THE ARBITRATION REVIEW OF THE AMERICAS 2014

Published by Global Arbitration Review in association with

Arias, Fábrega & Fábrega (ARIFA)
Baker & McKenzie SAS
Cárdenas & Cárdenas Abogados
Debevoise & Plimpton LLP
Dentons Canada LLP
FTI Consulting
Maples and Calder
Mezgravis & Asociados
Miranda & Amado, Abogados
Moreno Baldivieso Estudio de Abogados
OMG
Pérez Bustamante & Ponce
Richards, Cardinal, Tützer, Zabala & Zaefferer
Veirano Advogados
Von Wobeser y Sierra, SC

gar
The international journal of commercial and treaty arbitration
www.GlobalArbitrationReview.com

Decision on Anti-Enforcement Injunctions and Access to Justice

Claus von Wobeser
Von Wobeser y Sierra, SC

Preliminary considerations

Pursuant to the legal provisions on commercial arbitration regulated in the Commerce Code[1] and the Arbitration Rules of the ICC,[2] arbitral awards are binding to the parties and must be complied without delay. If they are not voluntarily complied, they must be enforced. Once an award is issued, it is considered to be definitive and binding under the applicable law or the arbitration rules, and must be enforced by the competent court of the place where the enforcement is requested. According to article 1461 of the Commerce Code and the international treaties signed by Mexico, such as the New York Convention[3] and the Panama Convention,[4] a party requesting enforcement has the fundamental right of access to justice and, with it, the right to request national or foreign tribunals the recognition and enforcement of an arbitral award, complying the requirements provided for in international treaties and not any other additional requirements.[5]

There is no court in any country that has the extraterritorial authority or jurisdiction to order another court in a different country to suspend a proceeding initiated for the enforcement of an award. It is the court of enforcement that holds the discretion to adjourn the decision on the enforcement of the award if there is an application for the setting aside or suspension made to a competent authority at the place of arbitration. Upon application of the party claiming enforcement, such court may order the other party to give suitable security.

This mechanism is recognised by the New York Convention and the Mexican Commerce Code, and effectively allows a party requesting the annulment of an arbitral award to oppose the enforcement of such award while the determination on annulment is pending, giving suitable security in the enforcement proceeding.

Therefore, it goes against the established provisions of international arbitration and is nonsensical for a party requesting annulment to also require the court at the seat of arbitration to grant an anti-enforcement injunction ordering a party from refraining to enforce a binding arbitral award before national or foreign courts.

Facts

Party A commenced arbitration against Parties B and C – state entities – for breach of contract. The Tribunal issued an award on liability and thereafter an award on quantification of damages (the final award), condemning B and C. These parties filed for the annulment of the final award before local courts (nullity claim) and requested the issuance of a provisional measure, ordering Party A to abstain from commencing a procedure for the recognition and enforcement of the final award before local and foreign courts.

On 11 December 2012, the district court ordered the admission of the nullity claim and issued a provisional measure directed at Party A (the anti-enforcement injunction) based on article 1478 of the Mexican Commerce Code. The District Court ordered Party A to 'abstain from initiating or continuing any action aimed at obtaining the recognition and enforcement of the award on quantification' in Mexico or elsewhere with the purpose to 'preserve the existing situation and the subject' of the annulment proceeding. Also, the district court ruled that there was no need for Parties B and C 'to provide security for the damages or losses which could be caused by the granting of the provisional measure' given that these parties are entities of the public administration and therefore exempt from providing such guarantee.

Party A initiated a constitutional proceeding against the decision issued by the District Court. The constitutional tribunal ruled in favour of the protection of Party A against the anti-enforcement injunction (the *amparo* decision). The *amparo* decision provided that the issuance of the provisional measure violated the right of 'access to justice' by preventing Party A to initiate or continue with a procedure for the recognition and enforcement of the arbitral award. The tribunal declared that the anti-enforcement injunction was illegal because it did not observe the general principles for the issuance of provisional measures and because it contravenes human rights and the principles of legality and legal certainty provided for in articles 14, 16 and 17 of the Mexican Constitution. Also, the *amparo* decision considered that the filing of the claim for recognition and enforcement does not impact the subject matter of the annulment proceeding given that both actions have autonomy.

Notwithstanding the previous reasoning, the constitutional tribunal ordered the District Court to annul the *amparo* decision and to 'issue another with the purpose of preserving the subject matter of the annulment proceeding but which does not restrict [Party A's] fundamental right of "access to justice"'. Given that the provisional measure was unconstitutional in the terms requested by B and C, the *amparo* should have been complete and not partial. There is no legal justification to order the District Court to grant another decision to preserve the subject matter of the annulment proceeding when it has already been settled that the terms in which it has been requested are incompatible with Party A's fundamental rights of access to justice.

In consideration of the previous, Party A partially challenged the *amparo* decision. The following issues are currently pending resolution before the review tribunal.

