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## Mota Engil v. Paraguay: Lessons in Contract Interpretation and Non-Compliance of Provisional Orders

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On December 8, 2023, a Permanent Court of Arbitration tribunal composed of José Emilio Nunes Pinto (president), Guido Tawil, and Claus von Wobeser issued its final award in *Mota Engil v. Paraguay* (the “State” or “MOPC”)<sup>1</sup>. In its final award, the tribunal ordered both Mota Engil and the State to make reciprocal payments due to different contractual breaches (¶ 760).

The dispute arose out of a failed rapid bust transit system called “Metrobus.” The main issue revolved around Mota Engil’s impossibility to access the construction sites as well as the lack of the required municipal permits to perform the works.

After several months of negotiations and two Memorandum of Understanding (MoU) to try and resolve the problems, the contract was terminated by MOPC in February 2020. However, Mota Engil had already lodged its request for arbitration in December 2019.

Mota Engil’s claim was that MOPC failed to grant the necessary access to the construction sites and that it also failed to obtain the necessary permits from the Municipality of Asunción to develop the Metrobus project. In addition, Mota Engil requested the tribunal to issue provisional orders enjoining MOPC from executing the performance bond and advanced payment guarantee.

On its part, MOPC argued that Mota Engil’s claims were inadmissible because it failed to comply with the multi-tiered dispute resolution clause provided for in the contract. Subsidiarily, MOPC argued that the damages claimed derived from risks assumed by Mota Engil.

### **Admissibility Issues: Paraguayan Contract Law Favored the Admissibility of the Dispute**

As indicated, MOPC’s main defense was that Mota Engil had failed to follow the multi-tiered dispute resolution clause and thus, its claims were inadmissible.

From the outset, the tribunal established that the admissibility issue was a matter of contractual interpretation pursuant to Paraguayan law, including the well-recognized principle that contracts “shall be interpreted in good faith.” (¶¶ 246, 247). In this context, the tribunal noted that on several occasions the parties drifted away from the strict dispute resolution mechanism previously agreed. One of these occasions was the parties’ failure to constitute the dispute resolution committee

envisaged as a previous step (¶ 251).

Additionally, the tribunal noted that the parties expressly agreed in their second MoU that any claims based on the contract should be submitted directly to arbitration. And, considering the parties' failure to constitute the dispute resolution committee, such step was impossible to comply with and therefore, the submission of the dispute directly to arbitration was valid (¶ 264).

Therefore, the tribunal understood that, under Paraguayan law, the dispute resolution clause contained in the second MoU must be interpreted in a way that gives effect to said provision (¶¶ 254-57). The tribunal reached this conclusion based in article 712 of the Paraguayan Civil Code,<sup>2)</sup> which codifies the principle *favor contractus* or conservation principle, which provides that “no one contracts for the sake of contracting, but rather taking care of the validity of what is stipulated.”<sup>3)</sup> This principle originated in ancient Roman law and it is also contained in soft law instruments of great relevance for international arbitration and international comparative law,<sup>4)</sup> such as the UNIDROIT Principles of International Commercial Contracts<sup>5)</sup> and the Principles of European Contract Law or PECL.<sup>6)</sup>

Considering that the seat of the arbitration was Asunción, Paraguay (¶ 7), and that the dispute was decided under Paraguayan law (¶ 10), this decision on admissibility is of great relevance for Paraguayan arbitration law, which is still behind neighboring jurisdictions such as Brazil, Argentina, or Chile.

### **Contractual Allocation of Risks Favored Mota Engil's Case**

At issue on the merits was the allocation of risks and responsibility related to the access to the works' site and the obtention of the relevant municipal permits to perform the works.

According to the State, the bidding specifications pointed out the risks associated with the lands due to outdated information and warned that the expropriation of additional land might be required (¶ 328).

Regarding the permits, the State argued that the municipal permits were not granted due to Mota Engil's failure to correctly implement the operational detours for non-permanent works (¶ 337) and that, in any case, MOPC cannot be held accountable if the municipalities incorrectly denied the permits because MOPC was a legal entity different from the municipalities (¶ 341). However, the tribunal saw it different.

First, it noted that the contract provided for MOPC's obligation to progressively grant Mota Engil access and possession to the construction sites (¶ 349) and that even if there were doubts as to which party assumed the risk of lack of access to the domain strip for lack of expropriation, this is a risk that MOPC was in a better position to face, as an instrumentality of the State that knew or should have known the disputed legal status and act accordingly (¶ 369).

