Enforcing Arbitration Awards in Ecuador

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WITH PRACTICAL LAW ARBITRATION

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A summary of the enforcement of arbitral awards in Ecuador, including procedural considerations and grounds for challenging awards. This Note covers both commercial and investment treaty arbitration.

SCOPE OF THIS NOTE

This Note provides guidance on the enforcement of domestic and foreign arbitral awards in Ecuador. In particular, this Note:

- Provides a summary of arbitration law in Ecuador.
- Explains the procedural and practical issues related to enforcement.
- Analyzes the annulment and setting aside proceedings including the causes under Ecuadorian law.
- Reviews the latest issues related to investor-state arbitration in Ecuador.

ECUADOR'S ARBITRATION LAW

STATUTES AND JURISDICTION

Ecuador enacted its Arbitration and Mediation Law (Ley de Arbitraje y Mediación or the LAM) in 1997 and reformed it in 2005. It differentiates between domestic and international arbitration. However, LAM includes only two articles related to international arbitration. They regulate:

- The conditions required for an arbitration to be considered international under the LAM (LAM Art. 41).
- The general regulations for international arbitration proceedings (LAM Art. 42).
- The requirements for state entities to bind themselves to international arbitration (LAM Art. 42 and Art. 190 of the Constitution of the Republic of Ecuador).

With these regulations, the LAM establishes the possibility for parties to submit to international arbitration if any of these three conditions are met:

- The parties had different places of residence when the arbitration agreement was executed (LAM Art. 41 a).
- When the place where the obligations have to be complied with or the place where the goods subject of the dispute are located in a different place from where at least one of the parties reside (LAM Art. 41 b).
- When the process is related to an international commercial transaction that can be submitted to arbitration and that does not contravene Ecuador's national interests (LAM Art. 41 c).

For Ecuador's state entities to submit controversies to domestic or international arbitration, they must first obtain the Attorney General's approval. This is done by submitting the arbitral agreement before the Attorney General (Constitution of the Republic of Ecuador of 2008, Article 190). Similarly, for state entities to agree on the application of a foreign law either to the contract or the arbitral agreement (the *lex arbitri*), they must obtain the Attorney General's approval (Art. 190 of the Constitution of the Republic of Ecuador).

THE ARBITRATION AGREEMENT

The arbitration agreement is defined as the written agreement in which the parties submit to arbitration all disputes that have arisen between them in connection with a certain legal contractual or non-contractual relationship (LAM Art. 5).

The arbitration agreement must be in writing. If it refers to a contract in which the arbitration agreement is not incorporated, it must consist of a document that expresses the name of the parties and unambiguously describe the contract to which it refers. Arbitration in non-contractual matters is permitted if the parties clearly express the facts to which the controversy relates (LAM Art. 5).

An arbitration agreement also exists not only where the agreement appears in a single document signed by the parties, but also when it results from an exchange of letters or any other written communication that leaves documentary evidence of the will of the parties to submit to arbitration (LAM Art. 6).

For a valid arbitration agreement to exist with the state or state entities, the following is required:

- The agreement must have the Attorney General's prior approval.
- The legal relationship to which the agreement refers must be contractual.

- The arbitration agreement must describe the arbitrator selection method.
- The arbitration agreement, by means of which the public institution waives the ordinary jurisdiction, must be signed by the person authorized to contract on behalf of that public institution.

TYPES OF ARBITRATION

The LAM provides the parties with the opportunity to opt between institutional and ad hoc arbitration. Parties can also submit controversies to arbitration decided by law or ex aequo et bono. If the arbitration is to be decided *ex aequo et bono*, the arbitral tribunal can consist of non-lawyers; otherwise for domestic arbitrations in Ecuador, they must be attorneys admitted to the Ecuador bar.

DEFAULT RULES

Absent agreement by the parties, the LAM requires for domestic arbitrations in Ecuador:

- The arbitration must be decided *ex aequo et bono*. (This provision may potentially conflict with a statutory requirement that the state and state entities can only submit controversies to an arbitration decided by law. Courts have decided the mandatory provision prevails in case of contradiction.)
- The arbitral tribunal is to consist of three arbitrators designated randomly by the arbitral institution (LAM Art. 16).
- The arbitration is not confidential.

MATTERS EXCLUDED FROM ARBITRATION

Ecuador requires that for matters to be submitted to arbitration they must encompass a waivable nature. Therefore, the following subject matters are not arbitrable in Ecuador:

- Civil status and legal capacity.
- Family law.
- Labor, consumer, and tenancy rights. (However, arbitral tribunals have established labor rights can be subject to arbitration if their nature cannot be waived.)

