# THE ARBITRATION REVIEW OF THE AMERICAS 2016

Published by Global Arbitration Review
in association with

Cárdenas & Cárdenas Abogados

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The international journal of commercial and treaty arbitration

www.GlobalArbitrationReview.com

# Colombia

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Prior to 12 October 2012, when Law 1563 of 2012 (the Arbitral Statute) came into force, Colombian arbitration law did not include a thorough and comprehensive regulation on interim measures in arbitral proceedings. Decree 2279 of 1989 constituted the legal framework for interim measures in domestic arbitration and such regime was limited to mirroring rules for interim measures in judicial proceedings. Law 315 of 1996, the scantly drafted international arbitration law that existed before the Arbitral Statute came into force, on the other hand, did not include any rules regarding interim measures in international arbitration proceedings seated in Colombia, arguably leaving the matter to the arbitration rules chosen by the parties but, in any event, failing to refer to one key aspect, which is the role of the courts in the enforcement of interim measures ordered by international arbitral tribunals.

In the light of such a background the enactment of the Arbitral Statute, which includes a clear and detailed regulation of interim measures in both domestic and international arbitration proceedings (a dualist arbitration law still exists in Colombia), constitutes a major makeover of the almost non-existent applicable legal regime in place prior to 2012. The aim of this article is thus to present an overview of the regime's major features, with a view of some of the challenges these rather novel legal rules have yet to face in the near future.

## Interim measures in domestic arbitration

### Available measures and criteria for ordering them

With regard to interim measures in domestic arbitration proceedings, article 32 of the Arbitral Statute expressly refers to the rules contained in the Code of Civil Procedure, the General Code of Procedure and the Code of Administrative Proceedings and Administrative Contentious Procedure and states that the interim measures that may be ordered in domestic arbitrations are those that would be available to the parties if the case before the arbitration tribunal were being tried in court. The scope of the reference extends to the types of measures available, the conditions that need to be met for them to be granted and the procedure for their enforcement.

In general, interim measures in civil proceedings (different from collection proceedings – which allow the attachment and seizure of assets) and, thus, in domestic arbitrations, are limited to the registration of the complaint in the registrar's office and seizure of moveable assets when the proceedings relate to in rem rights. In tort and contractual liability procedures, available interim measures are limited to the registration of the complaint in the registrar's office where assets of the defendant are registered. Assets subject to registration in Colombia are real estate property, automobiles, motorcycles, ships and aircraft. After a first-instance ruling that is favourable to the plaintiff is rendered, such plaintiff would be entitled to request the attachment and seizure of assets.

In contentious administrative proceedings (ie, judicial proceedings in which a state entity acts as a party), interim measures are more strictly regulated than in civil proceedings. Taking into account the nature of administrative proceedings that can be submitted to arbitration (some raise issues of objective arbitrability related to the powers – or lack thereof – of arbitral tribunals to annul administrative acts), the available interim measures in domestic arbitrations that are related to administrative matters (usually government contracts) are:

- the order to maintain the status quo or reestablish an existing situation;
- an order to suspend an administrative proceeding;
- an order to adopt an administrative decision, or the construction or demolition of a construction; and
- the issuance of orders to the parties, or the imposition of obligations on the parties.

In addition to the foregoing, article 32 of the Arbitral Statute contains a broad and general provision, which entitles domestic arbitration tribunals to order any other interim measure that is deemed reasonable to protect the right subject to controversy, prevent its violation, avoid damages, cease existing affectations or guarantee the effectiveness of the claims. These types of measures are referred to as innominate measures, as they are not specifically listed in the Arbitral Statute itself or in any of the procedural codes. This is a very broad power that is given to arbitration tribunals, which must be exercised within the purposes and standards provided for in the Arbitral Statute, explained below.

Innominate interim measures in domestic arbitration are to be based on the tribunal's analysis of:

- the interest of the requesting party on the order;
- the existence of a threat on the concerned right (periculum in mora);
- the likelihood of success on the merits of the case (fumus boni iuris); and
- the necessity, effectiveness and proportionality of the measure.

In any case, the arbitration tribunal is allowed to order a measure that is different and less burdensome than the one requested by the claimant, if it so deems appropriate. The arbitral tribunal may determine, sua sponte or upon a party's request, the duration, amendment or cessation of the interim measures. Finally, as a condition for the order of interim measures the claimant is required to grant security in an amount equivalent to the 20 per cent of the estimated claims, or any other sum, as determined by the arbitration tribunal, to guarantee the payment of the damages that may be caused by the performance of the measures.

