

Mexican court allows enforcement of arbitral tribunal's provisional measure ex parte

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In *Docket no 92/2012*, the Second Collegiate Tribunal in Civil Matters of the Third Circuit considered whether it could enforce an arbitral tribunal's decision on provisional measures *ex parte*.

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Speedread

In a decision dated 13 July 2012, but not published until February 2013, the Second Collegiate Tribunal in Civil Matters of the Third Circuit ruled that it can enforce a provisional measure ordered by an arbitral tribunal without giving the affected party an opportunity to be heard. The Second Collegiate Tribunal interpreted the applicable ambiguous provisions of the Code of Commerce favour of the *ex parte* enforcement of the tribunal's provisional measure on the basis of the preservation, effectiveness and urgency of the measures, in order to avoid possible frustration of the party's rights.

Although the decision is not yet binding, state and federal courts will probably adhere to the Second Collegiate Tribunal's view on whether to hear the party affected by a provisional remedy before enforcing such a measure. (*Docket no 92/2012*.)

Background

The provisions set forth by Articles 1470 to 1476, compared to Articles 1479 and 1480 of the Code of Commerce (CoCo), concerning the adoption, recognition and enforcement of provisional remedies in (or related to) arbitral proceedings, are ambiguous:

- Articles 1470 to 1476 of CoCo establish that the recognition and execution ordered by an arbitral tribunal should be conducted like a trial, that is, admitting the claim, summoning the defendants, producing evidence, hearing pleadings and giving a judgment.
- Articles 1479 and 1480 of CoCo establish that a provisional remedy ordered by an arbitral tribunal is binding and must be enforced when such enforcement is requested from a competent judge, unless there is a reason for refusal, including reasons that can be brought to the judge's attention by the party affected by the remedy.

Article 1478 provides that the judge has full discretion when it comes to adopting provisional remedies.

Article 1479 provides that a provisional remedy granted by an arbitral tribunal will be recognised

as binding on the parties, unless the arbitral tribunal states otherwise, and it will be enforced at the request of a party. Further, the party requesting the recognition and enforcement of a provisional remedy will promptly inform the judge about any revocation, suspension or modification of the measure. Article 1479 also provides that the judge may request the party to post a bond, if he deems it appropriate and if the arbitral tribunal has not already ordered this.

Article 1480 expressly provides for the limited situations where the judge should deny the recognition or enforcement of a provisional measure.

Facts

Party A commenced arbitration against Parties B and C for breach of contract and its addendum. A argued that the defendants violated the principles of good faith, proportionality and loyalty.

On 27 September 2010, the sole arbitrator issued an award against B and C. On 25 April 2011, A requested a provisional remedy from the sole arbitrator to instruct B (the trustee in the commercial relationship) to refrain from transmitting, encumbering, transferring or changing in any way the status of the property subject to the trust.

On 26 April 2011, the sole arbitrator granted a provisional measure ordering:

- C (beneficiary), through B (trustee), to refrain from transmitting, encumbering, transferring or changing in any way or sense, the status of the property subject to the trust.
- B (trustee) to make the corresponding preventive annotations in the Public Registry of Property.
- The Nayarit Public Registry of Property to execute those preventive annotations.

The provisional measure was granted without prior notice to B or C. The arbitrator stated that the purpose of the provisional measure was to guarantee the enforcement of the award issued on 27 September 2010.

A then requested the enforcement of the provisional measure before the Fifth Civil Court in Guadalajara, Jalisco.

On 29 April 2011, the Fifth Civil Court in Guadalajara, Jalisco, ruled to enforce the provisional measure without hearing B or C, or giving them any opportunity to argue against the measure's enforcement.

Amparo proceedings before the First Federal District Court in Jalisco

The claimant in these proceedings, B, filed *amparo* proceedings before the First Federal District Civil Court (acting as an *Amparo* constitutional review court), seeking to reverse the decision of the Fifth Civil Court in Guadalajara. B argued:

- The arbitrator's decision on 26 April 2011, whereby the arbitrator granted the provisional measure, violated its fundamental due process rights because it did not have an opportunity

to be heard.

- The decision of the Fifth Civil Court in Guadalajara dated 29 April 2011, whereby the judge enforced the provisional measure, violated its fundamental rights because it did not have an opportunity to present its case on the enforcement of the provisional remedies.
- Therefore, the preventive annotations made in the Nayarit Public Registry of Property were illegal.

B also argued that Articles 1425 and 1472 to 1476 of CoCo provide that the recognition and enforcement of a tribunal's procedural order or award should be conducted in the form of a trial, that is, with any potentially affected party having a right to be heard. In this respect, Article 1425 of CoCo provides that the parties may, before or during the arbitration proceedings, request provisional remedies from the competent judicial court.

Furthermore, Article 1470 of CoCo provides that the adoption and enforcement of provisional measures will be conducted in accordance with the "Special Procedure for Commercial Transactions and Arbitration" (special procedure), provided for under Articles 1472 to 1476 of CoCo (a recent (January 2011) amendment to the CoCo.)

