The Arbitration Review of the Americas

2022

Bolivia

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The Arbitration Review of the Americas 2022 covers Argentina, Bolivia, Canada, Ecuador, Mexico, Panama, Peru and the United States; and has eleven overviews, including two on arbitrability (one focused on Brazil in the context of allegations of corruption, the other on the relationship with competence-competence across the region). There's also a lucid guide to the interpretation of "concurrent delay" around the region, using five scenarios.

Other nuggets include:

• helpful statistics from Brazil's CAM-CCBC, showing just how often public entities form one side of an arbitration;
• an exegesis on the questions that US courts must still grapple with when it comes to enforcing intra-EU investor-state awards;
• a similarly helpful summary of recent Canadian court decisions;
• another on Mexican court decisions that showed a rather mixed year; and
• the discovery that the AmCham in Peru as of July 2021 now engages in ICC-style scrutiny of awards.

Bolivia

Andrés Moreno Gutierrez and **René Claure Veizaga**
Moreno Baldivieso Estudio de Abogados

Summary

IN SUMMARY

The construction industry in Bolivia is navigating difficult times. Several conflicts have arisen within the context of public and private contracting and subcontracting. The most representative conflicts have an international dimension since they involve local and foreign companies that have submitted their disputes to international arbitration. With the excuse of preserving and protecting their interests pending international arbitration, some companies have used and abused the power of local judicial authorities to order cautionary measures against the assets and economic flows of foreign companies operating in Bolivia. This article addresses topics related to provisional or interim measures under Bolivian law and the central role of the arbitral tribunals to review the decisions issued by local courts on this subject.

DISCUSSION POINTS

- Recent experiences regarding provisional measures before the constitution of the arbitral tribunal
- Arbitration Law and the Code of Civil Procedure
- Use and abuse of cautionary measures
- Authority of local courts to order provisional measures before the constitution of the arbitral tribunal
- Authority of the arbitral tribunal to review cautionary measures ordered by local courts

REFERENCED IN THIS ARTICLE

- Law No. 708
- Law No. 439
- Plurinational Constitutional Judgment No. 0229/2017-S3
- Judgment No. 931/2017, 29 August 2017
- Judgment 140/2014, 8 August 2014

RECENT EXPERIENCES RELATING TO PROVISIONAL MEASURES BEFORE THE CONSTITUTION OF THE ARBITRAL TRIBUNAL

Pursuant to the Arbitration Law, the parties to an arbitral agreement are entitled to submit for provisional relief either before[1] or after the constitution of the arbitral tribunal.[2]

In practice, and for the purposes of this article, the latter does not represent a major source of conflict or discussion. Upon constitution of the arbitral tribunal, the common intention of the parties to the arbitral agreement, to submit the resolution of their disputes and all incidental matters to the decision of the arbitral tribunal, takes full effect. Contemporary arbitration generally accepts that the arbitral tribunal has broad powers and full authority in all matters related to provisional relief.[3]

Nonetheless, in relation to the first scenario in which the submission for provisional relief occurs before the constitution of the arbitral tribunal, recent cases have shown that certain

local companies have implemented procedural strategies involving local courts, which are plainly aimed at putting pressure on their counterparties to obtain an advantage in the context of potential negotiations.

In particular, in past years, local companies have appeared before local courts requesting the freezing of: funds deposited in bank accounts and economic flows expected by contractors and subcontractors from third parties.

The economic effect derived from those intrusive measures could be devastating. Companies that are subjected to the freezing of their funds and economic flows cannot channel a single penny through their bank accounts and must implement urgent financial solutions that may incur additional costs to maintain their operations.

Even worse, because financial entities operating in Bolivia do not communicate with each other when enforcing the freezing of funds deposited in bank accounts, this interim measure is commonly enforced individually by each financial entity, exceeding the total amount of the provisional measure and destroying the principle of proportionality universally applicable in provisional relief matters.

