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Argentina: New Precedent on Preliminary Measures and International Arbitration

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The Commercial Court of Appeals in the City of Buenos Aires recently granted a request for preliminary measures. These measures aimed to obtain the necessary elements to analyze and determine whether the counterparty had breached a stock purchase agreement that included an arbitration clause as the dispute-settlement mechanism.

In this post, we discuss whether courts may issue preliminary measures in connection with a dispute covered by an arbitration clause, the two categories of preliminary measures provided for under Argentine law, and which courts have jurisdiction over these measures.

Introduction

In the last seven years, important amendments to improve Argentinian legislation on both local and international arbitration have been introduced.

One of the most important changes in the 2015 [Argentine Civil and Commercial Code \(CCC\)](#) was the inclusion of specific rules about local arbitration agreements, something that the previous civil or commercial codes did not contemplate. Although the CCC's private international law provisions do not have specific regulation for arbitration, article 2605 allows the parties to agree on the forum:

“In international matters referring to property, the parties are entitled to extend jurisdiction to judges or arbitrators outside the Argentine Republic, unless Argentine judges have exclusive jurisdiction, or the extension of jurisdiction is prohibited by law”. Likewise, section 2606 of the CCC states that: “The judge chosen by the parties has exclusive jurisdiction, unless they expressly decide otherwise.”

On the other hand, in 2018, the [Law on International Commercial Arbitration \(LACI\)](#) was enacted. The LACI is mainly based on the Model Law of the United Nations Commission on International Trade Law (UNCITRAL). In this sense, it has been argued that Argentina has taken a significant milestone that marks a strong endorsement of international commercial arbitration (All, P. M.; Rubaja, N.; “*Habemus Ley de Arbitraje Comercial Internacional*”. La Ley, 2018).

Argentinian case law has also followed the new trends in arbitration. In *Sowitec Operation GMBH*, the Chamber of Commercial Appeals in the City of Buenos Aires (June 22, 2022), analyzed a company's request to obtain the necessary elements to evaluate and verify whether its counterparty had breached a share purchase agreement that contained an arbitration clause.

Relevant provisions in Argentine Law

Although preliminary measures are not common in relation to arbitration clauses, they are relevant at the time of discussing whether courts may issue preliminary measures in connection with a dispute covered by an arbitration clause. Additionally, those who consider that courts may issue preliminary measures -even if the dispute is subject to an arbitration clause- have debated whether these measures should only be issued by the courts of the seat of the arbitration.

Various provisions in the Argentine legislation seek to answer these questions. Article 1655 of the CCC (on domestic arbitration) provides that the parties may request interim and preliminary measures to a court *“without this being considered a breach of the arbitration agreement or a waiver of arbitral jurisdiction (...)”*.

Additionally, the relevant provisions of private international law in the CCC establish: *“Argentine judges are competent to order provisional and precautionary measures (...) in cases of urgency, when the goods or persons are or might be in the country, even if they lack international jurisdiction to decide on the main proceedings”* (article 2603, paragraph B, CCC). Additionally, the forum of necessity is determined in the following terms: *“Although the rules of this Code do not grant international jurisdiction to Argentine judges, they may exceptionally intervene with the purpose of avoiding denial of justice...”* (art. 2602, CCC).

Finally, the LACI provides that *“[i]t shall not be incompatible with an arbitration agreement for a party to seek, either before or during arbitral proceedings, a precautionary measure of protection and for a court to grant such measures”* (art. 21, LACI). In this sense, the LACI establishes a joint competence between the arbitral tribunal and the judicial court to issue interim measures, according to article 38 (*“Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures of protection”*) and article 61 (*“The court shall have the same jurisdiction to grant precautionary measures of protection in arbitral proceedings, whether or not the arbitral proceedings take place in the country of its jurisdiction, as it has in judicial proceedings. The court shall exercise such jurisdiction in accordance with its own procedures and taking into account the distinctive features of international arbitration”*).

The Facts of the Case

In 2016, Sowitec Operation GmbH entered into a purchase contract with two companies for 100% of the shares corresponding to the company Loma de los Vientos S.A. Sowitec stated that the initial price was USD 5,625,000, which was partially paid through a first payment of USD 2,250,000. The balance of the price was to be paid in three instalments in accordance with the provisions of the contract.

Sowitec argued that the contract provided for the buyers' obligation to *“pay an additional price if*

Loma de los Vientos S.A. entered into one or more Supply Contracts” with Compañía Administradora del Mercado Mayorista Eléctrico S.A. (CAMMESA) relating to an energy project.

In this context, Sowitec sought as preliminary procedure that CAMMESA be required to provide information regarding the project. In its request, Sowitec argued that it sought to obtain the necessary elements to evaluate and verify whether the buyers had breached the contract. Sowitec argued that, with this information, it would be able to “*file a real and concrete claim against the buyers*”.

The Decision

The first instance judge partially granted Sowitec’s request and Sowitec appealed. In the appeal, the Chamber first held that the contract included the following arbitration clause:

“any dispute, claim, or controversy arising from this contract; or the breach, termination, fulfilment, interpretation, or validity thereof, including the determination of the scope or the applicability of arbitration to this case, shall be finally settled pursuant to binding arbitration in accordance with the in-force rules of arbitration of the International Chamber of Commerce (“ICC”). The arbitration proceedings shall take place in Amsterdam, The Netherlands (...)”.

Secondly, before analysing Sowitec’s request, the Chamber considered that a preliminary measure under Argentine law is “*a procedure to ensure the parties the adequacy and precision of their allegations, allowing them to access elements of judgment susceptible of delimiting, as accurately as possible, the object and other aspects of their future claim or opposition, or the obtaining of measures that facilitate the subsequent proceedings*”. In this regard, the Chamber stated that the preliminary measure requested by Sowitec was exclusively aimed at obtaining information to determine whether there was a “case”, and therefore differentiated such request from those preliminary measures “*aimed at securing evidence*”.

Finally, the Chamber held that under Argentine law, preliminary measures were not regulated in an exhaustive manner, therefore it was up to the “*judge’s discretion to admit measures other than those contemplated by the law, as long as it was duly justified that the proceeding was essential to properly and usefully file the claim.*”

After these considerations, the Chamber concluded that, notwithstanding “*the corresponding arbitration jurisdiction (...), there is no obstacle in making a judicial pronouncement regarding the preliminary proceedings under examination*”, since “*the procedural assistance requested by the appellant for this preliminary proceedings, which should be provided by this state jurisdiction due to its close proximity to the case, is suitable, subject to the rules of the lex fori and within the described framework*”.

Considering this, the Chamber granted Sowitec’s appeal even though the arbitration proceedings would eventually take place in Amsterdam; modified the first instance judgment, and fully granted Sowitec’s request, ordering the issuance of an official letter addressed to CAMMESA, requesting the company to provide information regarding the energy project and the supply contracts entered

into with the defendant.

Conclusions

The judgment under discussion is important insofar it analyses the applicability of preliminary measures in connection with a dispute subject to arbitration. In this case, the Chamber distinguished the two categories of preliminary measures under Argentine Law and considered that courts may issue preliminary measures in connection with a dispute covered by an arbitration clause. Moreover, the Chamber concluded that the power to grant these measures is not exclusive to the courts of the seat of arbitration. In turn, the decision is favourable to arbitration since the preliminary measures would allow Sowitec to eventually gather elements to file a request for arbitration, and the relief granted was not found to be a waiver of arbitration, therefore it did not preclude the party to file a request for arbitration.

This post is an expression of the authors' personal opinions and does not necessarily reflect Marval O'Farrell Mairal's views.

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