Legal issues that arise from this case

A provisional measure, granted during an annulment proceeding, is illegal and not contemplated by the provisions of the Commerce Code

There are no legal provisions in the Commerce Code that allow a court to grant a provisional measure during the annulment proceeding of an arbitral award. This position may not be interpreted or inferred from the content of the provisions of the Commerce Code either.

In the discussed case, the provisional measure was granted according to article 1478 of the Commerce Code, which provides: 'The judge shall have full discretion in the adoption of the provisional measures referred to in article 1425.' Thus, article 1425 provides that: 'Even where there is an agreement to arbitrate parties may prior to the arbitral proceedings or during its conduction, request a judge the adoption of provisional measures.' From the

wording of these provisions, it is evident that provisional measures may be granted in support of arbitration before the initiation of the arbitral proceeding to maintain the status quo of the arbitration and ensure that the arbitration is possible, and to preserve the subject matter of the dispute; or during the conduction of the arbitration in support to the arbitral tribunal. These articles do not contemplate the possibility to grant provisional measures once the arbitral proceeding has concluded. According to article 1449 of the Commerce Code, arbitral proceedings conclude with the issuance of the final award.

In the discussed case, the arbitration had already been conducted and the final award issued. Therefore, the District Court had no power to grant a provisional measure during the annulment proceeding in order to bar Party A from exercising its legal right to request the enforcement of the final award.

The District Court created a new legal situation that is not contained in the Mexican legal regime. Therefore, the review tribunal should confirm that there is no legal support to grant another provisional measure in order to 'preserve the subject matter of the annulment proceeding', as this situation is not regulated in the Commerce Code.

The position that national courts in an annulment proceeding have priority is contrary to Mexican law on commercial arbitration

Parties B and C have filed for the review of the *amparo* decision, with the contention that national tribunals must be allowed to analyse the validity of the arbitral award prior to its execution. They reason that the existence of a procedure for recognition and enforcement of an arbitral award, will necessarily lead to its enforcement, and that the procedure of recognition and enforcement deprives local tribunals of the jurisdiction to solve with regards to the annulment of the arbitral award. These parties argue that it is not possible to accumulate foreign proceedings and that without the provisional measure the Mexican judiciary will be prevented from analysing the validity of the final award prior to the foreign judges. Also, they have argued that national judges would not have the priority to solve the annulment of the award if leave for enforcement is allowed.

This position is contrary to the Mexican law on commercial arbitration. The review tribunal should recognise the following:

- Article 1461 of the Commerce Code, and articles 4, 5 and 6 of the New York Convention, allow a party to request the recognition and enforcement of the arbitral award in other jurisdictions. According to the New York Convention, the court requesting the enforcement of an award that has been annulled in another jurisdiction has the power of recognising that annulment.
- Foreign courts shall not analyse the validity of the arbitral award. This analysis may only be conducted by competent courts at the place of arbitration. Therefore, according to the provisions of the Commerce Code, New York or Panama Conventions, foreign judges may only recognise and execute the award, or refrain from doing so, if a cause for doing so is found.
- Accepting that the national courts must analyse the validity of the awards issued in their territory before they may be enforced in such country or abroad is contrary to human rights, the Commerce Code, and the New York and Panama Conventions, which oblige courts of a state to recognise and enforce arbitral awards issued by another state party.
- Allowing the district court to prevent Party A from enforcing the award, which is binding and has the nature of a final judicial decision, is contrary to the Commerce Code and articles III and V of the New York Convention and 4 and 5 of the Panama Convention.
- Party B and C are not without defence, given that they may argue article VI of the New York Convention and article 6 of the Panama Convention before a foreign judge, requesting that the decision on enforcement be stayed until the decision on the annulment action is issued.

Security to stay enforcement pending annulment of an award

Article VI of the New York Convention and article 1463 of the Commerce Code provide that the court of enforcement of the arbitral award may ask that the party requesting the stay of this procedure provides security, pending a determination on the annulment proceeding.

Notwithstanding the previous, in the case being discussed, the District Court ordered the anti-enforcement injunction and determined that it was not necessary for Parties B and C to provide security. In this situation, the government entity received a more favourable treatment than the one provided for in the applicable regulations.

Thus, the anti-enforcement injunction created an unequal ground whereby a party requesting the annulment of an arbitral award has all the rights and none of the burdens in prejudice to the party that has obtained a binding arbitral award, and is prevented from enforcing this decision with no security either.

Comments

The reasoning by the constitutional tribunal for annulling the anti-enforcement injunction was a first (but partial) step for the positive reinforcement that the Mexican state favours the recognition and enforcement of arbitral awards, both in its territory and abroad. The legal reasoning, followed by the constitutional tribunal, correctly interpreted the autonomous nature of both the annulment procedure and the recognition and enforcement procedure by concluding that depriving a party of its right to legal action is contrary to human rights and to the general principle of law of 'access to justice'.