ARBITRATION LAW AND THE CODE OF CIVIL PROCEDURE

In the words of the Plurinational Constitutional Tribunal of Bolivia: 'The purpose of the precautionary measures is to . . . provisionally ensure compliance with the judgment'. It further states: 'To avoid unnecessary damages or encumbrances to the owner of the assets, the judge may limit the requested precautionary measure or order a different one, according to the importance of the right to be protected' (SCP 0630/2015-S2, 3 June 2015).[4]

The Supreme Court of Bolivia has identified the main features inherent to provisional relief:[5]

> . . . when referring to the characteristics, legal nature, and assumptions of the precautionary measures, it indicates that the characteristics can be considered as such:
>
> 1) Instrumentality: They are exclusively conducive to making possible the effectiveness and compliance of the sentence that may be issued in the future; thus, they are instrumental in the process of declaration and execution, hence Calamandrei called them instruments of the instrument. Their reason for being is nothing but the dependence they have on another process, hence their instrumental nature.
>
> 2) Provisionality: As soon as they lack the vocation of definitive, they must be raised when the assurance is rendered useless in the main process, either for compliance with the sentence, or for actions in progress that deprive the maintenance of the measures.
>
> 3) Temporality: Of limited duration, without being determinable a priori, they are born to become extinct. They are adopted for a limited time, which depends on the duration of the main process, an obvious consequence of instrumentality.
>
> 4) Variability: They are susceptible to modification and revocation, they are variable, and can be modified and even suppressed, according to the rebus sic stantibus principle, when the factual situation that led to their adoption is modified. Variability can be positive (to adopt or modify them) or negative (to increase them).
>
> 5) Proportionality: They must be proportionally adequate for the intended

> purposes. To this end, a reasonableness judgment will be made regarding the intended purpose and the concurrent circumstances, thereby enhancing less onerous costs for the defendant. The judicial decision based on the idea of proportionality must always be motivated.

The Arbitration Law does not contain an exhaustive list of the interim measures that may be adopted to protect the interests or property of the parties while the arbitration proceedings are pending. In the absence of specific regulations applicable in the field of arbitration, the norms of the Code of Civil Procedure on this subject are applicable.

In accordance with the civil procedural law, local authorities have broad and extensive powers, being empowered to order a wide range of interim measures in accordance with the circumstances and particularities of the case.[6]

In general, the Supreme Tribunal of Justice of Bolivia has established that the following interim measures can be adopted:[7]

> At one time it was doctrinally held that the precautionary measures ensured only the execution of the sentence.
>
> This position has been overcome, given that they not only serve to guarantee the execution of the sentence but also its effectiveness, which is shown when the "winning" party in the lawsuit does not want the sentence to be executed, turning it into a monetary sentence, rather, he wants it to be executed on its fair terms (do, don't do...). That is why, depending on the function they develop, more or less incisive, it is possible to distinguish:
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> a) Assurance measures: they constitute the appropriate situation so that, once the judgment has been issued in the main proceeding, it can proceed to its execution (the most significant example is the preventive embargo);
>
> b) Conservative measures, which tend to prevent the defendant, during the pending process, from taking advantage of the results of the acts that are considered illegal by the actor (intervention and deposit of income obtained through an illegal activity)
>
> c) Innovative or anticipatory measures of the possible estimation of the claim, producing an innovation on the legal situation pre-existing to the main process (cessation of an activity, prohibition of its initiation, suspension of the corporate agreement, among others).

However, irrespective of how broad the provisional relief powers may be, the imposition of interim measures remains subject to compliance with certain proceedings and substantive conditions provided under procedural law.

Given the foregoing, the main and general procedural characteristics of provisional relief in Bolivia are that interim measures are ordered in the absence of the other party[8] and that the issuance of bonds or guarantees by the petitioners is not indispensable.[9]

The Code of Civil Procedure tries to balance the position of the parties by providing that the petitioner has the burden to demonstrate, through documentary evidence, that both of the following conditions are met: (1) there is a risk that the claim will be frustrated if provisional relief is not ordered urgently (***periculum in mora***); and (2) the case would have reasonable merits, on the basis of a prima facie analysis (***fumus boni iuris***).[10]

In respect of the aforementioned requirements, the Supreme Tribunal of Justice of Bolivia established that: 'The plausibility of the right refers to the degree of sufficient certainty that the right demanded has a justification in the current law. The danger in the delay refers to the danger of the subsequent marginal damage that could arise from the delay of the final ruling and which must be quantifiable.'[11]

In cases in which emergency arbitrators grant interim measures, the Arbitration Law provides that the efficacy of those measures is subject to submission of the request for arbitration within 15 days,[12] although it is not clear from which date the term should start.

However, the Arbitration Law states that the rules of the Code of Civil Procedure are applicable;[13] thus, the 15-day term should start from the date in which the interim measures are enforced.[14]

In contrast, the Arbitration Law is silent in respect of the case in which interim measures are ordered by a judicial court and not by an emergency arbitrator.

In addition to the above conditions that are generally applicable to all forms of provisional relief, the Code of Civil Procedure provides that the freezing or seizure of assets is applicable in specific cases:[15]

- when the debtor does not have a permanent domicile within Bolivian territory;
- when the right or obligation is evidenced through a public or private document and is not fully guaranteed; or
- in certain heritage, partnership, joint ownership or other real estate cases specifically detailed in the Code of Civil Procedure.

