourse to arbitration, the parties have accepted to submit their case to arbitrators. The non-compliance of a party with an arbitrators' award violates the arbitration agreement and amounts to a contractual violation. In other words, the non-complying party commits a legal violation which can lead to a legal consequence, namely the beginning of the *astreinte*'s running.

¹⁷⁴ See WIEGAND (n. 42) at 20. An arbitral tribunal can set the amount of the penalty according to its discretion, see unreported CA Paris decision of 7th October, 2004, *S.A. Otor Participations v. S.A.R.L. Carlyle (Luxembourg)*; BENSUADE (n. 164) at 357.

¹⁷⁵ See *supra* Chapter III.B.2.a).

¹⁷⁶ See YENISEY (n. 13) at 253-254. See also *supra* Chapter III.A.2.b)(iii).

¹⁷⁷ This is the solution adopted in *Belgium*: Art. 1385^{bis}(3) BJC reads: "*L'astreinte ne peut être encourue avant la signification du jugement qui l'a prononcée.*"

¹⁷⁸ See WIEGAND (n. 42) at 20.

¹⁷⁹ Considering that the *astreinte* does not run while the enforcement of the main obligation is pending as a result of a remedy would go a step too far: at least in jurisdictions where the appeal has no *effet dévolutif complet* and entails only an *effet cassatoire*, i.e., merely confirms or annuls the appealed award, provided no suspensive effect has been granted to the appeal. The appeal before the Swiss Federal Tribunal has in the vast majority of cases merely an *effet cassatoire*, see ATF 128/2002 III 50, 53.

¹⁸⁰ See CA Liège (7^e Ch.), 5th June, 1987, 35 *Annales de droit de Liège* 236, 241 (1990).

¹⁸¹ The *exequatur* only serves to allow state enforcement of the award. It is not a condition to the award obligatory effects deployment.

D. *Astreinte* Liquidation

The application of the decision to pay an *astreinte* raises a specific problem in arbitration: the power of the arbitrators who ordered the payment to repeal, suspend or reduce the *astreinte*, i.e., their power to liquidate the *astreinte*.

After the rendering of their final award arbitrators no longer enjoy *jurisdictio* and, subject to some rare exceptions,¹⁸² may no longer decide on the case (*functus officio*). Hence, if the *astreinte* may continue to deploy effects after the final award, it would be necessary to issue an *astreinte* with a complete amount setting regime that may not be modified, i.e., a “definitive” *astreinte*.¹⁸³ In fact, a risk may occur if there is still an *astreinte* amount which is not determined or determinable at the time of the final award.¹⁸⁴ In such case, not all the points of the case would have been definitively defined and enforcement judges may not have competence to set the final amount of the *astreinte*.¹⁸⁵ Therefore, the “final” award is incomplete, the arbitration proceedings are still pending and the “final” award is actually merely a partial award. To avoid such risk, the solution could be, where the amount determination modalities have been clearly set, to presume that any *astreinte*, at the time of the final award, is as “definitive” *astreinte*.¹⁸⁶ Otherwise, an *astreinte* issued in a partial award, may anyway be liquidated by the arbitrators.¹⁸⁷ That seems to be the best way to ensure that the arbitrators have control over both the entire case and its accessories, thereby respecting the parties’ will to submit their dispute to arbitration as well as the arbitrators’ *jurisdictio*.

¹⁸² See, e.g., Art. 29 ICC Rules which provides for the correction and interpretation of awards.

¹⁸³ Concerning the concept of “definitive” *astreinte*, see PEYER (n. 2) at 210-212; RAYNAUD (n. 15) at 253-254 and 260.

¹⁸⁴ In such situation, are the arbitrators actually deprived of the case? Is the final award actually final?

¹⁸⁵ See, e.g., in *Belgium*: where the legislator failed to enact an explicit provision on this issue. However, the Explanatory Statement (Bill amending the stipulations of the Judicial Code on Arbitration, *Parl. St. Kamer* 1997-98, No. 1374/1 at 10) stipulates that the arbitrators may repeal, suspend or reduce the *astreinte* in accordance with Art. 1385^{quinquies} BJC. It also stipulates that a party may appeal to the competent court if the arbitral tribunal can no longer be constituted. The State Council stresses in its advice (see Bill *supra* at 22) that it is upon the arbitral tribunal to decide on the *astreinte* in case it remains constituted. By ordering payment of an *astreinte*, the arbitral tribunal has retained the power to judge the issue. According to the State Council, if the arbitral tribunal can no longer be constituted, the party must turn to the Court of First Instance, and the provisions of Art. 1702^{bis}(5) BJC on interpreting arbitral awards will serve as a guideline, see DEMEYERE, LUC, “1998 Amendments to Belgian Arbitration Law: An Overview,” 15 *Arb. Int.* 295, 304 (1999); and in *The Netherlands*: where as to the revocation, suspension, or diminution of the *astreinte* only the national tribunal where the award is deposited is competent, see Arts. 1056 and 1058(1) WBR.

