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Too Complex for Arbitrators? A Look at Guatemalan Intra-Corporate Disputes

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The Guatemalan Constitutional Court (“Court”) recently ruled that a dispute can be too complex for an arbitral tribunal to decide for the umpteenth time.

For context, the Court has jurisdiction to rule on the constitutionality of Guatemalan laws upon the request of an interested party. In a recent decision, the Court was tasked with deciding a question on the constitutionality of Article 3(3)(c) of the [Guatemalan Arbitration Act](#) (“GAA”) (Case No. 448-2022, Constitutional Court of Guatemala, Decision of September 4, 2023) (“Decision”) which provides that those matters in respect of which the law confers a “special jurisdiction” shall not be arbitrable.

Whereas some Model Law jurisdictions actually decided to include a clarification that those matters legally tied to a special jurisdiction, specific court action or prescribed procedure can be submitted to arbitration,¹⁾ Guatemala—also a Model Law jurisdiction—seems to have gone in the opposite direction.

The Decision

Among other arguments, the question—which was brought to the Court by three law students—was prompted by the position that the contested subsection creates procedural uncertainty. Since virtually every matter has a legally allocated specific procedure or competent court, the contested provision makes it difficult to reasonably determine which matters may be submitted to arbitration.

The Court rejected the argument, explaining that non-arbitrable matters under Article 3(3)(c) must be construed together with arbitrable matters under article 3(1), which provides that parties may submit to arbitration any matter that is related to disposable rights. It follows that matters assigned to a “special jurisdiction” do not fall within the autonomy of the parties and therefore do not amount to disposable rights. Certainly not very helpful. In the Court’s view, this reasoning makes Article 3(3)(c) and its effects “perfectly predictable.” The problem persists, though: many disposable matters are assigned to special jurisdiction—*e.g.*, most commercial disputes (which are stereotypically considered as disposable matters) follow summary proceedings (by all means a “special jurisdiction” or special procedure under Guatemalan law).

Looking further into its decision, the Court shed some light on what it seems to be the rationale behind Article 3(3)(c). According to the Court, “**there are matters which, because of their nature, complexity, and possible effects, shall be settled by judicial courts.**” In other words, some disputes may be too complex to leave to the hands of arbitrators. Granted, the Court likely refers to public policy considerations. However, it is not very user-oriented to drop such a line and miss the chance to address what it considers to be the “nature, complexity, and effects” that are relevant and in its consideration problematic to determine whether a matter—on its face disposable—that is assigned by law a “special jurisdiction” is arbitrable or not.

Interestingly, this is not the Court’s first missed opportunity to do so. In fact, the Court has used the very same phrase over and over again, notably in the context of intra-corporate disputes.

Intra-Corporate Disputes

The Court has issued a significant number of decisions on the arbitrability of intra-corporate disputes. Notably, the discussion in those decisions revolved around a matter that was (i) on its face arbitrable and (ii) assigned a “special jurisdiction” by the law. Spoiler alert: the Court found that some of those were **arbitrable** matters.

Non-Arbitrable Disputes

Let’s start with those in which the Court found the underlying disputes to be non-arbitrable matters. These comprise the majority of decisions, to the extent that the Court set binding precedent with some of them (three decisions maintaining the same criteria are required for the Court’s rulings to become binding to all courts). In all of these cases, the underlying disputes consisted of challenges to the validity of a shareholders’ meeting. In all of these cases, the “special jurisdiction” was determined by Article 157 of the [Guatemalan Code of Commerce](#) (“CoCo”), which states that shareholders’ meetings may be challenged or annulled via “ordinary proceedings”—a specific type of civil procedure under Guatemalan law—“unless agreed otherwise.”

The Court has set three general principles when it comes to this specific type of intra-corporate disputes (*See, e.g.*, cases No. 1107-2010, Constitutional Court of Guatemala, Decision of March 15, 2011; No. 878-2010, Constitutional Court of Guatemala, Decision of March 15, 2011; No. 1783-2011, Constitutional Court of Guatemala, Decision of August 18, 2011; No. 3475-2014, Constitutional Court of Guatemala, Decision of December 9, 2014):

1. Companies, its bodies and shareholders may arbitrate matters that “for convenience, pertinence and opportunity are beneficial to the corporate purpose and the activity of the company.”
2. The validity of shareholders’ meetings is *per se* arbitrable.
3. The validity of shareholders’ meetings is not arbitrable when the challenged decisions do not meet principle (1) above.

Principle (1) above is ambiguous and the Court has yet to explain what is deemed to be covered by it. The Court has rather focused on providing examples of when principle (1) is not met. The arbitrability of the validity of shareholders’ meetings, which is in principle possible, may be determined by the extent to which the validity of such meetings is related to, *e.g.*, decisions on the

integration and functioning of the company. The stronger the relation, the higher the probability that such a challenge is considered a non-arbitrable matter. The Court has provided examples of shareholders' meetings decisions that, under that reasoning, it classifies as non-arbitrable matters: (i) decisions on the exclusion of shareholders for failure to comply with their obligations under the law or the applicable by-laws; (ii) decisions on the company's acquisition of its own shares; (iii) decisions on the amendment of the company's articles of association in relation to the form and modality of the company's administrative body; or (iv) decisions on the appointment, confirmation, or removal of the company's external auditors.