Under local law, an invasive aggression to property, such as the freezing of bank accounts or economic flows, should only be allowed under certain particular scenarios, which, in most recent cases, were not present.

USE AND ABUSE OF CAUTIONARY MEASURES

Despite the clarity of the cases identified by law, local courts have ordered the freezing of funds deposited in bank accounts and economic flows expected from third parties in circumstances different to those expressly individualised, disregarding that the rights and obligations claimed by the petitioners would not fall under any of the scenarios described by law and, on the contrary, would be subject to broad discussion and contention in the future arbitration.

The elevated purpose of provisional relief, designed to protect the parties or their property, is totally deformed when parties submit and local courts order the freezing of bank accounts, economic flows or other assets, when claims are evidently related to contentious or disputed rights and obligations.

In the context of construction contracting and subcontracting disputes, most claims are contentious in nature, and interim measures that differ from freezing or seizure should only be ordered with restrictive criterion.

Regretfully, the legal conditions set by law are sometimes ignored by petitioners and local courts, resulting in plain and illegal abuse.

Local practitioners and petitioners are fully aware that once the freezing of assets has been ordered and enforced, the effective lifting of the measure follows a complex, bureaucratic and lengthy path. Appeals are never-ending and, in short, affected parties are forced to litigate before local courts, in opposition to their primary and initial will to resolve and settle their disputes through arbitration, excluding complications that are naturally and unavoidably linked to judicial methods of dispute resolution.

Aside from the above, there have also been certain cases in which petitioners did not even submit their requests for arbitration within the legal term provided by law, leading to the revocation of the interim measures. In those cases, it is even more evident that the goal of the petitioners and practitioners was not to protect interests or property, but rather to cause damage or force negotiations on the basis of the difficulties associated with the lifting of freezing or seizure measures that affect funds deposited in financial institutions and economic flows expected from third parties.

AUTHORITY OF LOCAL COURTS TO ORDER PROVISIONAL MEASURES BEFORE THE CONSTITUTION OF THE ARBITRAL TRIBUNAL

From a comprehensive analysis of the legal framework governing provisional measures in Bolivia, it is beyond any doubt that local courts have the power to order provisional relief before the arbitral tribunal is constituted or at any time during the development of arbitration proceedings.

Pursuant to article 46-II of the Arbitration Law: 'It will not be considered tacit resignation to arbitration, the fact that any of the parties, before or during the arbitration procedure, requests from a competent judicial authority the adoption of preparatory or precautionary measures, or that said judicial authority grants compliance with them.'[16] The arbitral tribunal and judicial courts share a unique form of concurrent authority in interim relief matters before and during the arbitration.

However, over the past years, some practitioners have tried to sustain or have implied that any local court they choose within Bolivian territory would hold authority to order cautionary measures. This has led to grounded critics and concerns about the impartiality and transparency that should be of the essence of judicial activity.

The generous and wide attribution of authority to each Bolivian court to dictate provisional measures has its origin in the traditional litigation provided under the rules of the Code of Civil Procedure.[17] The design of the legal structure of provisional measures contained in the civil procedural law enables the parties to obtain provisional measures from any court, even if it lacks authority to decide the merits of the case. The rationale behind this norm is based on the urgency and necessity inherent to provisional measures.

Nonetheless, this argument is fragile and fails in arbitration because it disregards the principle of speciality in the application of the law.[18] The Arbitration Law expressly indicates which courts have powers to provide judicial support to arbitration.

Provisional relief in the context of arbitration should not be governed exclusively by general civil procedural law; it should be developed and enforced, taking into account the special legal provisions contemplated in the Arbitration Law, which should prevail over the Code of Civil Procedure.

Pursuant to the Arbitration Law,[19] provisional relief should only be decided by any of the following courts: the court of the seat of the arbitration; the court of the place where the

arbitration agreement was executed; or the court of the domicile or permanent residence of either party, subject to the petitioner's choice.

A practical solution to be explored to avoid potential abuse related to discretionary exercise of authority by the Bolivian courts would be to allow the parties to agree on the exclusion or derogation of the authority of local courts to order provisional relief, reserving this power for the exclusive exercise of the arbitral tribunal or an emergency arbitrator.

Nonetheless, at present, under local law and practice, it is not clear whether such an agreement would be legally valid and effective. The Arbitration Law enables the parties to restrict the arbitral tribunal from dictating interim measures;[20] however, nothing is said in respect of a potential agreement that would prevent judicial authorities from doing so.

