

A METHODOLOGICAL APPROACH TO DELAYING THE AUCTION OF AN ASSET

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ABSTRACT

Within the framework of the Ecuadorian legal system, civil legislation establishes that the creditor has the power to request, within the executive process, actions that lead to the collection of the debt. In this sense, once the corresponding legal procedure has been initiated and in the course of the execution, when the seizure of an asset has been decreed, it is auctioned. Previously, such property is evaluated by an authorized expert of recognized integrity, who makes an appraisal in accordance with the rules that support his expert report. However, in some cases, it is possible that the seized property is not finally auctioned, which may result in a second and even a third auction. If there are no bidders after these attempts, the plaintiff has two options: to request the seizure of another property or to request a new appraisal of the seized property. Precisely, the issue of the retasa is the main focus of this article, since, after reviewing the rules that could regulate it, it has been noted the lack of its specific regulation.

Key words: Ecuadorian legal system, civil legislation, executive process.

INTRODUCTION

Ecuadorian legislation, in the field of civil procedure, counted from 1938 to 2015 with the Code of Civil Procedure known under the acronym CPC and from 2016 the General Organic Code of Processes recognized by its acronym COGEP, officially registered on May 22, 2015, in both regulations, comes into force. but under different denominations the executive judgment (CPC) or the executive procedures (executive and order for payment COGEP) are regulated, which in essence its objective or application is related to the collection of an economic obligation, on the basis of an enforceable title, in which there is the creditor and the debtor.

The executive judgment, regulated in the Code of Civil Procedure, and the executive procedures, contemplated in the General Organic Code of Processes, have as their main objective the collection of an economic obligation established in an enforceable title These enforceable titles can be notarial documents, bills of exchange, promissory notes or other documents that give the creditor the right to claim payment of a debt The enforcement procedure provides a legal and procedural framework for carry out this recovery efficiently and effectively (González, 2017).

Importantly, COGEP introduced significant changes compared to CPC. One of the key aspects is the inclusion of the order for payment procedure, which allows a more agile and simplified process for the collection of minor debts this procedure provides a more expeditious and less formalistic option for cases in which the fulfillment of an economic obligation is sought without the need for an extensive trial (Cruz, 2019).

The Code of Civil Procedure

The Code of Civil Procedure mentioned the executive judgment in Book Two, Title II of the Conduct of Trials, Section 2, Paragraph 1, from Articles 419 to 479, in total 60 articles.

Article 439 mentioned that in the event that the debtor does not indicate assets for attachment, or if this resignation is malicious, or if the assets are located outside Ecuadorian territory, or are not



sufficient to cover the credit, the creditor could request the seizure of the assets indicated by the creditor. that is, the will of the plaintiff prevails over the assets of the defendant; Regarding the custody of the assets, there was the judicial depositary that the authority had, at this point the action of an expert is not observed or the analysis of the established considerations is not indicated, it is simply attributed to the creditor to request the seizure in case such situations occur.

Article 455 provided that "once the seizure has been made, the expert appraisal shall be carried out immediately, with the concurrence of the depositary, who shall sign the appraisal, and may make for its discharge the observations it deems appropriate, a curious situation since there are two participants, an expert and the auxiliary justice official to determine the value of the property or assets seized, Without counting on who despite the decreed measure continues to be the owner, their actions are to quantify, the one, and the other to observe particularities of discharge.

Article 456 regulated the procedure for publishing the auction posters, it is notorious that such action was carried out preferably in newspapers of provincial circulation and in places of greater circulation, it was not available or considered to be published in newspapers with greater scope such as national and / or foreign.

The process -so to speak- of the auction continues and particularizes certain guidelines, as the subject of this document article 471 detailed that "if no bidders have been presented, a new day will be set for the auction, based on half of the price of the appraisal. If there are no bidders, the creditor may also request that other assets be seized and auctioned. If the cash value offered does not cover the claim of the executor, or that of the latter and that of the third party in the case of art. 446 he or she may, at his or her discretion, request that term dividends be auctioned as claims, or that other assets of the debtor be seized and auctioned; the lack of bidders causes two situations, a new day, and; that without any revaluation expert, the property to be auctioned is considered at 50% of the value initially valued, the Code did not regulate the fee.

The general organic code of processes

The General Organic Code of Processes is structured in five books unlike its predecessor that was contained in two, of such books the IV refers to the Processes (Of knowledge, ordinary, contentious tax and contentious administrative, summary, voluntary and executive), in this the Title II called Executive Procedures that at the same time mentions the Executive Procedure and Order for Payment Procedure, Both proceed in favor of that person (actor) who intends to collect a debt.

The Executive Procedure, covers from articles 347 to 355 (9 articles) and the Order for Payment Procedure, is contained from articles 356 to 361 (6 articles), in both cases the development of the procedure is outlined.

