The Arbitration Review of the Americas

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Public Contracting, Foreign Investment and Arbitration

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Summary

IN SUMMARY

This chapter provides an explanation on how the current Bolivian conciliation and arbitration law addresses administrative contracts, which, as the means for public procurement, are expressly excluded from arbitration. Nonetheless, the two exceptions provided within the same Law are also described within the framework of the existing constitutional jurisprudence. In addition, this chapter includes an analysis concerning foreign investment and arbitration under Bolivian legislation presently in effect.

DISCUSSION POINTS

- Background to the Bolivian government's arbitration approach that resulted in Law No. 708.
- Administrative contracts: the exclusion rule and the exceptions.
- Constitutional jurisprudence on administrative contracts.
- Investment dispute resolution.

REFERENCED IN THIS ARTICLE

- Conciliation and Arbitration Law No. 708.
- Law for the Promotion of Investments No. 516.
- Law of Public Companies No. 466.
- Mining Law No. 535.
- Supreme Decision 405 of 1 November 2012.
- Supreme Decision 210 of 8 March 2017.
- Plurinational Constitutional Decision 1017/2017-S1 of 11 September 2017.
- Plurinational Constitutional Decision 554/2019-S4 of 25 July 2019.

Approximately six years after the enactment of the new Bolivian Constitution, on 25 June 2015, the Conciliation and Arbitration Law No. 708 (Law No. 708) was passed with the purpose of providing the new rules for the application of conciliation and arbitration as alternative methods to resolve disputes within Bolivian territory. Law No. 708 abrogated the previous Law No. 1770 of Arbitration and Conciliation, in force in Bolivia since 10 March 1997, which provided the legal framework that allowed the growth and development of arbitration in Bolivia.

The cited norms were developed and came to light within the Morales administration, which continued over 12 years. During the first few years of his presidency, rumours circulated regarding the abolishment of arbitration from the Bolivian legal system. Fortunately, Law No. 708 discarded those rumours, confirming and ratifying that Bolivia considers conciliation and arbitration to be valid legal mechanisms for dispute resolution.

Nonetheless, under the perspective adopted by the referred political regime, within a nationalisation process that caused a series of international arbitration cases against Bolivia and a treaty denunciation policy (addressed in a more detailed manner below), the general premise followed by the state related to keeping public contracting as far as possible from

arbitration, and should arbitration involving the state be chosen as a dispute resolution mechanism, keeping it within a domestic scope.

In light of the above-mentioned context, article 4 of Law No. 708 provides that the following matters are excluded from conciliation or arbitration:

- the ownership of natural resources;
- titles granted on fiscal reserves;
- taxes and royalties;
- administrative contracts, except as provided within Law No. 708;
- access to public services;
- licences, registrations and authorisations on natural resources in all states;
- matters affecting public order;
- matters on which there has been a final and definitive judicial decision, except for aspects derived from its execution;
- matters concerning the marital status and capacity of persons;
- matters relating to property or rights of incapable persons, without prior judicial authorisation;
- matters concerning the functions of the state;
- matters that are not the subject of a transaction; and
- any other determined by the political Constitution of the state or the law.

ADMINISTRATIVE CONTRACTS

In connection to public contracting, the fourth point of the list above provides that administrative contracts are expressly excluded from arbitration with the exceptions provided within the same Law.

Before addressing those exceptions, it is important to point out that administrative contracts are generally understood as those entered by state entities that refer to the contracting of works, provision of materials, goods and services, and others of a similar nature, directly related to the public interest or service. To this regard, the Supreme Tribunal of Justice has stated that 'administrative contracts by their nature are different from private contracts and are therefore subject to a special regulatory regime in which public law is the main rule' (Supreme Decision 405 of 1 November 2012).