Owing to the lack of self-enforcement authority on the part of the arbitral system, the derogation of court powers to order provisional relief should not be interpreted as the derogation of the faculties of powers of local courts to enforce interim measures ordered by arbitral tribunals or emergency arbitrators.

The bottom line is that arbitration is an agreement of a procedural nature, there being no reasonable grounds to deny legal effect to the parties' agreement that results in their disputes being resolved aside and independently from the judicial forum, both on the merits and ancillary subjects, as provisional relief.

AUTHORITY OF THE ARBITRAL TRIBUNAL TO REVIEW CAUTIONARY MEASURES ORDERED BY LOCAL COURTS

To preserve the will of the parties to an arbitration agreement, the Arbitration Law establishes that the request for precautionary measures, as well as any measure adopted by the judicial authority, in the absence of an emergency arbitrator, must be notified immediately to the arbitration centre, if it has been designated.[21] However, as in the 2021 Arbitration Rules of the International Chamber of Commerce,[22] no special sanction or legal consequence is attached to the omission to inform of the request or measures.

In light of the circumstances present in Bolivia, at the time of reviewing court decisions on interim measures, the careful and delicate mission of international arbitral tribunals or emergency arbitrators is to distinguish between procedural strategies aimed merely at putting pressure on the parties to leverage a position in negotiation, and the cases in which there are truthful and loyal merits that support the provisional relief that could have been granted by a local court.

Similar to contemporary arbitration legislation, the Arbitration Law expressly grants authority to arbitral tribunals to decide on ancillary matters.[23] Although there are no specific norms in the Arbitration Law that provide for the authority of the arbitral tribunal to review interim measures ordered by local courts, there would be no sense to believe that the parties to an arbitral agreement would have the intention of simultaneously litigating and settling their disputes in different jurisdictions (arbitral and judicial). It is undisputable that if the arbitral tribunal has authority to decide on the merits of the case, it also has powers to decide on interim measures: 'he who can do more, can do less'.

Based on the foregoing, as part of the effects of the arbitral agreement, the arbitral tribunal should have full authority to review, confirm or revoke interim measures ordered by judicial courts.

Endnotes

1 Article 46-II of the Arbitration Law. Back to section

2 Article 84 of the Arbitration Law. Back to section

3 Born, Gary. International Commercial Arbitration. 2014. p. 2428. Back to section

4 Plurinational Constitutional Judgment No. 0229/2017-S3, 24 March 2017. Back to section

5 Judgment No. 931/2017, 29 August 2017, Supreme Tribunal of Justice, Civil Chamber.- Back to section

6 The Code of Civil Procedure states the following: 'ARTICLE 324. (GENERIC SEALING POWER). Outside of the cases provided for in the articles that follow, whoever has well-founded reason to fear that during the time prior to the judicial recognition of his right, he may suffer imminent or irreparable damage, may request the urgent measures that, according to the circumstances, are the most suitable for provisionally ensure compliance with the sentence. ' Back to section

7 Judgment No. 931/2017, 29 August 2017, Supreme Tribunal of Justice, Civil Chamber.- Back to section

8 Article 315-I of the Code of Civil Procedure. Back to section

9 Article 320 of the Code of Civil Procedure. Back to section

10 Article 311-III of the Code of Civil Procedure. Back to section

11 Judgment 140/2014, 8 August 2014, Supreme Tribunal of Justice, Full Chamber. Back to section

12 Article 67-III Arbitration Law. Back to section

13 Ibid. Back to section

14 Article 310-II of the Code of Civil Procedure. Back to section

15 Article 326-I of the Code of Civil Procedure. Back to section

16 Article 46-II of the Arbitration Law. Back to section

17 Article 313 of the Code of Civil Procedure. Back to section

18 Article 15-I of the Law of the Judicial Body. Back to section

19 Article 78 of the Arbitration Law. Back to section

20 Article 84-I of the Arbitration Law. Back to section

21 Article 84-II of the Arbitration Law. Back to section

22 Article 29-7) of the 2021 Arbitration Rules of the International Chamber of Commerce. Back to section

23 Article 82-II of the Arbitration Law. Back to section

Andrés Moreno Gutierrez amorenog@emba.com.bo
René Claure Veizaga rclaure@emba.com.bo

Avenida Sánchez Bustamante No. 977, Torre Pacífi co, Piso 8, Calacoto, La Paz, Bolivia

Tel: +591 22 791554

http://www.emba.com.bo/