

Arbitration in Guatemala: The Admissibility of the Amparo Action Regarding Judicial Assistance on Jurisdictional Matters

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The *amparo* is a constitutional action available in several Latin American countries by means of which a person can request the protection of her fundamental rights when an authority has violated or threatened to violate them. Because of the *amparo*'s broad scope, it can be used as a guerrilla tactic in many of those jurisdictions, including Guatemala. This article addresses the Guatemalan Constitutional Court's analysis on the admissibility of the *amparo* action on jurisdictional matters.

The Guatemalan Arbitration Law (GAL) is based on the 1985 UNCITRAL Model Law. In its Chapter IV, the GAL addresses the subject of the jurisdiction of the arbitral tribunal and, in its article 21(3), it states that either party may request the civil or commercial judge of first instance (trial judge)—as indicated in the GAL's article 9—to determine whether the arbitral tribunal has jurisdiction to resolve the dispute. The judge's decision, according to article 21(3), is not subject to appeal. The wording employed by the GAL, however, is different. If translated literally, article 21(3) states that the decision is definite and cannot be revised by any recourse or remedy.

After that brief explanation, it is imperative to describe concisely how the *amparo* works in Guatemala. Under the Guatemalan constitutional procedural law, four requirements must be met in order to exercise the action: 1) temporality; 2) passive standing; 3) active standing; and 4) finality.

The latter is the relevant requirement in this analysis. The finality requirement is met when all ordinary recourses have been exhausted before bringing the *amparo* action. Put differently, an individual cannot bring forward the *amparo* action if there is an ordinary legal remedy or recourse still available.

Further, pursuant to the Guatemalan constitutional procedural law, the court with jurisdiction over the *amparo* proceeding will depend on the public or private entity or person who violated or threatened the individual's constitutional rights. The decision granting or not granting the *amparo* is subject to appeal and the Constitutional Court is the court with jurisdiction to see of the appeal. A final aspect that should be considered is that the *amparo* action is all encompassing. That is, its scope of protection is broad.

To illustrate the issue it is important to first discuss a case decided by the Guatemalan Constitutional Court regarding the admissibility of the *amparo* action (Case no. 1617-2012, decided on 5 July 2012). According to the facts of the case, the parties concluded a fuel transportation agreement, which

contained a multi-tiered arbitration clause that provided for conciliation and then arbitration before the Arbitration Center of the Guatemalan Chamber of Commerce. Pursuant to the agreement, Transportes Reyes ('Transportes'), using its own vehicles, would transport fuel supplied by Chevron Inc. ('Chevron'), from Chevron's facilities to a third party's service station. However, while fuel was unloaded at the service station a fire ensued. This fire destroyed Transportes' vehicle and caused damage to the third party's property. Chevron paid damages to the third party and in return Chevron urged Transportes to pay back the damages Chevron had paid. Because Transportes refused to pay, Chevron terminated the agreement and commenced arbitration. In its counterclaim, Transportes sought damages caused by the fire and damages arising out of unfair competition conducted by Chevron. Chevron argued that, pursuant to article 364 of the Guatemalan Commercial Code, the arbitral tribunal lacked jurisdiction to decide unfair competition matters and pursued judicial assistance before a trial judge. The judge ruled that the arbitral tribunal lacked jurisdiction to resolve unfair competition matters. Consequently, Transportes brought an *amparo* action against the judge's decision before the Supreme Court of Justice. The Supreme Court denied the action holding that, in order to satisfy the *amparo*'s finality requirement, Transportes had to exhaust all the ordinary recourses or remedies before bringing the action before the Court. Transportes appealed the Court's decision before the Constitutional Court. It argued that the decision resolving the arbitral tribunal's jurisdiction over unfair competition matters was not subject to appeal and therefore the *amparo* action was admissible. The Constitutional Court ruled that no other recourse or remedy was available under article 21(3) of the GAL and granted the constitutional protection. This case, however, is just one of the many that the Constitutional Court has decided in the same way.[fn]See *E.g.*, case no. 5571-2016, decided on 2 May 2016, in which the Constitutional Court held that the *amparo* action was admissible until all the legal remedies or recourses were exhausted.[/fn]

From the author's perspective, although article 21(3) of the GAL clearly states that the trial judge's decision on jurisdiction is final and not subject to appeal, it should not be construed as an authorization that an *amparo* action could be brought applying the same interpretation granted by the Constitutional Court. On the contrary, the intention of the rule is precisely to prevent the aforementioned situation.

As mentioned above, the GAL is based on the 1985 UNCITRAL Model Law, which states in its article 16(3) that the court's decision regarding the jurisdiction of an arbitral tribunal "shall be subject to no appeal" (which is akin to the expression "cannot be revised by any recourse or remedy," used in the GAL). The Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration states that when an arbitral tribunal decides "as a preliminary question that it has jurisdiction, article 16(3) allows for immediate court control in order to avoid waste of time and money." However, three procedural safeguards are added to reduce the risk and effect of dilatory tactics: short time-period for resort to court (30 days), court decision not subject to appeal, and discretion of the arbitral tribunal to continue the proceedings and make an award while the matter is pending before the court." [fn]Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration, paragraph 26.[/fn] It is clear, therefore, that the intention was precisely to prevent parties from delaying the arbitral proceedings applying recourses or other remedies, either ordinary or extraordinary. To allow the use of the *amparo* action against the trial judge's decision on whether the arbitral tribunal has jurisdiction does the opposite. Thus, the interpretation of the Constitutional Court with respect to article 21(3) of the GAL is incorrect and detrimental for the purposes of arbitration.

As stated above, the scope of the *amparo* action is broad. Based on this, it has been argued that the *amparo* action is admissible because the Guatemala's constitutional procedural law states that nothing is beyond the scope of the *amparo* action. However, from the author's perspective, that argument only allows litigants to initiate indiscriminately *amparo* proceedings arguing serious

violations of constitutional rights where there are none. Regardless, it should be noted that the same Constitutional Court has narrowed the scope of the *amparo* action through case law.[fn]Case no. 5557-2014, decided on 3 July 2015; Case no. 2972-2015, decided on 20 November 2015 and Case no. 5195-2017, decided on 7 March 2018[/fn]

In those cases, the Constitutional Court held that, although the Guatemalan Constitution and the law state that nothing is beyond the scope of the *amparo* action, there are certain aspects and circumstances that, for logical reasons and according to the principles of legal security and certainty, narrow the scope of the *amparo* action.

In that sense, it can also be argued that if an arbitral tribunal without jurisdiction renders an award, judicial review is still available via setting aside proceedings or at the recognition and enforcement stage. That is, parties do have procedural mechanisms to demonstrate that the arbitral tribunal lacked jurisdiction, thus protecting the rights of the parties. Because the purpose of the *amparo* action is to protect or restore a person's constitutional rights, applying it where there is a procedural mechanism achieving the same result, would only create the possibility of parallel proceedings—this is contrary to the principles of legal security and certainty.

For arbitration to be effective, it is fundamental that the Constitutional Court in Guatemala take a different approach. The Court's erroneous application of the *amparo* action is clear evidence of the lack of knowledge and understanding about the institutions and principles that inspire arbitration; a situation that hopefully will change, in order for Guatemala to become a competitive regional arbitral seat.