Furthermore, this Tribunal has also referred to the general characteristics of these types of contracts, stating that:

> this Supreme Court has characterised as general elements of all administrative contracts: the existence of an agreement of wills, the concurrence of the administration as one of the parties, the generation of obligations between the contractor and the administration, [and] the agreement of wills is formed for the satisfaction of a direct or immediate end of a public nature. The main characteristics of these contractual forms are: the primacy of the administration's will over the will of the individual, which is expressed in the conditions of the contract; the solemn forms in the contracting procedure; the predominance of the administration in the execution stage, which is

> externalised in the so-called exorbitant clauses, as it keeps the prerogatives of state bodies, such as the power of control, the power to unilaterally modify the contract, among others, an express confession of its role in protecting public interests (Supreme Decision 210 of 8 March 2017).

On the basis of the foregoing, regarding the competent jurisdiction to resolve matters relating to administrative contracts, the Supreme Tribunal continues the previous quote as follows: 'administrative contracts by their nature are different from private contracts and are therefore subject to a special regulatory regime in which public law is the main rule, which is why the courts of ordinary civil jurisdiction are not competent to resolve disputes arising from the conclusion, execution, development and liquidation of administrative contracts, which is the responsibility of the contentious-administrative jurisdiction' (Supreme Decision 405 of 1 November 2012). To this end, on 29 December 2014, Law No. 620 was enacted as the Transitory Law for the Processing of Contentious and Contentious-Administrative Proceedings, creating a specialised jurisdiction and establishing that the competent courts are to hear contentious and contentious-administrative proceedings, arising from conflicts, to which public administration institutions are a party.

As a result and further to the referred provisions of Law No. 708, a line of jurisprudence has been generated by the Bolivian Constitutional Tribunal, gathered in Plurinational Constitutional Decision 1017/2017-S1 of 11 September 2017 (SCP 1017/2017-S1). The Decision is founded on the following facts:

- the base case related to a contract for the provision of services for the collection and transportation of solid urban waste and associated activities, between a municipal company and a private contractor;
- the contract contained an arbitration clause that was activated, the parties accepted arbitration as the mechanism for dispute resolution and underwent the corresponding arbitration proceeding;
- resulting from the latter, an arbitral award was issued, and later subject to nullity recourses filed by both parties involved;
- the arbitral award was set aside and a new award was issued by the arbitral tribunal;
- the new award was subject to nullity recourses filed by both parties;
- the decision issued by the competent court was challenged by the municipal company via a constitutional protection action under the argument of lack of sufficient motivation in the judicial ruling, which would have led to a breach of the constitutional guarantee of due process and the right of defence;
- the competent judge granted the requested protection, declaring the decision as null and void, having the defendant authority to issue a new ruling; and
- following procedure, the latter decision was sent for revision to the Plurinational Constitutional Tribunal.

Consequently, SCP 1017/2017-S1 was issued, which confirmed the decision to grant the requested protection but also stated that the 'additional considerations' provided therein had to be considered in the new ruling. Those 'additional considerations' provided in the ratio decidendi mainly refer to the following:

> An administrative contract (such as the one under analysis) must be considered to be in the public interest, whether of the central state, a department, municipality or autonomous territorial entity. In this sense, article 45 of the Law on Government Administration and Control recognises the administrative nature of contracts signed by state entities subject to control regulations and, in accordance with this fact, it is necessary to point out that the nature of administrative contracts is precisely that which makes it possible to delimit the legal regime applicable when settling conflicts that arise between parties. This means that disputes arising from administrative contracts could not be submitted to ordinary civil jurisdiction, or to arbitration, for example, but must be resolved by a specialised jurisdiction, the contentious-administrative. . . . The present Plurinational Constitutional Decision modulates the line of jurisprudence applicable to administrative contracts, whose disputes can only be heard and resolved in contentious and contentious-administrative jurisdiction, depending on the parties involved.

In the same line, in 2019, a case involving a civil construction project to be performed by a private company as contractor of a departmental entity produced Plurinational Constitutional Decision 554/2019-S4 of 25 July 2019, which stated that 'it is clearly established that administrative contracts based on the participation of the state as a person under public law are not and were not subject to arbitration.'