Book V Execution, is detailed in article 362 as "the set of procedural acts to enforce the obligations contained in an enforceable title; Chapter III Auctions of seized assets and settlement of credit covers articles 395 to 413 (18 articles), among these, article 398 states that the movable or immovable property of the executed (debtor) not indicated in articles 39 - 397 will be auctioned only by the website of the Council of the Judiciary, for the purpose, the notice or "poster" (as it was called with the Civil Procedure) of auction is 'published with minimum 20 days term to the date indicated for the auction, the positions that are presented online (online) can be made from 00 to 24 hours on the day of the auction.

Article 400, indicates the requirements of the position, which for the first and second indication, must be made for 100% of the expert appraisal made with respect to the good, for the third indication will be for 75% of the expert appraisal made, and if there are no positions article 405 mentions the rate thus, "in the case where there are no bidders, The creditor may request the re-assessment of the seized goods and the auction process will be resumed with the new appraisal or request that other assets be seized and auctioned releasing the previously seized assets. At this point, it is distinguished that with the Code of Civil Procedure, in the second indication the position was made for 50% of the appraisal and in case of not presenting bidders the plaintiff could require the auction of other goods, and the General Organic Code of Processes for its part, presents two eligible alternatives for the consideration of the plaintiff. choose the figure of the retasa or choose to seize other goods, in both cases it will always be necessary to practice another expert for the appraisal of

the seized goods; the interesting thing is that in this regulation the first seized property is released, a situation that was not observed in the Code of Civil Procedure.

Rate

Guillermo Cabanellas defines the rerate as "second appraisal, reduction of what was taken out in a deserted auction, to try a new public sale

The retasa means "rebate", in the appraisal or price fixed for a judicial auction, that is, whenever a new appraisal is ordered and practiced, but under Art. 405 of the COGEP, should be considered as a decrease in the appraisal, this in order to increase the chances that there are positions and can conclude with the auction process for the collection of values ordered in a judgment.

The Plenary of the Constitutional Court of Justice, considering the attribution that concerns it in article 180.6 of the Organic Code of the Judicial Function, issues Resolution No. 05-022, officially registered under No. 71 on May 27, 2022, a document that is issued in consideration of article 405 of the General Organic Code of Processes, because its content is understood as ambiguity in relation to who must carry out the new expertise, if the same expert who prepared the first or must the judge appoint another. The analysis of the Constitutional Court establishes that the second report does not constitute a scope or extension of its predecessor, but of a different one, since such diligence entails determining the initial appraisal at least; "Therefore, it resolves that in the event that the executor requests the reassessment of the assets seized in accordance with article 405 of the General Organic Code of Proceedings, the judge will order a new expert report and for that purpose will appoint a different expert.

Expert

It is meritorious, therefore, to observe what the norm and other instruments mention with respect to the professional who makes the expert report, thus the General Organic Code of Processes defines him as "the natural or legal person who, by reason of his scientific, technical, artistic, practical or professional knowledge, is in a position to inform the judge about any fact or circumstance related to the subject matter of the dispute.


To act as an expert, in addition to the proven expertise that professionals must have, they must be accredited by the Council of the Judiciary to practice as such, their obligations and duties being those contemplated in Resolution No. 1472022, officially registered with No. 102, of July 11, 2022, which contains the Regulation of the Integral Expert System of the Judicial Function, Chapter IV, article 23, numeral 3 that indicates as a specific obligation "to present the corresponding report, in written form, with the minimum requirements established in these regulations and the law; and, upload it to the Expert Computer System, in PDF file. In the case of reports of appraisals of goods, the photographs of them must also be uploaded.

Expert report

On this point, the General Organic Code of Processes in article 224 indicates the minimum content of the expert report; In the same sense, article 29 of the Regulation of the Comprehensive Expert System of the Judicial Function also indicates the minimum requirements but makes them mandatory in any expert report.

EXPERT REPORT	
Organic Code General Process	Regulation of the Integral Expert System of the Judicial Function
Article 224	Article 29
Minimum content	Mandatory minimum contents
1. Full names and surnames, citizenship or identity card number, home address, telephone number, email and other information that facilitate the location of the expert.	1. Background: The object of the expert opinion will be delimited, specifying the subject on The one who will inform based on what was ordered by the judge, the prosecutor and / or what was requested by the procedural parties