When the measure that was requested by the claimant or ordered by the tribunal is of a monetary nature, respondent may request that such measure be removed, upon submission of a guarantee that would ensure compliance with a possible adverse ruling.

### Enforcement

Interim measures ordered by domestic arbitral tribunals are binding on their recipients without the need to fulfil any special requirements or acquire any sort of court order given that abritrators in domestic arbitrations have the same powers as judges. Additionally, if the enforcement of the measure requires court assistance by a judicial authority in a judicial circuit other than the one where the arbitral tribunal is seated, the arbitral tribunal is expressly entitled to request such assistance to the competent court, which will then be obligated to provide it.

## Interim measures in international arbitration

### Purpose of the interim measures

The segment of the Arbitral Statute that refers to the power of the tribunal to order interim measures in international arbitration proceedings is based on the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law), yet contains some differences which will be explained below. Interim relief is consequently defined as any temporary measure, whether in the form of an award or not, by which, at any time prior to the issuance of the final award, the arbitral panel orders a party to:

- maintain or restore the status quo pending determination of the dispute;
- take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm to the arbitration proceeding;
- provide a means of preserving assets; or
- preserve evidence.

Given the fact that the Arbitral Statute is fairly recent, case law regarding these issues has yet to develop. Therefore, we must draw on international experience to establish the scope of the powers of the arbitral tribunal under the Arbitral Statute. Regarding the status quo, some local courts have interpreted the term to mean 'the last peaceable state of affairs between the parties'. (UNCITRAL 2012 Digest of Case Law won the Model Law on International Commercial Arbitration, page 87.) Thus, interim measures could be sought to prevent the termination or suspension of an agreement or other potentially harmful conducts.

As to the second purpose, it is clear that the scope is wide enough for the parties to seek almost any form of interim relief as long as it has a link to the ultimate goal of preventing harm to the proceedings. For instance, parties could seek the arbitral tribunal to forbid public statements, prevent interference with contractual performance or property rights or to adopt specific conducts in order to prevent the proceedings from being harmed or disrupted.

Regarding the third purpose, it is clear that arbitral tribunals may 'provide a means of preserving assets out of which a subsequent award may be satisfied' . This interim relief will certainly reduce the claimant's risk of delay in the proceedings and is aimed at avoiding fraudulent divestitures of assets or the undue privilege to certain creditors, for example.

As per the general regime of interim measures of international arbitrations seated in Colombia, it is important to bear in mind that;

- except when otherwise agreed by the parties, the arbitral tribunal may grant interim relief requested by any of the parties in the dispute;
- there is no provision regarding emergency arbitrators;
- arbitration tribunals may order a security in connection with the interim measure issued; and
- interim relief may be granted inaudita pars via a preliminary order if the arbitration panel considers that prior disclosure to the party against whom it is directed risks frustrating the measure.

Following we will refer to perhaps the most important issue for litigators and arbitrators, which is that of the conditions upon which an arbitration tribunal may order interim relief. The Arbitral Statute in this regard differs significantly from the UNCITRAL Model Law, as we will now explain.

### Conditions for granting interim relief under the Arbitral Statute

For the arbitral tribunal to grant interim relief, the Arbitral Statute demands that the measure meet the requirements of being adequate, pertinent, reasonable and timely.

The terms adequate and pertinent are not frequently linked to interim measures in Colombian law. Rather, they are concepts that are typically used in evidence law, a field to which we must refer in order to understand what the Arbitral Statute intended.

Adequacy in evidence law is the legal ability that a certain means of evidence may have to prove a given fact. Extrapolating this concept to interim measures, adequacy is the ability of the measure requested to prevent the materialisation of the risk that the party requesting the measure seeks to avoid. This means that the first test for the viability of granting an interim measure in an international arbitration in Colombia is whether the order to be issued by the arbitral tribunal can, effectively, accomplish the end result which is sought by the rule.

Pertinence, on the other hand, in evidence law, is a logical liaison between the means of evidence and a given fact that is intended to be proved in the proceeding; hence pertinence must be understood as the suitable logical link between the purpose sought, and the relief requested. This means that the end result that is intended with the relief must be relevant and have a link to the controversy. Even if the measure is a suitable way to obtain the end that the party is seeking, that end cannot be irrelevant to the controversy.