¹⁸⁶ This solution allows limiting situations where “final” awards are actually partial awards. Thus, it avoids situations where arbitral tribunals must be reconstituted, which may in practice be problematic.

¹⁸⁷ See DE BOISSÉSON (n. 33) at 262.

In sum, arbitrators may liquidate an *astreinte* as long as the arbitration proceedings are pending, but arbitrators may no longer liquidate it after they are *functus officio* (because it would then relate to enforcement which pertains to *imperium merum*).¹⁸⁸

E. *Astreinte* Enforcement

The ideal situation materialises where the parties voluntarily comply with the award. In certain instances where the *astreinte* already began to run, the *astreinte* addressee and the *astreinte* beneficiary may nevertheless reach an agreement on the *astreinte* amount and liquidate it. In case of disagreement, the *astreinte* beneficiary will have to initiate state enforcement of the award, which involves the *exequatur* of the latter.¹⁸⁹ The judge dealing with the *exequatur* and/or enforcement will be bound to the clearly set determination modalities issued by the arbitrators in the partial or final award.¹⁹⁰ Like the principal condemnation of the award, the *astreinte* can only be enforced after the award *exequatur*,¹⁹¹ i.e., after the date the award has been integrated into the specific national legal order.¹⁹² Therefore, the final *astreinte* cannot be liquidated before the award *exequatur*,¹⁹³ unless parties agree otherwise.

¹⁸⁸ See, e.g., in *France*: CA Paris, 11th October, 1991, *Fleury v. Bienaimé*, 38 Rev. arb. 625 (1992) with note PELLERIN. This situation has been characterized as being at the edge between the merits and the enforcement, see LEVEL, Patrice, “*L’arbitrabilité*,” 38 Rev. arb. 213, 229 and footnote 23^{bis} (1992); GUINCHARD, Serge / MOUSSA, Tony, *Droit et pratique des voies d’exécution*, Paris, Dalloz, 2004, 289, § 412.11. But see, in *Belgium*: Article 1709^{bis} BJC which implies the arbitrators’ power to reduce, suspend or withdraw the *astreinte*, but if it is impossible for the arbitrators to convene, a party would as a practical matter have to submit its request to the local court, see HANOTIAU/BLOCK (n. 169) at 98.

¹⁸⁹ See, e.g., in *Switzerland*: Art. 193(2) PILA. See also *supra* n. 108.

¹⁹⁰ See, e.g., in *France*: the national judge dealing with the *exequatur* may not remove the *astreinte* issued by the arbitrator; but the judge has a limited control power on the *quantum*, Cass., 14th December, 1983, *Convert v. Droga*, Bull. civ. 1983, I, No. 295, 264.

¹⁹¹ See, e.g., in *Belgium*: VAN COMPERNOLLE, Jacques, *L’astreinte*, Bruxelles, Larcier, 1992, 38, § 36; DE LEVAL, Georges / VAN COMPERNOLLE, Jacques, “*Les problèmes posés par l’exécution de l’astreinte*,” in: *Dix ans d’application de l’astreinte*, Bruxelles, Créadif, 1991, 240-241. See also in *France*: DE BOISSÉSON (n. 33) at 260; note PELLERIN (n. 150). Thus, French case-law recognises the power of the arbitrator to order an *astreinte*, but such *astreinte* is not self-executing and becomes only effective after the *exequatur* of the award by the competent national court. Such competent national court is not always the same court that is competent to deal with the challenge of an arbitral award, see CA Paris, 8th October, 1998, *Sam v. Perrin*, 45 Rev. arb. 350, 353 (1999) with note ANCEL/GOUT.

¹⁹² See DE BOISSÉSON (n. 33) at 261.

¹⁹³ See BESSON (n. 48) at 317, § 537. In arbitration, the liquidation might be made by the *exequatur* judge, see DE BOISSÉSON (n. 33) at 262. In *Geneva*: Art. 461c of the *Loi de procédure civile du 10 avril 1987* (*Recueil systématique genevois* [“RSG”] E/3/05) and Arts. 19-22 of the *Loi d’application dans le canton de Genève de la loi fédérale sur la poursuite pour dettes et la faillite du 16 mars 1912* (RSG E/3/60).

V. Conclusion

The *astreinte* is a known measure in Europe. Several countries surrounding Switzerland explicitly provide for this measure in their statutes.¹⁹⁴ International conventions also deal with the *astreinte*, some are even wholly dedicated to it.¹⁹⁵ The *astreinte* is therefore viewed, both on the international and national levels, as a useful and legitimate measure.¹⁹⁶ Even the Joint ALI/UNIDROIT Principles of Transnational Civil Procedure, which aim at harmonising Common law and Continental law systems, explicitly mention this measure. Although the *astreinte* is a pure concept of Continental law, the eminent lawyers who participated in the elaboration of these Principles have deemed it necessary to mention the *astreinte*, giving to this measure an international legitimacy. In Switzerland, the *astreinte* is only known in the Canton of Geneva. But, because of its *praetor legem* nature, the Geneva legal system related to the *astreinte*, in particular the exact nature of this measure,¹⁹⁷ remains relatively indefinite. The AP-CPC, following both the international and the surrounding States' trend, suggested explicitly introducing the *astreinte* in the Swiss legal system at the Federal level. Unfortunately, this measure was not included in the P-CPC for motives that seem irrelevant or even erroneous. Indeed, the *astreinte* cannot be considered as an extraordinary or unknown measure in both Switzerland and the surrounding States. It also is unfortunate that the Federal Council renounced to this measure because of a so-called complex regime related to the setting of its amount. Surrounding States statutes and judicial practice, which have passed the test of time, should be a source of inspiration for Switzerland.

