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The Plurinational Constitutional Court of Bolivia Sets a Limit on its Own Jurisdiction: A Relief for the Arbitral Community

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Generally, by virtue of the principle of territoriality, the national courts of a State have jurisdiction only over persons and acts committed within the territory. In this context, the national courts of a State do not have jurisdiction to set aside an award or an order issued in the context of an arbitration whose seat is in another country. Indeed, only the courts of the seat have jurisdiction to resolve a set aside action against an arbitral award or order.

However, in a recent case (*Case 35140-2020-71-AAC*) brought before the Plurinational Constitutional Court of Bolivia (“**Court**”), the extraterritorial jurisdiction issue of Bolivian courts arose in relation to an order issued within an ICC emergency arbitration proceedings seated in Santiago, Chile. Under the argument that Bolivian law had been chosen as the law applicable to the contract, a constitutional “*amparo*” action was filed in Bolivia against the Order of an Emergency Arbitrator despite the fact that the seat of the arbitration was Santiago and, therefore, its courts had exclusive jurisdiction over any such challenge.

The Court rejected the misleading argument of the existence of extraterritorial jurisdiction based solely on the applicable law of the contract and confirmed that it does not have extraterritorial jurisdiction over acts committed by a foreign authority in another country.

This limit to the jurisdiction of Bolivian courts over an order issued within emergency arbitration proceedings seated abroad represents a strong signal for arbitrators and contracting parties in favor of arbitration and party autonomy. Furthermore, it confirms the key role of the Court in strengthening an arbitration-friendly approach.

Background to the Dispute

In 2017, the Ministry of Environment and Water of Bolivia concluded a contract with Spanish company Eurofinsa for the construction of the drinking water and sewerage system in Riberalta Beni. The contract provided that any dispute arising out of the contract shall be submitted to ICC arbitration with seat in Santiago, Chile.

On November 22, 2019, pursuant to article 29 of the [ICC Arbitration Rules](#) and Appendix V, Eurofinsa made an application for emergency measures requesting the maintenance of the *status quo* between the parties and therefore, that the Water and Sewerage in Peri Urban Areas Program

Coordinating Unit, an agency of the aforementioned Ministry, be ordered to refrain from terminating the contract and execute the guarantee bonds issued by Eurofinsa until all arbitration or judicial proceedings in relation to the contract were definitively resolved.

On December 10, 2019, the Emergency Arbitrator, Nicolas Gamboa Morales, denied Eurofinsa's request for emergency measures and, as a consequence, on December 18, 2019, two guarantee bonds issued in favor of the Ministry of Environment and Water were executed.

On December 19, 2019, Eurofinsa filed a constitutional "*amparo*" action in Bolivia against the Emergency Arbitrator's Order, alleging a violation of its rights to due process and to defense.

The Emergency Arbitrator, through his representative, argued, among others, that Bolivian courts lacked of jurisdiction to hear a constitutional "*amparo*" action against an order issued within an emergency arbitrator proceedings whose seat was in Santiago, Chile. In this regard, he pointed that Bolivian law as the law of the contract was applicable only to the merits of the dispute and not to the procedural matters, which were governed by the law of the seat and accordingly were submitted to the exclusive jurisdiction of Chilean courts. Moreover, he asserted that the party dissatisfied with the Order could request its modification or annulment before the emergency arbitrator, and consequently, the action did not meet the criterion of subsidiarity and it was inadmissible.

Unexpectedly, on March 6, 2020, the First Constitutional Chamber of the Departmental Court of Justice of La Paz (First Instance) by Constitutional Resolution 04/2020 partially granted the requested protection, only in relation to the due process argument and the right to a reasoned decision.

The Constitutional Chamber misapplied the law and made a manifest error in its reasoning. First, it dismissed the argument regarding the subsidiarity criterion by erroneously applying Bolivian law to a procedural issue and concluding that under this law there was no other remedy against the Order issued by the Emergency Arbitrator. This failed to consider the ICC Arbitration Rules on emergency arbitration and that the law governing the procedure was the Chilean Law. In this regard, the Constitutional Chamber pointed out that although Santiago was the seat of the arbitration, the application of Bolivian law had also been agreed upon and that this law did not foresee for a review or reconsideration mechanism of a request for precautionary measures.