JURISDICTION OF ARBITRAL TRIBUNALS AND ECUADORIAN COURTS

The LAM follows the principle of kompetenz-kompetenz, under which arbitrators are empowered to decide on their own jurisdiction (LAM Art. 22 - positive *kompetenz-komptenz* and article 7 negative *kompetenz -kompetenz*) (LAM Art. 7):

- The LAM follows the separability principle under which arbitration clauses are independent and separable of the underlying contract and clarifies that they may be enforceable even when the contract is not (LAM, Art. 5).
- The LAM also follows the *favor arbitralis* or *indubio pro arbitri* principles by which in case of doubt ordinary courts decide in favor of arbitration (LAM Art. 7).
- If a party breaches an arbitration agreement by filing a judicial claim, the counterparty can file a motion to dismiss for lack of jurisdiction before the court considers the merits (LAM Art. 8).

JUDICIAL SUPPORT FOR ARBITRATION

Arbitrators may grant interim measures if the parties agreed to this. To enforce them, however, because arbitral tribunals lack coercive power, the arbitrators must seek assistance from local authorities, such as the national police or military (LAM Article 9).

In the absence of an agreement and without relinquishing the jurisdiction of an arbitral tribunal's jurisdiction or undermining its powers, the parties may request these measures directly from courts (LAM Article 9).

INTERNATIONAL ARBITRATION TREATIES

According to Ecuador's legal system, international law is subordinated to the Constitution and prevails over and above any other domestic laws (Constitution of the Republic of Ecuador, Article 425) except regarding human rights where international instruments may prevail over the Constitution if they stipulate more favorable rights to persons (Constitution of the Republic of Ecuador, Article 417).

Ecuador has adopted several international instruments related to international arbitration, including:

- The 1928 Havana Convention on Private International Law.
- The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).
- The 1966 International Convention on Settlement of Investment Disputes between States and Nationals of other States (the ICSID Convention) (terminated by Ecuador in 2009).
- The 1975 Inter-American Convention on International Commercial Arbitration (the Panama Convention).
- The 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo Convention).

RECOGNITION AND ENFORCEMENT

DOMESTIC AWARDS

Enforcing a domestic award begins with a request before the competent judge, which is usually the first-level judge of the provincial court from the respondent's place of residence that has subject-matter jurisdiction (Article 102, General Organic Code of Procedures (GOCP)).

The enforcement petition must include the admissibility requirements for a lawsuit under the GOCP (Article 142 , GOCP). Once this request is granted, the judge appoints an expert for the liquidation of capital, interest and costs in the term granted enforcing the award.

Before the admission of the application, the claimant has five days to present the supporting vouchers of expenses according to the cost rules provided in the GOCP.

Once the court has admitted the request for liquidation, the judge must issue the writ of execution that must contain:

- The precise identification of the party that must comply with the obligation.
- The determination of the obligation.
- The order to the party to pay or comply with the obligation within a five-day period (GOCP Art. 372).

If the party does not comply with the obligation during this period, the court enforces it by issuing an order to seize the property. The National Police then executes the seizure (GOCP Articles 375 to 385).

If the party does comply with the obligation, the court declares it extinguished and orders closure of the process.

FOREIGN AWARDS

The rules for recognizing and enforcing an international arbitration award are set out in the GOCP. International awards are enforced according to international conventions ratified by Ecuador (GOCP Article 103). This seems to be a direct reference to the New York Convention, to which Ecuador is a party; unfortunately, the remaining GOCP provisions work to the contrary.

Under the GOCP provisions, before a foreign award's enforcement, it must be subject to a recognition process or *exequatur*, which is a declaration by which the award is given the same status as a national judgment.

This process should not last more than 30 days and must be brought before the correspondent appellate court of each jurisdiction (GOCP, Art. 102).

Unlike the New York Convention, the *exequatur* process (GOCP, Art. 104) puts the burden of proof on the petitioner, which must demonstrate that:

- The award complies with all the formalities required by the state where it was rendered.
- The award is final and has a res judicata effect under the law it was rendered.
- Documentation attached is translated (if applicable).
- Due process rights of the parties were met.
- The request indicates the domicile of the respondent for service of process purposes.

If the arbitral award was rendered against the state, the petitioner must also demonstrate that the award does not contravene any constitutional, treaty, or legal provision.

Once the competent court decides favorably on the recognition, the petitioner must file an enforcement petition before the correspondent trial judge according to the procedure indicated for domestic awards.

Ecuador has no available precedents on a local court applying the New York Convention.

