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Who Prevails? The Powers of the Arbitrator With Respect to Court-Ordered Interim Measures in Mexico

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Precautionary measures in international arbitration is a topic that never ceases to raise new questions and enhance further advancements due to its growing use and constant development. For instance, Mexico has experienced some improvements in these last decades regarding aspects such as anti-arbitration injunctions, powers of the court to order interim measures, the scope of interim measures, etc. However, some questions remain unanswered regarding the powers of arbitrators to review interim measures ordered by local judges.

The Mexican Arbitration Act (hereinafter "**MAA**"), an act embedded in the Mexican Commercial Code and based on the UNCITRAL Model Law on International Commercial Arbitration of 1985 ("**UNCITRAL Model Law**"), expressly recognizes the powers of both the arbitrator (*See* Article 1479 MAA) and the judge (*See* Article 1425 MAA) to grant injunctive relief in aid of arbitral proceedings. These provisions, taken together, acknowledge the so-called *"concurrent jurisdiction"* principle (*"competencia concurrente"*). Although it is mostly accepted that the decision on measures rendered by a judge is not binding on the arbitrator's final decision, there are no provisions in the MAA on the powers of the latter to revoke, suspend or modify a court-ordered measure.

The purpose of this post is to question if we should rethink the scope of court-ordered injunctions *vis a vis* the arbitral proceedings, based mainly on the principles of minimum judicial intervention and *compétence-compétence.*

The Foundation: Two Pillar Principles

As recognized by the Mexican Circuit Plenary Courts ("*Plenos de Circuito*"), arbitral proceedings seated in Mexico are ruled by several principles, among them, those that constitute a *"pillar"* of arbitration, such as the principle of minimum judicial intervention; meaning that the participation of the courts should be exceptional and only to assist the arbitral proceedings to the exceptional cases limited by the law (*See* Article 1421 MAA). Thus, preference should be given to the arbitration agreement between the parties, honoring its binding force.

On the other hand, the *compétence-compétence* principle, as explained by the Mexican Collegiate Circuit Courts ("*Tribunales Colegiados de Circuito*"), refers to the power of the arbitral tribunal to

decide on its own jurisdiction, including objections relating to the existence or validity of the arbitration agreement (*See* Article 1432 MAA). Accordingly, the arbitrator's opportunity to decide on his own jurisdiction must be respected. This principle also implies the obligation of local judges to refer the parties to the arbitration when noticing the existence of an arbitration agreement (*See* Article 1424 MAA).

These two principles serve as the spearhead for the powers of the arbitrator in terms of his or her duty to solve the dispute entrusted to him or her as originally agreed. With respect to interim measures granted by arbitrators, these principles become relevant to ensure that the dispute resolution *via* arbitration is not hampered by local judicial scrutiny and their decisions.

On paper, no decision rendered by local judges on precautionary measures should hinder the course of the arbitral proceedings. Nonetheless, on some occasions a measure ordered by the judge may *"tie"* the hands of the arbitrator in terms of solving the dispute. For instance, when a party requests the arbitrator the suspension of the court-ordered measure or when the decisions rendered by arbitrators and local judges are contradictory.

Currently, the MAA is silent on the issue, however, these principles are useful for developing better approaches to the concern in an effective way.

Concurrent, Alternative and Priority Jurisdiction: what we have, what is there and what we could achieve

What do we have? The UNCITRAL Model Law and those jurisdictions who have adopted it, follow the *"concurrent jurisdiction"* approach which basically means that both the arbitrator and the judge have the power to grant interim relief in aid of the arbitral proceedings, with no prevalence between their decisions. In the case of Mexico, this approach —or principle— is enshrined in Articles 1425 and 1479 MAA. The Secretariat Explanatory Note of the UNCITRAL Model Law of 1985 explicitly refers that the UNCITRAL Model Law does not take a *"stand"* on what is the appropriate role of the courts by *"itself"* but *"guarantees"* the inclusion of *"all instances"* of *"possible"* court intervention. This position certainly gives some discretion as to the extent of court intervention and its impact on the proceedings. Nevertheless, the exceptional nature of the judiciary aid should give us a hint on how to understand the concurrence of jurisdictions related to the granting of injunctive relief.

In the realm of arbitration, securing interim measures can be pivotal in safeguarding parties' interests and ensuring the efficacy of the arbitral proceedings. We believe Brazil stands as a beacon of clarity in this regard, setting a commendable precedent for the interpretation of interim measures within arbitration proceedings, as we further explain in the following paragraphs.

What is out there? There are other jurisdictions in Latin America, such as Brazil—whose arbitration law is inspired by the UNCITRAL Model Law but have not fully adopted it— that follow a more eclectic view, which we will refer to as the *"alternative jurisdiction"* approach. The Brazilian Arbitration Act (hereinafter "**BAA**") expressly provides that before commencing of the arbitration, the parties may seek urgent relief from a judicial court (*See* Article 22-A, ¶1 BAA) but once the arbitration has been commenced, the arbitrators will have the power to maintain, modify or revoke the provisional measure granted by the local judge (Article 22-B, ¶1 BAA). Also, the BAA makes it crystal clear that if the arbitral proceedings have already commenced, the request for

the injunctive relief will be directly addressed to the arbitrators (Article 22-B, ¶2 BAA), precluding the possibility to recourse to the local courts.

Thus, the BAA takes a proactive stance on interim measures, by recognizing and entrusting the arbitrators with the final decision on whether they maintain, modify, or revoke any provisional measures initially granted by the local judge. This grants arbitrators the flexibility and autonomy necessary to adapt interim measures as the case evolves, reflecting a practical understanding of the dynamic nature of disputes.

