Interim Measures and Emergency Arbitration in Chile

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In the past fifteen years, Chile has become a leading arbitration hub in Latin America due to its constant legislative and judicial commitment to promoting and protecting alternative dispute resolution methods.[1] As a result of its pro-arbitration approach, Chile is considered one of the most attractive arbitration venues in the region.[2]

Chile has been a particularly appealing venue because of its courts' readiness to collaborate with arbitration proceedings. However, Chilean case law shows that there are significant obstacles to consolidating the *pro arbitri* approach when it comes to interim measures in support of international arbitration.

This article focuses on three different scenarios regarding interim measures: one, measures ordered by foreign arbitral tribunals to be enforced in Chile; two, measures requested in Chilean courts in support of international arbitrations with a foreign seat prior to the constitution of the arbitral tribunal; and three, measures ordered by emergency arbitrators to be enforced in Chile.

In this regard, the article examines how and when the Supreme Court of Chile recognises interim and provisional measures ordered in foreign-seated arbitrations, and reviews the Chilean Supreme Court's approach of failing to recognise arbitral awards that order interim measures to be enforced in Chile.

It also reviews the Chilean courts' approach to interim measures requested to support a foreign-seated arbitration before the constitution of the arbitral tribunal. It reviews the Chilean courts' changing approach, which have gone from

1 Presidential message on the enactment of Chilean Law 19971 on international commercial arbitration (29 September 2004): 'We should aspire, from both a public and private point of view, to be in a prominent position as a centre for international arbitration, especially in Latin America' (free translation).

2 M. Vásquez, '*Ley chilena de arbitraje comercial internacional: Análisis de las doctrinas jurisprudenciales, a diez años de su vigencia*' (2015) Vol 21, No 2, Ius et Praxis, p 525.

granting provisional measures in support of international foreign-seated arbitration prior to the tribunal constitution to denying them. Lastly, we also review possible trends in Chile with respect to emergency arbitration awards to be enforced in Chile, in light of the cases discussed.

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How Chile regulates interim measures

In general, modern arbitration laws recognise that arbitrators can grant interim measures in support of an international arbitration[3], as is the approach in the UNCITRAL Model Law of 1985. This trend is similar to that in other Latin American countries. Indeed, Law 19971 on international commercial arbitration ('LACI') came into force in Chile in 2004, incorporating the provisions of the UNCITRAL Model Law of 1985.

The LACI establishes that Chilean courts have jurisdiction to issue interim measures in support of international arbitration. Article 9[4] provides that arbitration agreements are compatible with granting interim measures and[5], as such, the LACI recognises that national courts can grant them.

Likewise, article 1 of the LACI provides as an exception to its territorial application for international arbitration the adoption of provisional measures. This is important when determining whether Chilean courts have jurisdiction and authority to issue interim measures in support of foreign-seated international arbitrations before the constitution of the arbitral tribunal.

Chile is also a signatory to the New York Convention and Chile can thus recognise and enforce foreign arbitral awards. It does so through the exequatur process before the Chilean Supreme Court, which parties can only oppose on strict due process and public order grounds.[6]

This is the regulatory framework under which the Chilean courts consider whether to recognise interim measures granted by foreign arbitral awards, and whether they have jurisdiction to grant interim measures in support of foreign-seated future arbitrations.

How Chile recognises and enforces interim measures

Recognising arbitral awards granting interim measures is, in many countries,[7] controversial. The challenge in Chile arises from Article I of the New York Convention, which refers to recognising 'arbitral awards.'[8]

There is a certain lack of consensus on whether interim or provisional measures are included within the concept of an 'arbitral award' although several academics take the view that the New York Convention's concept of an 'arbitral award' does not encompass decisions ordering interim protection measures or provisional measures.[9] Therefore, the question is whether awards granting interim measures can be recognised (excluding measures granted along with the merits awards), since they are not considered 'arbitral awards, mainly because they are provisional.

3 J. Rivera, '*La ejecución de medidas cautelares y provisionales en un país distinto al de la sede del arbitraje*' (2017) Year LXXXI No 32, La Ley 2017-A, p 1.

4 LACI, Art 9: 'A party requesting a court to grant interim measures or the court actually granting them, in either case whether before or during the arbitral proceedings, is not per se incompatible with an arbitration agreement' (free translation).

5 UNCITRAL Model Law of 2006, Art 9: 'It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.'

6 LACI, Art 35 and Chilean Civil Procedure Code, Art 245.

7 See footnote 3.

8 New York Convention, Art I: '1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought. 2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.'

9 See F. González de Cossío, 'Arbitraje' (Porrúa: 2011), p 730; G. Kaufmann-Kohler and A. Rigozzi '*Arbitrage International*' (Weblaw: 2010), p 387; and J. Lew, L. Mistelis and S. Kröll, 'Comparative International Commercial Arbitration' (Kluwer Law International: 2003), paras 23-94.

Under Chilean procedural law, an emergency arbitrator's award could be considered final – since it entails the complete decision with respect to the matters for which it has authority – and thus be recognised by the Supreme Court

Chilean courts have tended not to recognise orders or awards granting interim measures, since these arbitral decisions would not be categorised as 'arbitral awards' according to Chilean procedural law. Under Chilean procedural law, a ruling is final when it ends an instance, resolving the issue or matter that is the object of the dispute, or at least when it permanently resolves issues that are incidental to the trial.[10]

In this regard, the Chilean Supreme Court has clearly refused to recognise foreign-seated arbitral awards granting interim measures in exequatur proceedings.[11]

10 Chilean Civil Procedure Code, Art 158.

11 *Western Technology Services International Inc. (Westech) v Sociedad Chilena Cauchos Industriales SA (Cainsa),* Supreme Court of Chile, Dot No 5468-2009, 11 May 2010.