SETTING ASIDE PROCEEDINGS

Article 31 of the LAM provides the rules and causes by which a party can seek to annul the award. The nullification petition must be brought before the Appellate Court that corresponds to the respondent's place of residence.

The causes for which a party may request to nullify the award are the following:

- The respondent was not legally served with process resulting in a default judgement. The defendant must demonstrate that the lack of service prevented the defendant from its right of defense and, in addition, the defendant must point out lack of service at its first intervention in the controversy.
- One of the parties has not been notified with the orders of the tribunal and therefore limits the right of defense of the party.
- When the arbitral tribunal did not decide on evidentiary submissions by the parties or if decided favorably evidence was not conducted according to law.
- The award refers to matters not submitted to arbitration or granted beyond what was claimed.
- When the procedures for appointing the arbitral tribunal established either by law or contract were violated.

Recently appellate courts have misapplied article 31 and have annulled awards by referring to issues not included in the list of grounds for annulment set out in this article. For example, one appellate court annulled an award because the tribunal did not have jurisdiction to decide the matter *ratione matterie*, even though lack of subject-matter jurisdiction is not listed as grounds for annulment of an award in article 31. Another appellate court annulled an award because it deemed that the dispute was not correctly decided on the merits.

INVESTOR-STATE ARBITRATION

Ecuador's former president Rafael Correa, as one of his last actions in office, concluded the BIT denunciation process initiated in 2008. Denunciation is based on the idea that dispute resolution clauses included in the BITs violate article 422 of the Ecuadorian Constitution which provides: 'Treaties or international instruments where the Ecuadorian State yields its sovereign jurisdiction to international arbitration, in contractual or commercial disputes, between the State and natural persons or legal entities cannot be entered into.

The Constitutional Court has issued a series of decisions declaring that the dispute settlement provision of BITs is unconstitutional (see the examples of Argentina, Bolivia, Canada, Chile, China, Finland, France, Germany, Italy, the Netherlands, Peru, Spain, Sweden, Switzerland, the United Kingdom, the United States, and Venezuela).

Ecuador has negotiated 30 BITs, 27 of which have entered into force. Only one, agreed to with Egypt, was terminated in 1995. In 2008, Ecuador terminated nine of these BITs, those executed with Uruguay, the Dominican Republic, Guatemala, El Salvador, Cuba, Nicaragua, Honduras, Paraguay, and Romania (the last six remain in force until 2018, due to their survival clauses).

Consequently, 17 BITs remained in force and a second denunciation round took place in 2017. The National Assembly's special committee responsible for analyzing the denunciations issued several reports, recommending the termination of the remaining BITs entered into with Argentina, Bolivia, Canada, Chile, China, Finland, France, Germany, Italy, the Netherlands, Peru, Spain, Sweden, Switzerland, the United Kingdom, the United States and Venezuela. On May 3, 2017, the National Assembly's Plenary approved the termination of all these BITs.

Back in 2013, President Correa created the Commission for Comprehensive Audit of the Reciprocal Investment Treaties and the Investment International Arbitration System (CAITISA, for its acronym in Spanish). CAITISA finally made public its report and conclusions on 8 May 2017. Among its general recommendations, CAITISA proposes to eliminate or limit certain BIT provisions, namely:

- To exclude dispute resolution clauses.
- To include rights to be claimed by host states.

- To give standing to the indigenous communities.
- To establish performance standards for investors, such as technology transfer obligations, capital flow regulations, and others.

However, CAITISA's main recommendation focuses on sponsoring an Alternative Model BIT (AMB), suggesting a reinforced focus on human and labor rights, together with protections for the indigenous communities and nature. The AMB also proposes giving host states standing to bring claims under the BIT, enforcing sustainable development standards, and creating an international investment court. The AMB also suggests including a specific and strict definition of "investment," requiring two-year minimum duration and limited to direct property owned by the investor. The AMB also recommends limiting the "investor" definition by:

- Requiring potential investors to have active operations in the host state for at least two years.
- Revealing ownership information.
- Providing the possibility of losing investor standing if fraud or corruption in the management of the investment is proven.

The AMB recommends expressly and strictly defining the fair and equitable treatment standard to:

- Exclude umbrella and most-favored nation clauses.
- Limit survival clauses by establishing fixed-term provisions requiring the states' express intent for renewal.
- Exclude protection for indirect expropriation.

Interestingly, the AMB suggests replacing full protection and security clauses with provisions enforcing the international minimum standard of treatment of foreign investors.

On May 16, 2017, President Correa issued the executive decrees ordering the termination of the BITs and notifying the state parties to the treaties. Several formal notifications have already been made in conclusion with the denunciation process.

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