



The Arbitration Review of the Americas

2020

Bolivia

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Bolivia

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Summary

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On 25 June 2015, the Conciliation and Arbitration Law No. 708 (Law No. 708) was enacted with the purpose of providing the new rules for the application of conciliation and arbitration as alternative methods to resolve controversies within Bolivian territory. Law No. 708 abrogated the previous Law No. 1770 of Arbitration and Conciliation, in force in Bolivia since 10 March 1997, which provided the legal framework that allowed the growth and development of arbitration in Bolivia.

Based on the fact that Law No. 708 incorporated a series of modifications and introduced specific rules concerning investment dispute resolution involving the Bolivian state, the first part of this article focuses on investment arbitration under the current Bolivian legal framework.

In addition to the above-mentioned, considering that approximately four years have passed since the enactment of Law No. 708, the second part of this article focuses on a current issue related to the challenging of an award within Bolivian jurisdiction.

PART I

Investment Dispute Resolution Features

Pursuant to Law No. 708, any controversies of a contractual or non-contractual nature that involve the state and arise from or are related to an investment made under Law No. 516 for the Promotion of Investments shall be bound by the following rules:

- investment controversies shall be subject to Bolivian jurisdiction, laws and authorities;
- the parties must submit the controversy to conciliation prior to arbitration;
- conciliation or arbitration will be local;
- conciliation or arbitration will have the territory of Bolivia as their seat. Nevertheless, hearings, evidence production and other procedures, could be conducted outside of Bolivian territory; and
- the existence of an arbitration clause or the willingness to conciliate, do not limit or restrict the attributions and competences of control and supervision from the corresponding regulatory entities and competent authorities, to whom the parties will be subjected at all times according to applicable norms.

In addition, Law No. 708 states that controversies with public entities which fall within the stipulations of the previous paragraph will be resolved in the following manner.

- By the application of section II, related to disputes that involve Bolivian investment: when they arise as a consequence of the interpretation, application and execution of decisions, activities and regulations between partners of a state inter-governmental company; and when they arise within and between state companies and state inter-governmental companies.
- By the application of section III, related to disputes that involve foreign investment: when they arise as a consequence of the interpretation, application and execution of decisions, activities and regulations between partners of a state mixed company and mixed company; and when they arise within and between state mixed companies and mixed companies.

In summary, the specific chapter dedicated to investment dispute resolution establishes the central rules that will govern arbitration, distinguishing the two above-mentioned sections, one referring to controversies related to Bolivian investment and the other to foreign investment.

Controversies Relating To Bolivian Investment

Law No. 708 stipulates that the following common rules shall apply to conciliation and arbitration regarding controversies that involve Bolivian investments made by a Bolivian individual or legal entity, whether public or private:

- conciliation and arbitration will be administered by a Bolivian centre;
- applicable rules for conciliation or arbitration will be those pertaining to the centre chosen by the parties; and
- the nominating authority will be appointed by the centre chosen between the parties.

Moreover, in the case of conciliation, the conciliator will be appointed by the parties based on the list of conciliators from the chosen centre. In case of disagreement, the parties may request that the appointment is made by the nominating authority.

As regards arbitration, the following rules shall apply:

- the controversy will be solved by a sole arbitrator or a tribunal formed by three arbitrators, in which case each party will appoint one arbitrator from the list of the centre chosen by the parties;
- the third arbitrator will perform as president of the arbitration tribunal and will be elected by the two arbitrators appointed by the parties from the list of arbitrators of the chosen centre;
- in case of disagreement regarding the appointment of a sole arbitrator or the president of the tribunal, the appointment shall be made by the nominating authority;
- the sole arbitrator or arbitral tribunal shall apply the Bolivian constitution, laws and norms to decide the merits of the dispute; and
- the arbitration shall be at law.

Controversies Relating To Foreign Investment

For the conciliation of disputes which involve the Bolivian state and foreign investment, the following rules shall apply.

- The conciliator shall be appointed by the parties. In the event of a disagreement, the parties may request that the appointment of the conciliator be performed by the nominating authority, which shall be designated by the conciliation centre or by the secretary general or equivalent authority of the centre for the solution of investment controversies of an organisation of which Bolivia is a part of, within the framework of an integration process.
- The conciliation rules shall be those chosen by the parties. If no agreement is reached, the applicable conciliation rules shall be those of the centre for the solution of investment controversies of an organisation of which Bolivia is a part of, within the framework of an integration process.

Pursuant to Law No. 708, to solve any dispute that involves the Bolivian state and foreign investment by means of arbitration, the following rules shall apply.