EXCEPTIONS TO THE RULE

As administrative contracts are expressly excluded from arbitration, the exceptions are limited to the following provisions of Law No. 708:

- state entities or companies may apply conciliation and arbitration, in disputes arising from a contract for the acquisition of goods, works or provision of services, with foreign entities or companies without legal domicile in Bolivia signed abroad, within the framework of the provisions of the corresponding contract (article 6); and;
- public companies, until the migration to the legal regime of Law No. 466 of 26 December 2013 of Public Companies, may incorporate in their administrative contracts dispute resolution clauses through conciliation and arbitration, which will have Bolivia as the seat and will be subject to Bolivian law (fourth transitory provision).

The first exception refers to the opportunity for public entities or state companies to resort to conciliation and arbitration if provided for in the agreements signed by them outside Bolivia for the acquisition of goods, works or provision of services, if and only if, the contractor is a foreign entity or company without legal domicile in Bolivia. For this purpose, public entities and companies that are to require the acquisition of goods, works or the provision of services abroad, count with express contracting regulations that allow so.

Insofar as the second exception, despite the fact that Law No. 708 establishes as a rule that administrative contracts fall out of the scope of arbitration, pursuant to its fourth transitory provision, this rule would not be applicable to administrative contracts of state-owned companies until their migration or conversion process is complied with and concluded per the terms of Law No. 466 of Public Companies. In the meantime, these companies are enabled to include conciliation and arbitration clauses in their contracts, subject to the mandatory inclusion of Bolivian law as governing law and having the seat within Bolivian territory.

In light of the foregoing, although around five years have passed since the enactment of Arbitration Law No. 708 and over six years of Law No. 466 of Public Companies, most state-owned companies – including those managing natural resources – have not concluded their migration or conversion process and therefore are currently able to submit their contractual disputes to arbitration, within the limits previously expressed.

Similarly, with regard to the highly relevant mining sector in Bolivia, Mining Law No. 535 provides for the mining association agreement as a contractual mechanism for conducting mining activities of the productive chain and developing strategic mining projects between the state (through any state mining company) and any private legal entity, whether Bolivian or foreign. Within the minimum content that a mining association agreement is to include, Law No. 535 establishes that if an arbitration clause is agreed upon, domestic arbitration shall apply exclusively.

Notwithstanding this, a potential reformation of the described legal framework is envisaged in the medium term. In October 2019, social unrest caused by controversial presidential elections resulted in a transitional new government in Bolivia led by President Jeanine Áñez, which has shown a shift in direction and a different administration approach compared with that of the Morales regime. Within the new policies, the intention to restructure the current legislation applicable to foreign investment has been expressed, including the specific interest to modify Law No. 708 towards a more arbitration-friendly set of norms. However, bearing in mind that new presidential elections are to take place in 2020, the intended legislative restructuring is yet to be confirmed.

Leaving aside the possibility of a new or amended legal framework, and until a modification to the current norms takes places, it is relevant to complement the provided analysis and information with the stipulations of Law No. 708 directed to investment dispute resolution. Foreign investment in Bolivia may interact with the state in different ways, one being the possibility to enter into public contracting for the provision of goods, works or services, but also, in the case of strategic sectors and projects, foreign entities my associate with Bolivian public entities or companies by means of association contracts or the incorporation of state mixed companies and mixed companies. Having addressed the rule and exceptions applicable to the former scenario related to public contracting, in the case of the latter, arbitration is a viable alternative to resolve disputes, but under the specific features described below.

INVESTMENT DISPUTE RESOLUTION FEATURES

Pursuant to Law No. 708, any disputes of a contractual or non-contractual nature that involve the state and arise from or are related to an investment made under Law No. 516*1* for the Promotion of Investments shall be bound by the following rules:

- investment disputes shall be subject to Bolivian jurisdiction, laws and authorities;
- parties must submit the dispute to conciliation prior to arbitration;
- conciliation or arbitration will be local;
- conciliation or arbitration will have the territory of Bolivia as their seat. Nevertheless, hearings, evidence production and other procedures,could be conducted outside of Bolivian territory; and
- the existence of an arbitration clause or the willingness to conciliate does not limit or restrict the attributions and competences of control and supervision from the

corresponding regulatory entities and competent authorities, to whom the parties will be subjected at all times according to applicable norms.