The *astreinte* is an extremely efficient incentive measure in view of performance, which the Swiss legal system lacks. Indeed, Art. 292 CP may only sanction individuals. As for "penal" *astreintes*, their amount is relatively low, limiting greatly the potential threat of these measures. In sum, nowadays and in the current state of the P-CPC, Switzerland is deprived of any measure able to induce large corporations to comply with their obligations.¹⁹⁸ It is to be hoped that this lack will be brushed up before the enactment of the new Federal CPC.

¹⁹⁴ See, e.g., Belgium, France, Luxembourg and The Netherlands.

¹⁹⁵ See, e.g., the Benelux Convention (n. 48).

¹⁹⁶ The law of procedure has less and less to do with specific national character and some international texts make the law of *astreinte* uniform, see, e.g., the Draft European Code of Civil Procedure (Art. 13). What counts is that decisions will be endowed with greater efficiency as regards implementation by virtue of the system of *astreinte*, see STORME, Marcel, "General introductory report," in: STORME (Ed.), *Rapprochement du droit judiciaire de l'Union européenne – Approximation of Judiciary Law in the European Union*, Bibliotheek van Gerechtelijk Recht 19, Dordrecht, Martinus Nijhoff Publishers, 1994, 37, 64. See also BRUNS (n. 7) at 17-18.

¹⁹⁷ Provisional advance on compensation for a potential future damage or true private penalty?

¹⁹⁸ Moreover such corporations actually already enjoy a strong position towards their commercial partners.

On the other hand, arbitrators sitting in Switzerland may not issue any Art. 292 CP threat because they are not a state authority. Therefore, in arbitration the application of *astreintes* is justified by the lack of other statutory incentive measures and their incorporation would represent a useful way of ensuring that awards are satisfied by threatening debtors with monetary penalties. Moreover, the fact that the money goes into the pockets of the opposing party has certainly often more effect on a litigating party than a fine that would go into the State pockets. Besides, in view of the fact that the jurisdictional function of an arbitrator is quite similar to that of a judge¹⁹⁹ and since arbitral tribunals tend to emancipate from state courts,²⁰⁰ an incorporation of *astreinte* measures in the Swiss legal system ought not to exclude arbitration. As seen, in theory, the Swiss legal system does not sanction arbitrators issuing *astreintes*, even *ex officio*. However, in practice, arbitrators seem reluctant to issue such measure. An explicit incorporation of the *astreinte* in Swiss statutes might convince them to make use of such procedural tool without apprehension. Of course, it would only represent a small step because any monetary penalty an arbitral tribunal might ultimately award in light of a party's non-compliance with a decision would itself be subject to enforcement by state courts. Nevertheless, the prospect of the arbitral tribunal imposing such a penalty, in addition to awarding any damages that might also be caused by the violation, would likely help focus the mind of a party otherwise inclined to violate an award.²⁰¹

In sum, the *astreinte* is already part of the past in Switzerland, contrary to Belgium where no *astreinte* existed before the Benelux Convention entered into force. *A fortiori*, the *astreinte* could have as bright a future in Switzerland, as in Belgium, in both litigation and arbitration proceedings. To triumph in Switzerland the *astreinte* must wait until the approach of the members of the Parliament in Bern changes: such patience will have to continue until the respect of obligations, embedded in adjudicatory bodies' decisions, attains a higher level as the compensation through damages in the country's policy. Potential developments of the P-CPC in the near future will provide either the temporary rejection of *astreintes* in Switzerland, or hopefully, the schedule and modalities of an incorporation of such incentive measure. Such incorporation would amount to a double harmonisation of Swiss law both domestically (among Cantons and at the Federal level) and internationally (with neighbouring countries).

¹⁹⁹ See, e.g., the Benelux Convention (n. 48), which was originally only intended to apply to litigation, but that wisely did not expressly exclude arbitration. See also Arts. 1709^{bis} BJC and 1056 WBR; HORMANS (n. 110) at 513, § 50 and at 530, § 73, with further references.

²⁰⁰ The evolution of international arbitration in Switzerland tends to give more and more power to arbitrators, see Art. 183 PILA and compare it with Art. 26 of the *Concordat intercantonal sur l'arbitrage du 27 mars 1969* ("CIA"; RS 279). State courts control on awards has also become more limited, see Arts. 190 and 192 PILA and contrast it with Art. 36 CIA.

²⁰¹ See BENSUADE (n. 164) at 362.