2. The profession, trade, art or special activity exercised by the person submitting the report.	2. Technical considerations or methodology to be applied: Clear explanation of the analysis and how they apply their specialized knowledge of a profession, art or trade, to the case, the expert object or assignment subject of the expertise;
3. The accreditation number granted by the Council of the Judiciary and the declaration of the expert that it is in force.	3. Conclusions: after the technical considerations, the technical opinion or conclusion of the application of specialized knowledge on the specific case analyzed will be issued. The conclusion shall be clear and direct in relation to the expertise performed. All kinds of ambiguous judgments are prohibited, as well as any kind of value judgment about the performance of the parties in the technical report;
4. The explanation of the facts or objects submitted to analysis.	4. Inclusion of supporting documents, annexes or explanation of technical criteria: you must support your conclusions, either with supporting documents and objects (photos, demonstration sheets, certified copies of documents, audio and video recordings, etc.) and/or with a clear explanation of what is the technical or scientific basis for obtaining a specific result or conclusion. They must be exposed clearly the specialized reasons of the expert to reach the corresponding conclusion. This requirement will not be met if the conclusion is not supported by documents, objects or the technical and scientific explanation required in this paragraph.
5. The details of the examinations, methods, practices and investigations to which he has submitted said facts or objects.	Expert reports containing appraisals shall include: a. The adjusted commercial valuation, which will be determined by analyzing the value of the good with respect to others of similar conditions in the market. Where possible, at least three existing assets with characteristics and conditions similar to those of the valued property should be identified; and b. The sources of information used in this assessment; if the Whether there are few or only sources, the expert should point out this novelty in the report. In both cases, the system or methodology and the adjustment, correction or approval factors used for the determination of the adjusted commercial value shall be indicated.
6. The reasoning and deductions made to reach the conclusions presented to the judge.	In addition to the minimum obligations established in the preceding paragraphs of this article, the expert must include in the report any other requirement specifically determined by the corresponding law. Without prejudice to the requirements that must be included in any expert, verbal and/or written report, the appointed expert may include additional information that



	he or she considers relevant as part of his or her work and for the purpose of the expertise.
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Figure 1: Expert report requirements

As can be seen from the comparative table, the General Organic Code of Processes lists minimum requirements that an expert report must contain, its emphasis revolves around the data of the expert and the result of the report depends on the reasoning and deductions that I made to reach the conclusions presented to the judge; For its part, the Regulation of the Integral Expert System of the Judicial Function, although it also indicates minimum requirements, institutes them as mandatory, and unlike the Code, the Regulation focuses on whether the content of the expertise, its mode of development and application, so much so that in the case of goods it indicates additional requirements.

METHODS

Deductive method

The deductive method was used in this document by virtue of having started it with the analysis of codes and regulations of universal application and proven validity, to apply them to solutions or particular facts.

Inductive method

The reasoning was used to reach the conclusions, starting from the facts accepted as valid previously because they were contained in codes and regulations elaborated by the governing bodies of the matter until reaching the conclusions of a universal nature.

With the union of these two systems, a procedure is achieved that starts from assertions as hypotheses and seeks to refute or falsify such hypotheses, deducing from them conclusions that must be confronted with the facts.

Quantitative method

The results obtained are based on the explanation, this article is based on bibliographic and legal aspects, by taking advantage of the content of legal norms.

Bibliographic and documentary study

Books, codes, regulations, official records, criteria of the National Court of Justice were consulted.

RESULTS

From the comparative review carried out it is concluded that effectively what an executive process or procedure pursues is to guarantee the collection of an obligation generally of an economic nature, for the purpose the creditor has tools such as the seizure and seizure of property (furniture or real estate), in most cases it is opted for the seizure of real estate that are subject to expert appraisals in which professionals in the matter have to act for which they are required, however, the revised rules in civil matters and the applicable regulations do not yield parameters previously established for the case of repricing the seized property, the guidelines indicated in the General Organic Code of Processes and the Regulation of the Integral Expert System of the Judicial Function detail general requirements for the content of the report leaving the methods to the discretion of the expert, techniques or methodology to be applied subject to presenting an explanation of what has been done, acting that falls on giving a technical opinion or conclusion on the matter analyzed.

In the case of the appraisal of real estate, the Regulation establishes that the adjusted commercial appraisal will be recorded, but that occurs in the case of the rerate, understanding that in the first report the commercial appraisal was already considered, then if the rerate is intended to appraise in less how could the expert reduce the commercial value, and the situation of the debtor as affected by it, to what extent the rate proceeds in favor of both parties, how it should be carried out so that it does not affect the debtor for the exclusive benefit of the plaintiff.

The revised rules are limited only to requiring experts to indicate the system or methodology and the adjustment, correction or approval factors used for the determination of the adjusted commercial value, perhaps by the fact of carrying out the revaluation of the property, the circumstances observed for its valuation, its location, change, surface, environment, construction, functionality, type,



facilities will remain the same, then the fact that there is no regulation that regulates the parameters or methodology to reduce the value of the good is configured, in addition to the fact that if it is carried out, the situation of vulnerability in which the debtor is is not considered since the request for repayment is subject to the will of the actor.

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