The special procedure provides that, once the court admits a request for provisional measures, the judge will notify the other party, giving it 15 days to answer the request. Once the respondent submits its response, the judge will summon the parties to a hearing, which will take place within three days. If the judge deems it necessary, he will provide the parties, before the hearing, with ten days for them to submit their evidence. The court will then issue its final ruling.

First Federal District Court's ruling

With respect to B's allegations, the First Federal Civil District Court determined that the special procedure does not apply to cases where a party is requesting the **enforcement** of a provisional remedy granted by an arbitral tribunal. The District Court clarified that that procedure applies to requests for a provisional remedy, rather than the enforcement of a remedy already granted by an arbitral tribunal.

The District Court instead held that Articles 1478, 1479 and 1480 regulate the enforcement of a provisional remedy granted by an arbitral tribunal. Based on those provisions, the District Court ruled that the enforcement of a tribunal's provisional measure did not bind the court to follow the special procedure.

The District Court denied B the *amparo* it requested, holding that the Fifth Civil Court in Guadalajara did not violate B's due process rights because the case at hand did not require B to submit evidence or make oral arguments. With respect to the arbitrator's decision of 26 April 2011, the District Court held there were no arguments supporting its unconstitutionality (this is the basis for any *amparo* action). Therefore, the claim should be dismissed, in accordance with the terms of the *amparo* rules of procedure.

B appealed the District Court's judgment to the Second Collegiate Tribunal in Civil Matters of the Third Circuit (federal appellate court).

B objected to the District Court's reasoning, on the ground that it had wrongly interpreted the law.

B claimed that according to a strict interpretation, Articles 1472 to 1476 of CoCo applied in this case and, therefore, the special procedure governed the recognition and enforcement of a provisional measure. B argued that for the recognition and enforcement of provisional remedies a court must:

- Give notice and summon the party against whom the provisional remedy was ordered.
- Provide that party with an opportunity to produce evidence and file its arguments.
- Decide whether to grant the provisional remedy, subsequent to hearing both parties.

Decision

On 13 July 2012, the Second Collegiate Tribunal held that the First Federal District court should have also considered the unconstitutionality of the arbitrator's decision of 26 April 2011 since it was intimately related to the decision of the Fifth Civil Court in Guadalajara on 29 April 2011. Therefore, both decisions should have been considered together. The Second Collegiate Tribunal therefore granted the *amparo* and reversed the District Court's decision on this point. However, in respect of all other claims, the Second Collegiate Tribunal confirmed the findings in the *amparo* ruling of the First Federal District court.

Findings relevant to the procedure regarding the adoption, recognition and enforcement of provisional measures

The Second Collegiate Tribunal acknowledged that provisional remedies are requested in order to preserve the dispute's subject matter, to guarantee the enforceability of the final judgment. The Collegiate Tribunal also recognised that provisional measures are usually urgent. Therefore, in order to avoid a possible frustration or modification of the status quo, courts are allowed to grant a provisional measure *ex parte*.

The Second Collegiate Tribunal found that the provisions in Articles 1470 to 1476, compared to Articles 1479 and 1480 of CoCo, concerning the adoption, recognition and enforcement of provisional remedies in (or related to) arbitral proceedings, are ambiguous. Therefore, a statutory conflict arose concerning the procedure that should be followed for the enforcement of provisional remedies.

Faced with the inconsistent CoCo regulation, the Second Collegiate Tribunal concluded that balancing the provisional measure's conservatory purpose together with the effectiveness allowed by an *ex parte* motion, on the one hand, against the due process constitutional right to be heard, on the other hand, the judge should tend in favour of granting provisional remedies (assuming a court can grant such remedy without summoning the person against whom a provisional remedy is sought).

A court should normally rule in favour of the arbitral provisional measure, assuming the requesting party has demonstrated that the request is urgent and none of the limited defences to deny enforcement of an arbitral order or award apply, in order to preserve the enforceability of the final

result of the arbitration.

Comment

This judgment provides an important guide to resolving the underlying statutory conflict with respect to the recognition and enforcement of provisional measures in Mexico. The Second Collegiate Tribunal provides an accurate interpretation of the ambiguous CoCo provisions by weighing in favour of the *ex parte* enforcement of an arbitral tribunal's provisional measure on the basis of the preservation, effectiveness and urgency of the measures, in order to avoid possible frustration of the party's rights. The Collegiate Tribunal correctly provides the checks and balances to enforce an arbitral interim measure.

The decision communicates to both practitioners and arbitral tribunals in Mexico that courts will generally enforce arbitral tribunal decisions on provisional measures, and that they will even do so *ex parte*.

Case

Docket no 92/2012 (Second Collegiate Tribunal in Civil Matters of the Third Circuit) (www.practicallaw.com/2-532-4705).

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