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Chilean Court Blocks Calling of Performance Bonds in Support of Potential ICSID Arbitration

Sebastian Coulon Bauer (Schellenberg Wittmer) · Saturday, March 2nd, 2024 · Asociación Latinoamericana de Arbitraje (ALARB)

In a decision dated 29 December 2023, the Chilean Court of First Instance upheld an earlier decision dated 7 November 2023, which had granted a pre-judicial conservatory measure in support of a potential ICSID arbitration. The ruling prevents the Telecommunications Regulatory Authority of the Republic of Chile (hereinafter, "**Chile**") from calling performance bonds of approximately USD 50 million.

The case is relevant for several reasons. In particular, because based on an arguably expansive interpretation of domestic procedural law, the court accepted a notice of dispute under the Chile-Norway BIT (which triggers a six-month period of amicable "consultations") as sufficient "legal action" or "claim" (*demanda*) within the meaning of Article 280 of the Chilean Code of Civil Procedure ("**CPC**").

For the reasons mentioned below, the case confirms Chile's long-standing pro-arbitration stance.

Background to the Dispute

In 2021, Wom S.A., a Chilean telecommunications company owned by the private investment fund Novator Partners ("**Wom**"), won a public tender for the deployment of 5G technology in Chile.

Wom undertook to install a network of antennas and related infrastructure for the 5G technology within a specified timeframe. As security, Wom issued several on-demand performance bonds totalling approximately USD 50 million.

Wom alleges that it faced obstacles which hindered the timely implementation of the 5G rollout. Such obstacles included permit denials and delays in accessing state-controlled lands due to a lack of coordination among governmental agencies, pandemic-related delays in the supply of essential construction materials, and difficulties with the electricity supply, among others. Wom also claimed that its requests for extension of time and amendments to the terms of the concession have been met with arbitrary and unfair treatment by the Chilean government. In this context, Wom accused the State of arbitrarily rejecting Wom's requests and unfairly imposing fines for the late deployment of the 5G network.

Due to the allegedly unreasonable and arbitrary behaviour of the State and based on public statements made by state officials, Wom allegedly feared that the Chilean telecom authority would call the performance bonds. In its submissions, Wom referred to a press release issued by a state attorney who apparently stated that the State had the right to collect the performance bonds, indicating that the guarantee would be collected in full.

Accordingly, in October 2023, Wom applied to the Chilean courts of first instance for a pre-judicial conservatory measure, seeking an *ex parte* order from the courts to suspend the collection of the bonds (the case was brought before the First Civil Court of Santiago, case Rol: C-18027-2023).

The Proceeding Before Chile's Domestic Court

Under Chilean law, a pre-judicial conservatory measure can be granted if the following requirements are met. *First*, the petitioner must describe the legal action it intends to bring and briefly state the basis of its claim. *Second*, the applicant must determine the value of the assets in respect of which the conservatory measure is sought. *Thirdly*, the applicant must provide security. *Fourth*, the petitioner must show that there are serious and qualified grounds for granting the conservatory measure. *Fifthly*, the applicant must establish a *prima facie* case and demonstrate the risk of irreparable harm if the conservatory measure is dismissed.

If the conservatory measure is granted, the applicant must file the corresponding "legal action" or "claim" (*demanda*) within 10 days and request the court or tribunal to keep the conservatory measure in place (Article 280 CPC states as follows: "Once the application referred to in the preceding Article has been accepted, the applicant shall file his/her legal action within ten days and request that the measures ordered be maintained. This period may be extended by up to thirty days for good cause.").

Wom asserted in its submission that it intends to bring a claim against Chile before an arbitral tribunal established under the ICSID Convention to seek compensation for alleged breaches of the "applicable treaties" (Application, para. 91). It claimed that there were serious and qualified grounds for granting the measure, citing the State's threats to call the bonds in full. In addition, according to Wom, the conservatory measure was necessary because otherwise the State could simply call the bonds and render meaningless a possible future award of the ICSID tribunal. Finally, Wom requested the court to consider that a notice of dispute under the applicable BIT was sufficient to satisfy the requirement to file its "action" or "claim" (*demanda*) under Article 280 CPC.

The First Civil Court of Santiago granted the pre-judicial conservative measure on 7 November 2023.

On 1 December 2023, Chile challenged the court's decision, arguing, inter alia, that Wom had failed to properly specify the claim it intended to file and that the mere triggering of the mandatory six-month "consultation" period under the BIT did not constitute a "claim" or "action" (*demanda*) in any sense. Therefore, it did not fall within the meaning of Article 280 CPC.

Chile's challenge was dismissed on 29 December 2023. The case is currently pending before the Santiago Court of Appeals.

Confirmation of Chile's Pro-Arbitration Stance

The purpose of conservatory measures is to grant provisional relief in urgent cases. A party in need of a conservatory measure sometimes cannot wait for an arbitral tribunal to be constituted in order to seek provisional relief. This is particularly the case where the party must wait for a cooling-off period of six months before it can even commence arbitration. For this reason (and in the absence of specific rules on non-judicial emergency relief), parties often seek assistance from national courts that would otherwise come too late from an arbitral tribunal.

In this respect, the decision of the First Civil Court of Santiago is remarkable. It appears to have adopted a purposive interpretation of the concept of "action" or "claim" under Article 280 CPC (arguably even an expansive interpretation) in order to ensure protection for a potential ICSID claim.

This case thus adds to a long list of recent case law confirming Chile's pro-arbitration stance (reported here, here and here).

If the ICSID arbitration goes ahead, the ICSID tribunal will have to decide whether Wom's pre-judicial request for interim measures before Chilean courts conflicts with the ICSID Convention and ICSID Arbitration Rules. Article 26 of the ICSID Convention provides that "consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy." Rule 47(7) of the ICSID Arbitration Rules (2022) state that "[a] party may request any judicial or other authority to order provisional measures if such recourse is permitted by the instrument recording the parties' consent to arbitration." These provisions have been interpreted as to to preclude state court interim measures in support of ICSID arbitration unless the applicable BIT provides for such a remedy. In *Tokios Tokelés*, for instance, the tribunal ruled that "once the parties have consented to ICSID arbitration, they must refrain from initiating or pursuing proceedings in any other forum in respect of the subject matter of the dispute before ICSID," ordering the parties to "refrain from, suspend and discontinue, any domestic proceedings, judicial or other, […] including those noted in the request for provisional measures…" (*Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 1 (Provisional Measures) dated 14 August 2002).

The ICSID tribunal will also have to decide whether Wom has triggered the fork in the road provision in the BIT.

Conclusion

The Chilean judiciary has once again demonstrated its willingness to act in support of international arbitration. The court of first instance accepted an arguably expansive interpretation of "legal action" (*demanda*) under Article 280 CPC in order to maintain the *status quo* and defer the matter to an arbitral tribunal constituted under the ICSID Convention.

It remains to be seen whether the Santiago Court of Appeals will confirm the decision of the first instance court and, if the case proceeds to arbitration, it will be interesting to see how the ICSID tribunal will deal with the interim measures granted by the Chilean domestic courts in light of the

ICSID Convention, ICSID Arbitration Rules and the applicable BIT.

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