- The arbitral tribunal shall be comprised of three arbitrators, with each party having the right to appoint one arbitrator. The third arbitrator shall be the president of the tribunal and shall be appointed by the two arbitrators selected by the parties. If no agreement is reached, the nominating authority will conduct the appointment upon request of the parties.
- The nominating authority shall be elected by the parties. If no agreement is reached, the nominating authority shall be the secretary general or equivalent authority of the centre for the solution of investment controversies of an organisation of which Bolivia is a part, within the framework of an integration process. If the latter is non-existent, the nominating authority shall be the secretary general of the Permanent Court of Arbitration in The Hague.
- The arbitral tribunal shall apply the constitution, laws and norms of Bolivia to decide the merits of the controversy.
- The arbitration rules shall be those selected by the parties. If no agreement is reached, the applicable arbitration rules shall be those of the centre for the solution of investment controversies of an organisation of which Bolivia is a part, within the framework of an integration process.
- The arbitration term may be extended up to an additional 600 calendar days.
- The arbitral tribunal shall decide and resolve any objection to jurisdiction as an issue of preliminary nature.
- The arbitral award shall be definitive and unappealable. The arbitral award shall be issued within a term of 90 calendar days to be counted from the last procedural act. The term may be extended only once for an equivalent number of days, unless the arbitration rules chosen by the parties provide otherwise.
- The arbitration shall be resolved at law.

It is worth noting that on the subject of foreign investment disputes, the main rules provide that prior to the initiation of arbitration proceedings, the parties must submit their dispute to conciliation. If the controversy is further submitted to arbitration, the arbitration process shall be local, entailing that the seat will be the Bolivian territory and that the dispute will be subject to Bolivian jurisdiction, laws and authorities.

Notwithstanding the foregoing, Law No. 708 allows for the parties to freely determine the applicable arbitration rules, which in the case of foreign investment controversies may be those of the International Chamber of Commerce, the London Court of International Arbitration, the International Dispute Resolution Centre, UNCITRAL or any other chosen by the parties, provided that the referred mandatory conditions are met. If no consensus is reached, the applicable arbitration rules shall be those of a centre for the solution of investment controversies of an organisation of which Bolivia is a part of, within the framework of an integration process.

The latter is a relevant feature of the new investor–state arbitration provisions, considering that before the enactment of Law No. 708, there was a trend of applying to foreign investment the same conditions now established for Bolivian investment. That is to say, the arbitration

rules had to be those of a Bolivian centre, which also implies that the appointment of the sole arbitrator or arbitral tribunal would be limited to the list of the Bolivian centre chosen by the parties.

Administrative Contracts And Arbitration

Despite the fact that Law No. 708 establishes as a rule that administrative contracts fall out of the scope of arbitration, pursuant to its fourth transitory provision, said rule would not be applicable to administrative contracts of state-owned companies until their migration or conversion process is complied with and concluded per the terms of Law No. 466 of Public Companies. In the meantime, these companies are enabled to include conciliation and arbitration clauses in their contracts, subject to the mandatory inclusion of Bolivian law as governing law and having the seat within Bolivian territory.

In light of the foregoing, it should be noted that, although around three years have passed since the enactment of Arbitration Law No. 708 and over three years of Law No. 466 of Public Companies, most state-owned companies – including those managing natural resources – have not concluded their migration or conversion process and therefore are currently able to submit their contractual disputes to arbitration, within the limits previously expressed.

In like manner, with regard to the highly relevant mining sector in Bolivia, Mining Law No. 535 provides for the mining association agreement as a contractual mechanism for conducting mining activities of the productive chain and developing strategic mining projects between the state (through any state mining company) and any private legal entity whether Bolivian or foreign. Within the minimum content that a mining association agreement is to include, Law No. 535 establishes that if an arbitration clause is agreed upon, domestic arbitration shall apply exclusively.

Recognition And Enforcement Of Foreign Awards

Notwithstanding that investment arbitration under Law No. 708 shall only generate awards to be rendered in Bolivia, due to the relevance of the subject and the potential existence of awards to be issued under arbitration proceedings currently in place against the Bolivian state, we hereby describe the process of recognition and enforcement of foreign arbitral awards.

Law No. 708 commences the description of the process by stating that any arbitral award issued in a seat different from the Bolivian territory shall be deemed as a foreign arbitral award. Furthermore, it establishes that foreign awards will be recognised and enforced in Bolivia in accordance with the rules of judicial international cooperation established in the current Code of Civil Procedure and the treaties related to recognition and enforcement of foreign awards, so long as they do not contradict the procedure established by Law No. 708.

Unless otherwise agreed by the parties and in the case of more than one international applicable instrument, the treaty or convention most favourable to the party that requested the recognition and enforcement of the award shall apply. In the absence of any treaty or convention, foreign arbitral awards shall be recognised and enforced in Bolivia according to the stipulations of Law No. 708.

