Kluwer Arbitration Blog

Interim Measures by Chilean Courts in Aid of Foreign Arbitration

Orlando Palominos (Morales & Besa) and Catharina Müller (University of Heidelberg) · Monday, September 10th, 2018

Throughout the years, Chilean courts and legislation have fostered a pro-arbitration and a pro-enforcement environment, favoring arbitration and recognizing the benefits that are generally attached to it. In such regard, the Civil Procedure Code, the Code on the Organization of Tribunals, the New York Convention on the Recognition and Enforcement of Arbitral Awards and Law No. 19,971 on International Commercial Arbitration (also known as "LACI"), encompass a clear commitment towards arbitration, particularly in connection with the finality of arbitral awards and the enforcement of foreign awards.

However, in light of recent judgments, this pro-arbitration bias seems to suffer when it comes to the request of interim measures, before national courts, in aid of foreign arbitrations. Indeed, some Chilean courts have refused to grant them in aid of an international arbitration seated in a country other than Chile and involving parties not domiciled in Chile. Is such approach consistent with Chilean law? It does not seem so.

I. Interim Measures by Chilean Courts: A Confusing Signal

Following the UNCITRAL Model Law on international arbitration, LACI meant a major improvement and modernization of Chilean legislation in this regard. As per interim measures, Article 9 LACI provides that "It shall not be deemed incompatible with the arbitration agreement for a party to request, before arbitration proceedings or during their process, from a court an interim measure nor for a court to grant such a measure."

The provision does not distinguish on the seat of the arbitration nor the nationality or domicile of the parties thus, apparently, providing for full assistance from national courts on the issuance of interim measures, be it before or after the commencement of the arbitration. Is that so?

In GCZ Ingenieros S.A.C y Otra v. Latin America Power Perú S.A.C y Otras, a civil court of Santiago casts doubts on such a straight interpretation and rejected a request for interim relief in aid of a foreign arbitration. To do so, the court argued that Chilean law did not allow such a resolution because the arbitration proceeding was seated in another country and that the respondent parties were not domiciled in Chile. To support its reasoning, the court referred to Articles 1 and 107 et seq. of the Chilean Code on Organization of Tribunals and Articles 279 et seq. of the Chilean Civil Procedure Code that, purportedly, would provide for a territorial scope of Chilean

law on arbitration.

However, such arguments and provisions are not convincing and pose a contradiction with the wording of Article 9 LACI, its legislative history and its purpose.

First, since the wording of Article 9 does not distinguish between arbitrations based in Chile or abroad, the interpreter or the court cannot make such a distinction in order to restrict the scope of the rule. Moreover, Article 1.2 LACI recognizes that Article 9 LACI is applicable if the seat of the arbitration is located outside the Chilean territory.[1)] Therefore, article 9 LACI is a clear exception to the principle of territoriality.

Furthermore, LACI was enacted to fill a legal vacuum and provide a special and autonomous set of rules, procedurally and substantially, for the international commercial arbitration.[2)] Therefore, it is improper to resort to general rules (such as the Civil Procedure Code and the Code on Organization of Tribunals) to reject interim measures in aid of foreign arbitral proceedings. Such rules remain applicable to local arbitration proceedings due to the dualistic nature of the Chilean arbitration system: on the one hand, domestic arbitration governed by general rules and, on the other hand, international commercial arbitration governed by LACI.

This approach is consistent with the adoption of the UNCITRAL Model Law and its aim at creating legal certainty, avoid the risk of the local law and to follow the general international consensus in this field. In this regard, the commentary and explanatory note by UNCITRAL on this Model Law confirms that interim measures by local courts do not depend on the place of arbitration.

Moreover, the judgement may present an additional risk if read along with certain decisions of Chilean courts in connection with interim measures granted abroad. In particular, the criterion of Chilean higher courts, as shown in Western Technology Servis Internacional Inc. v. Caucho Industriales S.A., is to reject the exequatur of interim measures granted abroad regarding assets located in Chile. Such approach, and the uniform decisions of Chilean courts in connection with the exclusive application of Chilean law over assets located in Chile, may leave claimants without proper legal protection and, on the other hand, may convey a message to defendants that Chile offers a sort of “safe haven” regarding the request and enforcement of interim measures. This would be an even bigger issue before the constitution of the arbitral tribunal or in the case of measures affecting a third party.

Another civil court also rejected an interim relief request in Hyundai Engineering & Construction v. Construtora OAS S.A. but on the basis of a very limited reasoning: “the seat in which the request was filed”. Fortunately, the judgment was overruled by the Court of Appeals of Santiago but it did not provide reasons to reach such decision.

II. Foreign Decisions May Shed Some Lights on the Subject

The issue is not new and it has already been addressed by foreign courts that, in general, have favored interim measures in aid of foreign arbitration proceedings under certain circumstances.

In such regard, although the United States’ Federal Arbitration Act does not contain a specific provision on the subject matter, the mere fact that the arbitration is seated abroad was not considered a determinative argument for rejecting an interim measure in its aid by a New York

court. Indeed, in Sojitz Corp. v. Prithvi Info. Solutions Ltd., and based on Section 7502(c) of the Civil Practice Law and Rules (as amended on 2005), the court affirmed a decision that granted an interim measure on the basis that the arbitration award would otherwise be rendered ineffectual and that the account seized was a debt owed by a New York domiciliary.

Quite similar to the United States is the situation in the United Kingdom. In such regard, Section 44 (5) of the United Kingdom's Arbitration Act authorizes interim relief by national courts if the arbitral tribunal is not able to grant them effectively. Pursuant to Section 2 (3), in the case of a foreign arbitration, the national court is allowed to reject interim measures provided that approving them is "inappropriate" considering the foreign seat. Accordingly, local courts have ruled that there must be some kind of connection to the territory of the UK, thus rejecting cases in which there was only a tenuous link to the UK (Econet Wireless Services Ltd v. Vee Networks Ltd [2006] EWHC 1568 (Comm); Company 1 v. Company 2 [2017] EWHC 2319 (QB)).

III. Promoting an International Approach from Chilean Courts towards Interim Measures

As detailed above, the denial of court-ordered interim measures in aid of a foreign arbitration by some Chilean courts, based on the location of the arbitration seat and the defendants' domicile is inconsistent with the wording, legislative history and purpose of Article 9 LACI. Moreover, such an approach is counterintuitive considering the UNCITRAL Model Law and the international consensus and decisions on the subject.

Accordingly, Chilean courts should develop a proper balance between the autonomy of the arbitral tribunal, the supportive interference of national courts and the need to foster the effectiveness of the arbitral award.

An approach based on the existence of a sufficient connection with Chile would be consistent with LACI, the international consensus and the Chilean court's cautiousness. Bearing that in mind, and considering that in the Chilean case mentioned above the operation of the respondents which the claimants aimed to inhibit took place in Chile and that a substantial part of the respondents' obligations was connected with companies whose shares and assets were situated in Chile, it would have been possible to conclude the existence of "sufficient connection", thus granting the requested

---

References

?1 BLACKABY, Nigel/PARTASIDES QC, Constantine/REDFERN, Alan/HUNTER, Martin (2015): Redfern and Hunter on International Arbitration, Student Version (Oxford, Oxford University Press, Sixth Edition), p. 429, para. 7.24.

?2 Message of the President of the Republic of Chile in History of the Law No. 19,971, Library of the National Congress, 2004, p. 7.

This entry was posted on Monday, September 10th, 2018 at 12:13 am and is filed under Chile, Interim measures, National Courts, Seat of the arbitration
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.