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Use of precautionary measures in arbitration

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[Arbitration & ADR Mexico](#)

[Objectives](#)

[Effectiveness](#)

[Comment](#)

A 'precautionary measure' is a tool used during arbitration in order to protect the *litis* of the dispute and facilitate the execution and enforcement of the award once issued. Thus, precautionary measures are an essential way in which to preserve assets that are subject to dispute or ensure that a final award is enforceable.

Objectives

When used in arbitration, precautionary measures have one of the following purposes:

- to maintain the *status quo* of the dispute while it is resolved;
- to avoid irreparable damage;
- to preserve assets to make an award enforceable; or
- to obtain or preserve evidence.

In this regard, precautionary measures may be required in arbitration to avoid irreparable damage and provide a guarantee to the petitioner. In this sense, 'irreparable damage' is damage that cannot be remedied with monetary compensation.

Effectiveness

The effectiveness of precautionary measures will depend on how quickly they are issued and implemented. Thus, it is worth assessing whether using these measures in arbitration will meet one of the above objectives.

To answer this question, petitioners should consider two essential issues – namely:

- the counterparty's right to be heard; and
- the due process for invoking such a measure, as provided for in the applicable arbitration rules.

ICC rules

The arbitration rules under which the parties have agreed to resolve any dispute must set out the rules that apply with regard to precautionary measures. As an example, the International Chamber of Commerce (ICC) regulations provide the following procedure for obtaining a precautionary measure:

- the counterparty will have a set period in which to respond to the petitioner's request;
- the arbitrator who will decide the request must be appointed within a set period; and
- the arbitrator must render their answer (ie, whether or not the measure will be granted) within a set period.

This process means that it will take at least 30 days for parties to learn whether a precautionary measure will be granted.

Mexican law

On the other hand, under Mexican law, precautionary measures are granted without the counterparty being granted the right to be heard, as they will have such right once the measure has been granted. As this means that precautionary measures can be obtained within 10 days, it should be assessed whether their use in arbitration will meet one of the above objectives.

Comment

Arbitration offers many advantages over judicial proceedings. However, in practice, precautionary measures need to be issued more quickly in order to achieve the objectives for which they are designed. Notably, under Mexican law, such measures are issued much faster and more effectively than those issued under the ICC arbitration rules.

For further information on this topic please contact [Raúl Herrera Hazas](mailto:Raul.Herrera.Hazas@becerril.com.mx) at Becerril, Coca & Becerril SC by telephone (+52 55 5263 8730) or email (rherrerah@bcb.com.mx). The Becerril, Coca & Becerril website can be accessed at www.bcb.com.mx.

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Author



[Raúl Herrera Hazas](#)

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