Regarding causes for inadmissibility, Law No. 708 provides that the recognition and enforcement of a foreign award will be denied and declared inadmissible for the following reasons:

- existence of any grounds for nullity in accordance with the provisions relating to the nullity recourse, demonstrated by the party against which the foreign award recognition and enforcement was invoked;
- absence of enforceability owing to non-existence of writ of execution, nullity or suspension of the foreign award by a competent judicial authority of the state where it was issued, demonstrated by the party against which the foreign award recognition and enforcement was invoked;
- existence of causes for nullity or inadmissibility established by currently valid international treaties or conventions; and
- breach of the rules contained in the Code of Civil Procedure regarding international judicial cooperation.

Concerning competence and authority, the request for recognition and enforcement of a foreign arbitral award shall be filed before the Bolivian Supreme Tribunal of Justice.

The party that requests the recognition and enforcement of a foreign award must submit duly legalised copies of the arbitration agreement and foreign award, and if such agreement and award are not in Spanish, the petitioner must submit a translation of the documents signed by an authorised translator.

The recognition and enforcement procedure states that once the request is filed, the Supreme Tribunal of Justice will submit it to the other party so that it may respond within 10 days from its notification, having the opportunity to file and offer the evidence considered necessary.

Evidence must be produced in the maximum period of eight days from the last notice to the parties with the decree that initiates such a term. Once this term is over, the Supreme Tribunal of Justice has five days to issue a resolution.

If the request is admitted, the enforcement of the foreign arbitral award shall be executed by the competent judicial authority appointed by the Supreme Tribunal of Justice, corresponding to the domicile of the party against which the foreign award recognition and enforcement was invoked or by any other authority with jurisdiction.

Oppositions to the enforcement of a foreign arbitral award can be filed before the Supreme Tribunal of Justice based on documentary evidence regarding the compliance of such an award or the existence of a pending nullity recourse. Should this be proven, the Supreme Tribunal of Justice will suspend the recognition and enforcement of the foreign award.

International Treaties

To date, all bilateral investment treaties signed and ratified by Bolivia have been denounced. Bolivia had signed 22 bilateral investment treaties with Italy, the United States, Austria, Sweden, Paraguay, Spain, Argentina, Belgium-Luxembourg, France, China, Germany, Romania, Denmark, the United Kingdom, Ecuador, Peru, Chile, Netherlands, Switzerland, Korea, Cuba and Mexico.

The basis for such denunciations are found in the ninth transitory provision of the Bolivian constitution, which establishes that within the term of four years from the election of the executive branch, the new government authorities are to denounce, or if the case may be, renegotiate those international treaties considered contrary to the constitution.

Furthermore, even before the enactment of the current Bolivian constitution (7 February 2009), Bolivia denounced the 1966 International Convention on Settlement of Investment Disputes between States and Nationals of other States (the Washington Convention) in the year 2007 and therefore, the International Centre for Settlement of Investment Disputes is no longer available for settling disputes relating to investments made in Bolivian territory after the denunciation was made effective.

Despite the aforementioned, Bolivia is still a party to international instruments such as the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the 1975 Inter-American Convention on International Commercial Arbitration (the Panama Convention).

Comments On Investment Arbitration

Even though the conditions discussed above with respect to arbitration over foreign investment in Bolivia restrict foreign investors from choosing and having a 'neutral' seat of arbitration among other features, Law No. 708 along with Law No. 516 for the Promotion of Investments provide the general framework and rules to be considered in advance by foreign investors currently analysing the feasibility of investing in Bolivia, which contrasts with the uncertainty that surrounded the subject in previous years.

At present, Bolivia holds four active international proceedings related to foreign investments, having thus far executed in previous cases a general policy of settling investment controversies in different stages of arbitral proceedings.

Finally, around four years have passed after enactment of Law No. 708 with no investment arbitration proceedings initiated so far under the provisions of Law No. 708.

PART II

Challenge Of Arbitral Awards

Law No. 708 establishes that the only way to challenge an arbitral award is by means of a nullity recourse. The grounds that allow the competent judicial authority to declare an arbitral award as null and void are as follows:

- arbitrability (the subject matter of the dispute is not capable of settlement by arbitration);
- public policy; and
- if the party requesting the nullity of the award proves one or more of the following:
 - the existence of grounds for annulment or nullity of the arbitration clause according to civil law;
 - right of defence violations during the arbitration proceedings;
 - that the arbitral tribunal exceeded its powers in the award rendered, deciding ultra petita over controversies not comprehended by the arbitration clause; or
 - irregular constitution of the arbitral tribunal.