Second, the Constitutional Chamber asserted extraterritorial jurisdiction of the Court over an act issued in another country based on the argument that the Bolivian law had been chosen by the parties, ignoring the distinction between substantive law and procedural law. In this connection, the Constitutional Chamber justified the connection between the Order issued by the Emergency Arbitrator and the Court jurisdiction by holding that the contract was signed in Bolivia between a Bolivian state entity and a foreign company, and was subject to Bolivian law.

The position taken by the First Constitutional Chamber set a dangerous precedent against arbitration and raised a big concern in the arbitral community which feared that the "*amparo*" action would be improperly used as mechanism to challenge arbitral decisions issued in a foreign country.

In that context, it was expected that the Court, which acts as a review body, would take a clear position against an extraterritorial jurisdiction under the circumstances of the case at hand.

The Plurinational Constitutional Court's Decision

Fortunately, the Court completely departed from the First Constitutional Chamber's reasoning and, by **Decision 0288/2021-S4**, partially revoked the Constitutional Resolution 04/2020 and rejected the "*amparo*" action submitted by Eurofinsa.

The Court did not address the argument regarding the subsidiarity criterion, but instead focused its reasoning on the principle of territoriality and the distinction between substantive law and procedural law.

First, the Court made clear that its jurisdiction is based on the principle of territoriality, as it can only reach those acts committed by Bolivian authorities within the Bolivian territory. In this line, it emphasized that the scope of application of the **Bolivian Constitution** was restricted to the Bolivian territory and, therefore, the "*amparo*" action was inadmissible against acts committed by foreign authorities in another country.

The Court noted that:

"the constitutional and legal rules regulating the amparo action are made to govern within the national territory (...)" and that such defense action *"is a means of control of undue and illegal acts or omissions of authorities or persons from the Plurinational State of Bolivia, (...) not to control acts of other authorities or persons that are not Bolivian (...) and are located in the national territory (...)"* (free translation).

Within that framework, the Court concluded that it lacked jurisdiction to hear the "*amparo*" action, since the act subject to challenge (i.e., the Order) was issued by a foreign authority within the territory of another State. In this regard, it determined the place of issuance of the act by reference to the seat of the emergency arbitrator proceedings.

The Court noted that:

"since the challenged act was not issued by a national authority but by a supranational authority belonging to the International Chamber of Commerce, as is the case of the Emergency Arbitrator of Colombian nationality, and that the act was not issued within the Bolivian territory, as it was issued at the seat of the emergency arbitrator proceedings, in Santiago, Chile, it is clear that the Constitutional Court of Bolivia lacks jurisdiction to resolve the amparo action against acts of foreign authorities issued in a territory other than the Bolivian State".

Finally, the Court expressly rejected the argument regarding extraterritorial jurisdiction based on the law of the contract and evoked the distinction between substantive law and procedural law. It asserted that under the underlying arbitration agreement Bolivian law applied to the substantive issues and not to procedural matters *"or the constitutionality control of the procedural acts*

performed at the seat of the arbitration”.

Conclusion

Notwithstanding the fact that the term “*supranational authority*” was improperly used by the Court, the decision leaves no doubt as to the Court’s lack of jurisdiction over acts committed by foreign authorities outside the Bolivian State and therefore, its lack of jurisdiction over decisions issued within arbitral proceedings seated in foreign jurisdictions.

This decision is to be welcomed as it closes the door to the possibility of using the “*amparo*” action as a mechanism to challenge decisions issued within international arbitral proceedings. Once again, the Court demonstrated a favorable and respectful stance towards arbitration.

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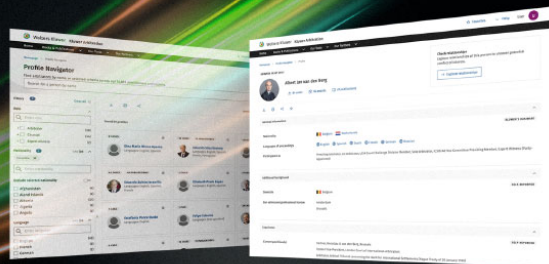
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