Furthermore, the BAA unequivocally asserts that if the arbitral tribunal has already been constituted, requests for injunctive relief must be directly addressed to the arbitrators (Article 22-B, ¶2 BAA), effectively precluding recourse to local courts, which promotes a streamlined process, ensuring that all interim measures are handled within the arbitral framework, thereby fostering efficiency and consistency.

What could we achieve? Conversely, The Dominican Republic's stance, as articulated in Article 13 of the Dominican Arbitration Act (hereinafter "**DAA**"), represents a significant commitment to the autonomy and authority of arbitral proceedings. This provision establishes a clear and unequivocal principle: decisions rendered by an established arbitral tribunal concerning the suspension or lifting of measures ordered by a judicial authority must be recognized and enforced; following a further *"pro-arbitri"* vision, which we will refer to as the *"priority jurisdiction"* approach.

This provision highlights the importance of respecting and upholding the decisions of an arbitral tribunal, even in cases where interim measures have previously been issued by a judicial court. Reflecting a strong commitment to the integrity and efficacy of arbitration proceedings as the primary means elected by the parties to resolve their dispute.

By enshrining this principle into their arbitration framework, we believe that the Dominican Republic acknowledges the fundamental principle of party autonomy in arbitration. It reinforces the idea that once parties have chosen arbitration as their method of dispute resolution, the authority to issue, modify, or revoke interim measures lies firmly within the jurisdiction of the arbitral tribunal. A commendable step towards bolstering the credibility and effectiveness of arbitration.

The Question: Who prevails? The Arbitrator *v.* the Judge

So, what about Mexico? *Who prevails* or *who should prevail?* The arbitrator or the judge? We propose that it be the arbitrator, for two main reasons: i) the arbitrator serves as the *"original"* adjudicator of the dispute, and ii) the intervention of the local courts is limited to the cases provided by the law and only to assist the arbitral proceedings (Article 1421 MAA). Therefore, it seems appropriate that the arbitrator should be the one to have the last word on issuing interim measures. In this regard, some scholars have pointed out some considerations on those jurisdictions that adopted the UNCITRAL Model Law —including Mexico— when assessing the issue of court-ordered measures and the role of arbitrators (*See* here for further details), namely:

1. The arbitrator is the only competent adjudicator to solve the dispute by means of a final award;
2. The arbitrator has the obligation to protect the rights of the parties involved in the dispute;
3. The arbitrator has the obligation to deliver an enforceable award to the parties;

4. The arbitrator has the obligation to protect the cause by means of the granting of the precautionary measures that it deems pertinent; and
5. The arbitrator may request the judge's cooperation, recognition, and enforcement of its decisions on precautionary measures.

In addition to these considerations, we must add that the arbitrator has —or at least, he or she is compelled to have— a deeper and better knowledge of the dispute, as he or she will ultimately have to decide on the merits of the case. This is the key aspect underlying the *rationale* behind the justification of the prevalence of the arbitrator's decision over the judge's.

As we said before, in the realm of arbitration, the enforcement of interim measures is a critical aspect of ensuring an efficient and effective dispute resolution process. However, in Mexico, there exists a discrepancy in the recognition of arbitrators' authority to modify or revoke interim measures issued by judicial authorities. This misalignment poses challenges to the autonomy and integrity of arbitral proceedings. Drawing inspiration from the progressive approaches of Brazil and the Dominican Republic, Mexico should consider adopting similar principles to strengthen its arbitration framework.

Currently, Mexican law does not explicitly confer upon arbitrators the authority to lift interim measures issued by the courts. This discrepancy can lead to procedural inefficiencies, potentially undermining the expeditious and flexible nature of arbitration. It is crucial to bridge this gap and empower arbitrators to exercise their expertise in determining the appropriateness of interim measures issued by courts.

The BAA provides a commendable model for Mexico to consider. By expressly granting arbitrators the power to maintain, modify, or revoke interim measures, Brazil reinforces the principle of party autonomy and respects the expertise of the arbitral tribunal. This approach recognizes that as the arbitration process evolves, the need for interim measures may change, and arbitrators are best positioned to make those determinations.

The DAA underscores the authority of an established arbitral tribunal to enforce its decisions regarding interim measures. This provision enhances the confidence of parties in the arbitral process, knowing that the decisions of the tribunal will be respected and enforced by the judicial system.

Conclusions: A feasible solution for Mexico

To fortify the arbitration landscape in Mexico, it is recommended that Mexican law be amended to expressly grant arbitrators the authority to modify or revoke interim measures issued by judicial authorities. This would align Mexican law with the principles of party autonomy and empower arbitrators to effectively manage the arbitration process.

Hence, greater powers should be given to the former, including revoking, suspending, or modifying a court-ordered measure. Ideally, the solution to this issue is to amend the MAA to expressly provide for this prevalence as the rule, following what other jurisdictions —such as Dominican Republic— have been accomplishing. However, a systematic and integrative interpretation of Articles 1421, 1425, 1432 and 1479 of the MAA, in line with the above considerations may be sufficient when, either the arbitrator or the local judge, is confronted with

the question in arbitrations seated in Mexico.

Embracing the principles exemplified by Brazil and the Dominican Republic would represent a significant step forward for Mexico's arbitration framework. It would instill confidence in the arbitral process, enhance efficiency, and solidify Mexico's position as a favorable jurisdiction for international arbitration. By empowering arbitrators, Mexico can further strengthen its role in the global arbitration community and contribute to a more robust and trusted system of dispute resolution.

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