In other words, adequacy should be understood as the ability of the interim measure to fulfil the purpose sought, while pertinence is the relevance that such purpose has to the case.

The term reasonable, on the other hand, has never been defined in the context of interim measures in Colombia. We feel, however, that the term is related to the possible damage that the interim measure can cause to the party against whom it is directed. This concept force arbitral tribunals to take into account the possible effect that their orders may have in terms of ensuring that they will not cause irreparable harm to one of the parties or to the controversy itself and its possibility of successful resolution by means of an arbitral award.

Finally, timeliness makes reference to the moment in which the interim measure is requested as compared to the moment in which the measure must be adopted for it to effectively serve its purpose. A measure cannot be requested to prevent a damage that has already occurred or that can only occur far off in the future.

### Departure from the UNCITRAL Model Law

As stated above, the conditions for granting interim measure in Colombian international arbitration differ from those established in the UNCITRAL Model Law, which requires:

> *(i) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom*

*the measure is directed if the measure is granted; and (ii) there is a reasonable possibility that the requesting party will succeed on the merits of the claim.*

Even though the first of the conditions set forth in the UNCITRAL Model Law seems to resemble in substance some of those established in the Arbitral Statute, the second condition, the fumus boni iuris, is conspicuously absent from the Colombian Arbitral Statute. This is a significant difference between the Colombian regime of interim measures in international arbitration and the UNCITRAL Model Law, as well as those arbitration regimes that follow it.

The requirement – or lack thereof – of fumus boni iuris as a condition to granting interim measures is strongly debated by scholars and practitioners, as it requires the balancing of the need for arbitrators not to prejudge the controversy with the need to adopt measures during the proceeding in order to prevent irreparable harm from occurring. Colombian law seems to have sided with those who believe that the need to prevent certain situations to consummate during the proceedings should be reviewed with no regard to the likelihood of success of either party, as can be assumed at a particular moment of the controversy. This situation, in our view, generates a possible burden for parties who may have acted properly and are subject to an obligation imposed by an arbitration tribunal, before they have had a chance to present their case.

### Enforcement

The provisions regarding the enforcement of interim measures in the Arbitral Statute are similar but not identical to those of the UNICTRAL Model Law. The Arbitral Statute emphasises that a recognition proceeding is not required for interim measures granted by an international arbitration panel under any circumstances, whether seated in Colombia or abroad. The interim relief granted by the tribunal is binding and its enforcement may be requested to the Colombian judicial authorities regardless of where the tribunal is seated (in Colombia or abroad). In this case, the competent authority must act as if it were enforcing a final decision issued by a Colombian judicial authority.

The grounds for a Colombian judicial authority to refuse the enforcement of the interim measures, at the request of the party against whom they are invoked, are:

- when the arbitration agreement is void;
- when such party was not notified of the initiation of the arbitral proceeding;
- when the decision regards a controversy that is not covered by the arbitration agreement;
- when the integration of the arbitral tribunal, or the arbitration proceeding did not adjust to the agreement or the law of the seat of the arbitration, if by this the party was not able to defend himself from the interim measures sought;
- if the security in connection with the interim measure issued by the arbitration panel has not been complied; and
- if the interim measure has been suspended or modified by the arbitration tribunal.

The court can also refuse the enforcement of the interim measure sua sponte when: according to Colombian law the controversy is not arbitrable; and if the execution of the interim measure is contrary to Colombian international public policy, ie, the set of the most basic and fundamental principles of Colombian juridical institutions such as due process, impartiality of the arbitral tribunal, good faith and prohibition to abuse of rights.

### Preliminary orders

Finally, the Arbitral Statute allows arbitral tribunals to issue preliminary orders, that is, decisions by the arbitration tribunal directing a party not to frustrate the purpose of an interim measure. The special conditions described above for the issuance of interim measures are also applicable to preliminary orders. Given that a preliminary order is granted inaudita pars, the arbitral tribunal must allow the party against whom the preliminary order is directed the possibility to exercise its rights, as soon as possible.

These orders will expire 30 days after the arbitral has tribunal granted them. However, the arbitral panel may ratify or modify the order through the issuance of an interim measure, once the other party against whom the preliminary order is directed has been able to present its case.

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THE ARBITRATION REVIEW OF THE AMERICAS 2016 ISSN 1759-6416