In addition, Law No. 708 states that disputes with public entities that fall within the stipulations of the previous paragraph will be resolved in the following manner:

- By the application of section II, related to disputes that involve Bolivian investment: when they arise as a consequence of the interpretation, application and execution of decisions, activities and regulations between partners of a state intergovernmental company; and when they arise within and between state companies and state inter-governmental companies.
- By the application of section III, related to disputes that involve foreign investment: when they arise as a consequence of the interpretation, application and execution of decisions, activities and regulations between partners of a state mixed company and mixed company; and when they arise within and between state mixed companies and mixed companies.

In summary, the specific chapter dedicated to investment dispute resolution establishes the central rules that will govern arbitration, distinguishing the two above-mentioned sections, one referring to disputes related to Bolivian investment and the other to foreign investment.

DISPUTES RELATING TO BOLIVIAN INVESTMENT

Law No. 708 stipulates that the following common rules shall apply to conciliation and arbitration regarding disputes that involve Bolivian investments made by a Bolivian individual or legal entity, whether public or private:

- conciliation and arbitration will be administered by a Bolivian centre;
- applicable rules for conciliation or arbitration will be those pertaining to the centre chosen by the parties; and
- the nominating authority will be appointed by the centre chosen between the parties.

Moreover, in the case of conciliation, the conciliator will be appointed by the parties based on the list of conciliators from the chosen centre. In the case of disagreement, the parties may request that the appointment is made by the nominating authority.

As regards arbitration, the following rules shall apply:

- the dispute will be solved by a sole arbitrator or a tribunal formed by three arbitrators, in which case each party will appoint one arbitrator from the list of the centre chosen by the parties;
- the third arbitrator will perform as president of the arbitration tribunal and will be elected by the two arbitrators appointed by the parties from the list of arbitrators of the chosen centre;
- in the case of disagreement regarding the appointment of a sole arbitrator or the president of the tribunal, the appointment shall be made by the nominating authority;
- the sole arbitrator or arbitral tribunal shall apply the Bolivian constitution, laws and norms to decide the merits of the dispute; and
- the arbitration shall be at law.

DISPUTES RELATING TO FOREIGN INVESTMENT

For the conciliation of disputes that involve the Bolivian state and foreign investment, the following rules shall apply.

- The conciliator shall be appointed by the parties. In the event of a disagreement, the parties may request that the appointment of the conciliator be performed by the nominating authority, which shall be designated by the conciliation centre or by the secretary general or equivalent authority of the centre for the solution of investment disputes of an organisation of which Bolivia is a part of, within the framework of an integration process.
- The conciliation rules shall be those chosen by the parties. If no agreement is reached, the applicable conciliation rules shall be those of the centre for the solution of investment disputes of an organisation of which Bolivia is a part of, within the framework of an integration process.

Pursuant to Law No. 708, to solve any dispute that involves the Bolivian state and foreign investment by means of arbitration, the following rules shall apply.

- The arbitral tribunal shall comprise three arbitrators, with each party having the right to appoint one arbitrator. The third arbitrator shall be the president of the tribunal and shall be appointed by the two arbitrators selected by the parties. If no agreement is reached, the nominating authority will conduct the appointment upon request of the parties.
- The nominating authority shall be elected by the parties. If no agreement is reached, the nominating authority shall be the secretary general or equivalent authority of the centre for the solution of investment disputes of an organisation of which Bolivia is a part of, within the framework of an integration process. If the latter is non-existent, the nominating authority shall be the secretary general of the Permanent Court of Arbitration in The Hague.
- The arbitral tribunal shall apply the constitution, laws and norms of Bolivia to decide the merits of the dispute.
- The arbitration rules shall be those selected by the parties. If no agreement is reached, the applicable arbitration rules shall be those of the centre for the solution of investment disputes of an organisation of which Bolivia is a part of, within the framework of an integration process.
- The arbitration term may be extended up to an additional 600 calendar days.
- The arbitral tribunal shall decide and resolve any objection to jurisdiction as an issue of preliminary nature.
- The arbitral award shall be definitive and unappealable. The arbitral award shall be issued within a term of 90 calendar days to be counted from the last procedural act. The term may be extended only once for an equivalent number of days, unless the arbitration rules chosen by the parties provide otherwise.
- The arbitration shall be resolved at law.