In a complex construction, the Court has further ruled that the arbitrability of the validity of shareholder's meetings may also be determined by the extent to which the validity of such meetings is based on the inexistence of any of the essential requirements for the validity of an act (although the Court may have meant the essential requirements for the existence of an act). The Court has provided examples of shareholders' meetings decisions that, under that reasoning, it classifies as non-arbitrable matters: (i) the alleged omission by the administrative body to inform the shareholders that the assets that were to be sold were annotated with an attachment; or (ii) the alleged lack of legal subject matter of the sale of an asset which is subject to attachment.

All of the above-mentioned scenarios are considered non-arbitrable matters by the Court due to their "nature, complexity and possible effects." There are, of course, other decisions in which the Court has determined that other specific subject matters are not arbitrable (*See, e.g.*, cases No. 870-2013, Constitutional Court of Guatemala, Decision of August 7, 2014; No. 5092-2017, Constitutional Court of Guatemala, Decision of March 7, 2018), but, as specific as they are, these are the most general guidelines provided by the Court to this date to assess arbitrability of intra-corporate disputes under Guatemalan law. In a nutshell, the validity of shareholders' meetings is arbitrable (a) as long as the subject matter of the challenged decisions is beneficial to the corporate purpose and the activity of the company and (b) unless such decisions are related to the integration or the functioning of the company or touch upon the legal validity or existence of an act, this remains ambiguous. As pertinently put by a commentator, this equation results in a "complex and impractical solution,"²⁾ for the purposes of determining the arbitrability of a dispute.

Arbitrable Disputes

An example of a dispute where the validity of a shareholders' meeting has been found to be arbitrable by the Court in accordance with the above parameters is a dispute in which a shareholder challenges the form in which such meeting was summoned and communicated to the shareholders (*See* Case No. 6063-2016, Constitutional Court of Guatemala, Decision of June 28, 2018). In the Court's view, that is a type of dispute between private law subjects that can be submitted to arbitration. Although the Court definitely shows less public policy concern due to the nature of the relationship between the parties to such disputes, one cannot help but wonder what the Court's view on the impact of these disputes over third parties is.

Following a similar reasoning, the Court has also asserted the arbitrability of other types of intra-corporate disputes. Besides the subject matter—these have no relation with the validity of shareholders' meetings—another difference in these cases is the fact that the "special jurisdiction" was determined by Article 1039 of the CoCo, which provides that any action arising out of the Code of Commerce must be solved via "summary proceedings"—a specific type of civil procedure

under Guatemalan law—“unless agreed otherwise.” Considerations like the commercial nature of the relationship between the parties and their private law origins have prompted the Court to determine that disputes between shareholders or shareholders and the company are arbitrable (*See* cases No. 1110-2020, Constitutional Court of Guatemala, Decision of July 16, 2020; No. 4142-2022, Constitutional Court of Guatemala, Decision of September 20, 2022). Alas, the Court has not elaborated on its considerations as much in these decisions as it has in those where it found the subject matter of a dispute not to be arbitrable.

Conclusion

Admittedly, the validity of shareholders’ meetings is among those matters which raise public policy concerns, for these disputes entail the possibility of affecting third parties or of involving non-contractual relationships. That is a valid concern and one that goes beyond the scope of this post.

These lines are rather intended to test whether non-arbitrability under Article 3(3)(c) is as reliable and predictable as the Court portrays it to be. It would seem like the reasoning of the Court on what it considers to be matters with a “nature, complexity and possible effects” such that should be prevented from being submitted to arbitration has been a tad too specific. Nevertheless, by listing detailed scenarios that it considers non-arbitrable matters, the Court has certainly provided predictability. Over those very specific scenarios, that is. The Court has picked some fruits off the bushes and called them cherries, but there are miles of bushes left to be explored and tons of fruits to be named (cherries or else).

In sum, arbitrability under Article 3(3)(c) remains unpredictable, unless a claimant is lucky enough to find themselves under one of the exact fact patterns that have been listed by the Court in one or the other end of the arbitrability spectrum. Unfortunate claimants diving into unexplored factual sets or gray areas of those already explored face the risk of picking poorly and incurring fees, time and effort in the wrong dispute settlement process, be it court or arbitration. Picking wisely, on the other hand, would require clear, abstract criteria to inform a decision under virtually all circumstances. Luckily, the Court’s decisions on the non-arbitrability of some intra-corporate matters is not as misguided as one may be tempted to think, although it is also true that its greenlight to arbitrate some other intra-corporate matters should not be perceived as winds of change. This means that the Court’s own binding precedents, as structured today, do not prevent it from enunciating such principles and even less from doing so in a user-oriented way. Steps must be taken, for all that.

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References

UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, United Nations Commission on International Trade Law, New York, 2012, para. 12. *See, e.g.*, Art. 11(2) of Singapore's International Arbitration Act of 1994: “The fact that any written law confers jurisdiction in respect of any matter on any court of law but does not refer to the determination of that matter by arbitration does not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration.”

Diego Thomás Castagnino, *Arbitraje societario: Aprendizajes del derecho comparado y formulación de propuestas para su aplicación en el foro venezolano*, AVANI, Nro 2, Venezuela, 2021, p. 49.

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