Interim measures in support of foreign-seated international arbitrations

Interim measures are an exception to the territorial scope of the LACI.[12] This means that Chilean courts have jurisdiction over interim measures related to foreign-seated international arbitrations. Nonetheless, the civil courts have been inconsistent in this respect, which raises the question whether Chile has a court with jurisdiction over this matter.

When the LACI came into force, the Chilean courts considered that they had jurisdiction to grant interim measures for foreign-seated international arbitrations before the constitution of the arbitral tribunal.[13] One of the first cases was decided in 2008,[14] in which the Chilean court granted an *ex parte* interim measure in support of an arbitration, which was yet to be initiated in Zurich under the International Chamber of Commerce rules. Two other courts followed suit.[15]

12 LACI, Art 1.

In 2017, however, a civil court rejected the interim measure requested in the case *GCZ Ingenieros S.A.C v Latin America Power Perú S.A.C*[16] in support of an arbitration in Peru. In this case before the Chilean civil courts, GCZ Ingenieros S.A.C. requested interim relief against the respondent that would oblige it to inform its potential buyers of the arbitration that was in the arbitrators' appointment stage. The court dismissed the request on the grounds that the future respondents' addresses were not in Chile and thus the national rules on this matter did not apply because the court did not have jurisdiction over the respondents.

This unfortunate decision has had important consequences. The trend among academics and courts had

13 F. Ossa and R. Zamora, '*El arbitraje internacional en la jurisprudencia*' (Thomson Reuters: 2014), pp 63-64.

14 *Constructora Sigdo Koppers Salfa Limitada v Lurgi*, Civil Court 28 of Santiago, Dot No C-5243-2005, 26 May 2008.

15 *Constructora Hochtief-Tecsa S.A. v Hidroeléctrica La Confluencia S.A.*, Civil Court 19 of Santiago, Dot No C-18468-2012, 16 August 2013, and *Domino's Pizza v Ann Arbor Foods*, Civil Court 11 of Santiago, Dot No C-6853-2007, 29 August 2014.

16 *GCZ Ingenieros S.A.C v Latin America Power Perú S.A.C and others*, Civil Court 27 of Santiago, Dot No C-28263-2016, 13 January 2017.

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been consistent in confirming that Chilean civil courts had jurisdiction in matters regarding interim measures in support of foreign-seated international arbitrations before the constitution of the arbitral tribunal. However, the 2017 judgment casts some doubt on this issue.

Emergency arbitration

The Supreme Court of Chile's stance of not recognising foreign-seated awards that grant interim or provisional measures has created uncertainty with regard to its position when it comes to recognising awards issued by emergency arbitrators, in the absence of any rulings in this area.

The purpose of emergency arbitration is to assess whether there are justifiable reasons for imposing urgent, interim measures in support of an international arbitration that needs to start without delay, before the arbitration starts, when these measures cannot wait for the tribunal to be constituted.[17]

Based on these considerations, some authors take the view that the award granting an interim measure should be regarded as definitive and final, since it resolves the specific issue that the arbitrators were asked to resolve.[18] There are some international court decisions supporting this position, such as *Yahoo! Inc. v Microsoft Corporation*,[19] in which the District Court of New York refused to annul an award an emergency arbitrator had rendered because it deemed that the award was final.

Under Chilean procedural law, an emergency arbitrator's award could be considered final – since it entails the complete decision with respect to the matters for which it has authority – and thus be recognised by the Supreme Court. The courts have yet to analyse this matter, but there are grounds for the Supreme Court to confirm its *pro arbitri* stance and follow the international decisions on this issue.

Conclusions

It is not just Chile that is reluctant to recognise and enforce interim measures granted in a foreign award, but also other Latin American countries. Chilean courts have a very important role to play in promoting and consolidating the *pro arbitri* approach across Latin America and should serve as a model for the rest of the region. Modernising the LACI by incorporating the changes to the UNCITRAL Model Law of 2006, or similar improvements, would certainly help provide more legal certainty on the recognition of awards granting interim measures. It would also be important for the Chilean courts to consolidate their original position regarding their jurisdiction over interim measures in Chile in support of foreign-seated arbitrations before the constitution of the tribunal. Finally, we should closely monitor developments in the Chilean Supreme Court's case law on recognising emergency arbitration awards, since they are likely to have a knock-on effect on the rest of the region.

17 R. Bordachar, '*Medidas cautelares en arbitraje y la incorporación del árbitro de emergencia*' (2015) No 13, Revista Derecho y Ciencias Sociales, p 88.
18 P. Simsive, 'Indirect Enforceability of Emergency Arbitrator's Orders' (15 April 2015) <Indirect Enforceability of Emergency Arbitrator's Orders - Kluwer Arbitration Blog> accessed 2 April 2022.
19 *Yahoo! Inc. v Microsoft Corporation*, United States District Court, Southern District of New York, 13 CV 7237, 31 October 2013.