The tribunal also concluded that, contractually, it was MOPC's obligation to obtain the permits for the permanent works (¶ 371). The tribunal also noted that, while the Asunción Municipality withheld the release of some permits, this was due to the design of a project that was incompatible

with the existing sewage system (¶ 381). Therefore, the tribunal found that the MOPC was directly (under the contract) and indirectly (for designing an incompatible project) responsible for Mota Engil's lack of access to the work site (¶ 384).

### **Non-Compliance with Provisional Orders Results in Sanctions for the State in the Form of Costs**

Finally, it is worth noting that the State's disregard for procedural orders issued by the arbitral tribunal expressly preventing it from calling on the performance bonds resulted in a sanction for the State in relation to the arbitration's costs.

While MOPC lawfully terminated the contract as a result of Mota Engil's failure to renew the guarantees on time (¶ 563) which, in turn, would entitle the MOPC to call on the bonds, the tribunal nonetheless issued three procedural orders (PO 1, 3 and 5) preventing MOPC from calling the guarantees to avoid aggravating the conflict (¶¶ 582, 756) and, at the same time, requiring Mota Engil to post further guarantees in exchange (¶ 587).

The MOPC tried to justify its actions arguing that the failure to call the guarantees could result in their agents being criminally prosecuted for breach of their fiduciary duties and therefore, the State would be in a vulnerable position. Yet, the tribunal disagreed with MOPC and referred to its reasoning in PO 5.

First, it recalled that the parties had voluntarily agreed to submit their disputes to arbitration. Second, all decisions issued by the tribunal have jurisdictional effects and therefore, must also be complied with as the law itself. Finally, the tribunal explained that a provisional measure, by definition, requires a party to do or not to do something, even against its will. Thus, compliance with a provisional measure issued by an arbitral tribunal voluntarily chosen by the parties cannot result in damages, as MOPC argued. On the contrary, failure to comply with an order from an arbitral tribunal may result in damages to the defaulting party (¶ 586). Moreover, the PO 1 provided for the issuance of an "Arbitration Guarantee" to replace the contractual guarantees and therefore, MOPC was not in a vulnerable position like it argued.

The tribunal ended up ordering the State to reimburse Mota Engil for costs incurred in the payment of the bonds, but more importantly, non-compliance with the provisional measure resulted in the tribunal granting a further 10% of the legal costs in favor of Mota Engil (¶ 758).

### **Conclusion**

The award in *Mota Engil v. Paraguay* carries important lessons for both parties, but specially for Paraguay, in both arbitration and contractual law.

First, the parties' behavior during the performance of a contract will be essential to decide a dispute regarding the interpretation of certain contractual provisions. Here, it related specifically to the arbitration clause and the admissibility of Mota Engil's claims, an issue so critical that could have ended in the tribunal finding that claimant had lost its chance to claim the damages it suffered.

Second, the importance of a well-drafted construction agreement. The allocation of specific duties and risks is not a task to be taken lightly. Paraguay paid a high toll here by assuming the risk of granting Mota Engil access to the work sites and getting the necessary permits from the municipalities.

Finally, while the tribunal does not have *imperium* to enforce its orders, the award reminded the State that the tribunal still has tools to sanction any non-compliance of its decisions, even if these are provisional measures. This is, perhaps, the most important part of the award, because it serves as a reminder for recalcitrant parties who wish, in one way or another, to interfere with the normal functioning of the arbitral process.

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**?1** Ministerio de Obras Públicas y Comunicaciones, PCA Case No. 2020-14, Final Award, Dec. 8, 2023 [hereinafter, “Mota Engil v. Paraguay”].

Civil Code, art. 712: Clauses capable of two meanings, one of which would result in the validity  
**?2** and the other in the annulment of the act, must be understood in the first. If both give equal validity to act, they must be taken in the sense most suited to the nature of contracts and the rules of equity.

**?3** Fancesco Messineo, Manual de Derecho Civil y Comercial, Tomo I, p. 484 (Buenos Aires, 1954).

**?4** José Moreno Rodriguez (ed.), Código Civil de la República del Paraguay Comentado, Tomo V (La Ley, 2017), pp. 776 – 78.

**?5** Article 4.5 – All terms to be given effect.

**?6** Article 5:106 – Terms to be given effect.

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