Notwithstanding the above, the constitutional tribunal did not fully analyse the legal matters that arise from this case and incongruently ordered the District Court to issue another decision to protect the subject matter of the annulment proceeding.

The review tribunal should correct the partial analysis conducted by the constitutional tribunal in a consistent manner to the objectives of the provisions of arbitration of the Commerce Code (which incorporate the UNCITRAL Model Law provisions), the New York and Panama Conventions. The review tribunal must give full effects to these legal instruments and acknowledge that a court maintains the discretion to enforce an arbitral award even when annulment proceedings are occurring in the country where the award was rendered.[6]

The solution to be adopted by the review tribunal will be key to ensuring that Mexican courts are motivated by an interest in facilitating the recognition and enforcement of foreign arbitral awards, not preventing it. The stance that is ultimately followed by the review tribunal may strengthen the efficacy of international awards in a view to the objectives of the New York Convention and the needs of foreseeability and fairness in the scope of judicial review.

Notes

1 Article 1461 Commerce Code, 'Arbitral awards, irrespective of the country in which they are rendered, shall be recognised as binding and, after the filing of a petition in writing to court, they shall be enforced according to the provisions of this chapter.'

2 Article 28, ICC Rules of Arbitration:

> *'Article 28: Conservatory and Interim Measures:*
>
> *1) Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate.*
>
> *2) Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the arbitral tribunal thereof.'*

3 Convention on the Recognition and Enforcement of Arbitral Awards of 1958 (New York Convention).

4 Inter-American Convention on International Commercial Arbitration of 1975.

5 File with the request:

- the original of the award or a certified copy;
- the original or certified copy of the arbitral agreement; and
- an official translation of the award if it is rendered in a language other than the official language of the country in which its execution is being requested.

6 Christopher Koch, 'The Enforcement of Awards Annulled in their Place of Origin', *Journal of International Arbitration*, (Kluwer Law International 2009 Volume 26 Issue 2) p267–292.

Claus von Wobeser
Von Wobeser y Sierra

Claus von Wobeser is managing partner of Von Wobeser y Sierra with almost 40 years of experience advising both multinational Fortune 500 clients as well as governments. He has an undisputed track record acting as counsel and arbitrator appointed by international companies and governments involved in international investor-state or commercial disputes. Furthermore, he has a strong background in corporate and litigation matters, and has been the leader in some of the most groundbreaking transactions taking place in Latin America and Mexico during the past 30 years.

Mr von Wobeser has received international recognition for his work as an arbitrator and has been involved in more than 100 arbitral proceedings globally including the Latin America region, North America, Europe, Africa and Asia. He has represented foreign and Mexican companies in international arbitrations conducted under the rules of the ICC, AAA, ICDR, UNCITRAL Arbitration Rules, ICSID, NAFTA, Inter-American Commercial Arbitration Commission, Hong Kong International Arbitration Center and the LCIA. He has served as an arbitrator in more than 15 investor state arbitration cases under UNCITRAL Arbitration Rules, ICSID and ICSID Additional Facility Mechanism.

Additionally, he has acted as arbitrator in ad hoc arbitrations as well as a judge ad hoc in the Inter American Human Rights Court. Mr von Wobeser has acted as an expert witness on Mexican and international law in several international arbitrations, as well as before US and English Courts. Other experience includes appearing as counsel in arbitrations and before Mexican courts in disputes relating to foreign and international awards, and arbitration agreements and their enforcement.

VON WOBESER Y SIERRA

Guillermo González Camarena 1100
Piso 7, Col Santa Fe, Centro de Ciudad
Del Álvaro Obregón, CP 01210
Mexico City
Mexico
Tel: +52 55 5 258 10 00

Claus von Wobeser
cvonwobeser@vwys.com.mx

www.vonwobeserysierra.com

Offering excellence and integrity, Von Wobeser y Sierra SC was founded in 1986 and is one of the foremost Mexican law firms offering full-service legal solutions. The firm is composed of more than 30 different practice areas and specialised desks with a strong roster of international and national clients. Its lawyers are renowned for their expertise in advising and fortifying leading companies in establishing and conducting day-to-day business dealings related to entering and expanding their operations in Mexico and Latin America. The firm has been recognised on an international level by various institutions, including *Chambers Global*, *Chambers Latin America*, *Latin Lawyer 250*, *Global Arbitration Review* (*GAR 100*), *Legal 500* and *IFLR 1000*, among others.

Our arbitration team is renown on an international level, and the firm is a member of various national and international arbitration institutions, including The American Arbitration Association, The London Court of International Arbitration, The International Chamber of Commerce, CANACO and CAM, among others. Our arbitration lawyers are experts in all matters related to arbitration and have acted as arbitrators, counsel and expert witnesses. The team also has solid expertise as co-arbitrators and Chairman of Arbitral Tribunals.

Strategic research partners of
the ABA International section

THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012

The Official Research Partner of
the International Bar Association

Law
Business
Research