On the subject of foreign investment disputes, the main rules provide that prior to the initiation of arbitration proceedings, the parties must submit their dispute to conciliation. If

the dispute is further submitted to arbitration, the arbitration process shall be local, entailing that the seat will be the Bolivian territory and that the dispute will be subject to Bolivian jurisdiction, laws and authorities.

Notwithstanding the above-mentioned, Law No. 708 allows for the parties to freely determine the applicable arbitration rules, which, in the case of foreign investment disputes, may be those of the International Chamber of Commerce, the London Court of International Arbitration, the International Dispute Resolution Centre, UNCITRAL or any other chosen by the parties, provided that the referred mandatory conditions are met. If no consensus is reached, the applicable arbitration rules shall be those of a centre for the solution of investment disputes of an organisation of which Bolivia is a part of, within the framework of an integration process.

The latter is a relevant feature of the new investor–state arbitration provisions, considering that before the enactment of Law No. 708, there was a trend of applying to foreign investment the same conditions now established for Bolivian investment. That is to say, the arbitration rules had to be those of a Bolivian centre, which also implies that the appointment of the sole arbitrator or arbitral tribunal would be limited to the list of the Bolivian centre chosen by the parties.

In addition, it is fair to state that the Bolivian policy at the time of drafting Law No. 708 was to provide a narrow alternative to investment arbitration under international instruments.

INTERNATIONAL TREATIES

To date, all bilateral investment treaties signed and ratified by Bolivia have been denounced. Bolivia had signed 22 bilateral investment treaties with Italy, the United States, Austria, Sweden, Paraguay, Spain, Argentina, Belgium-Luxembourg, France, China, Germany, Romania, Denmark, the United Kingdom, Ecuador, Peru, Chile, the Netherlands, Switzerland, Korea, Cuba and Mexico.

The basis for such denunciations is found in the ninth transitory provision of the Bolivian constitution, which establishes that within the term of four years from the election of the executive branch, the new government authorities are to denounce, or if the case may be, renegotiate those international treaties considered contrary to the constitution.

Furthermore, even before the enactment of the current Bolivian constitution (7 February 2009), Bolivia denounced the 1966 International Convention on Settlement of Investment Disputes between States and Nationals of other States (the Washington Convention) in 2007 and therefore, the International Centre for Settlement of Investment Disputes is no longer available for settling disputes relating to investments made in Bolivian territory after the denunciation was made effective.

Despite the aforementioned, Bolivia is still a party to international instruments such as the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the 1975 Inter-American Convention on International Commercial Arbitration (the Panama Convention).

COMMENTS ON INVESTMENT ARBITRATION

Even though the conditions discussed above with respect to arbitration over foreign investment in Bolivia restrict foreign investors from choosing and having a 'neutral' seat of arbitration among other features, Law No. 708 along with Law No. 516 for the Promotion of

Investments provide the general framework and rules to be considered in advance by foreign investors currently analysing the feasibility of investing in Bolivia, which contrasts with the uncertainty that surrounded the subject in previous years.

At present, Bolivia holds four active international proceedings related to foreign investments, having thus far executed in previous cases a general policy of settling investment disputes in different stages of arbitral proceedings.

Around five years have passed after the enactment of Law No. 708 with no investment arbitration proceedings initiated so far under its provisions.

Finally, as previously underlined, a potential shift in the approach that the Bolivian state has regarding arbitration and foreign investment is foreseen, based on the commencement of actions towards that shift taken by the transitory government of President Áñez, but yet to be confirmed considering the presidential elections of 2020.

Endnotes

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