The parties may invoke one or more grounds for nullity of the award if such causes were raised during the course of the arbitration proceedings.

The nullity recourse shall be filed before the sole arbitrator or the arbitral tribunal that issued the award, reasoning the alleged grievance within a term of 10 days from the date the arbitral award was notified or the notification date of the amendment, complementation or clarification of the award. The nullity recourse shall be notified to the other party, which shall have the same period of time to respond. Once this term has finished, the sole arbitrator or the arbitral tribunal, with or without said response, shall grant the recourse determining the submission of the supporting documents to the competent judicial authority of the jurisdiction where the arbitration took place. This submission must be made within three days from the admission of the nullity recourse.

The sole arbitrator or the arbitral tribunal will reject, with no further ado, any nullity recourse filed past the 10-day term or not founded on the grounds described above.

The competent judicial authority will declare the admission of the recourse once the supporting documents have been received. When the nullity of an award is requested, the judicial authority may suspend the enforcement of the award, if applicable and if requested by one of the parties, for the time lapse the authority deems necessary to give the sole arbitrator or arbitral tribunal the opportunity to reinstate the arbitration proceedings or to adopt any measure that in its perspective eliminates the grounds that motivated the nullity of the award.

The judicial authority will issue a resolution within a term of 30 days from the date of reception of the case file. The judicial authority may admit the production of evidence within an eight-day term, according to civil procedure.

The resolution of the nullity recourse admits no further appeals or recourses.

Nevertheless, in the event that the nullity recourse is rejected by the sole arbitrator or arbitral tribunal, the affected party or parties could turn to the competent judicial authority of the place where the award was issued, within a term of three days, for the purpose of requesting admission of the recourse.

In such a case, the judicial authority will require the sole arbitrator or the arbitral tribunal to submit the supporting documentation in a term of three days from the reception of the notice. The judicial authority will resolve the matter within three days from the reception of the documentation.

Nullity Recourse In Bolivia – A Current Issue

From an analysis of local arbitration practice, taking into account a period of time starting with the enactment of Law No. 708 up to 2019, we have evidenced the use of a constitutional protection action provided by Bolivian law, when the nullity recourse they file is declared as inadmissible by the competent judicial authority.

First, it is relevant to point out that, as stated before, Law No. 708 establishes that the only way to challenge an arbitral award is by means of a nullity recourse. Nonetheless, Bolivian legislation also provides for a constitutional protection action that can be exercised by any individual who considers that one of his or her constitutional rights has been violated, after having the corresponding legal actions been exhausted with no further recourse available.

As a consequence, the Bolivian judiciary has accepted the cited constitutional protection action against rulings that have dismissed a nullity recourse filed against an arbitral award. An argument used for this purpose relates to the lack of sufficient motivation in the award

or judicial ruling that would lead to a breach of the constitutional guarantee of due process and the right of defence.

Second, it is also worth noting that, according to the law, the parties may invoke one or more grounds for nullity of the award if such causes were raised during the course of the arbitration proceedings. However, if a party considers that the arbitral award is against, for instance, public policy, regardless of the fact that during the course of the arbitration proceedings one or more grounds for nullity were raised or not, the nullity recourse is sustained on the argument that there are grounds for nullity relating to the arbitral award itself. Within this context, there is a misuse or abuse of the nullity recourse that presents within the Bolivian arbitration practice, which has further developed into resorting to the referred constitutional protection action when a party disagrees with the results of the arbitration proceeding reflected in the award and when a competent court has rejected to nullify the award.

Third, at present there are a couple of constitutional sentences issued by the Constitutional Tribunal of Bolivia, whereby the argument of lack of sufficient motivation that would lead to a breach of the constitutional guarantee of due process and the right of defence was upheld. As a result of the above situation, the denial by the jurisdictional authority to pronounce the nullity of the award has been overturned by the Constitutional Tribunal, which ordered the annulment of the judgment that resolved and denied said nullity of the arbitral award.

Therefore, despite the fact of having a recourse with numerous *causales* grounds for nullity found in Law No. 708, the cited constitutional jurisprudence seems to be opening an undue manner to turn around an arbitral final decision or a judicial judgment on a nullity recourse, which should have no further instances. On the brighter side, this issue should allow for further analysis and discussions towards reaching a solution in the mid- and long term, make arbitrators and arbitral tribunals put special emphasis on the manner they motivate their awards, as well as drive judges to strengthen their judgments on nullity recourses. Finally, the possibility of making use of a constitutional protection action may also be seen as an additional guarantee by practitioners and users of arbitration if a breach of a constitutional right is presented within the course of an arbitration proceeding or recourse stage, which was deemed unattended.

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