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Ecuador

Rodrigo Jijón-Letort and Juan Manuel Marchán
Pérez Bustamante & Ponce

Arbitration and mediation law: guidelines for applicability

Arbitration in Ecuador is regulated by the Arbitration and Mediation Law of 1997 (AML).[1] The AML provides for a dualist regime comprising detailed rules governing local arbitration and a few – albeit determinant – rules on international arbitration. Additionally, pursuant to the AML, other bodies of law, such as the Organic Code of Procedures (COGEP), the Organic Code for the Judiciary and the Civil Code,[2] may be supplementary to it, provided that arbitration is conducted at law.[3]

As regards international arbitration, article 42 of the AML categorically provides the following:

> *International arbitration shall be regulated by treaties, conventions, protocols and other acts of international law signed and ratified by Ecuador. Every natural or juridical person, public or private with no restrictions whatsoever is at liberty, directly or by reference to an arbitration regulation, to stipulate everything concerning the arbitration proceeding, including its establishment, discussions, language, applicable legislation, jurisdiction and seat of the arbitration panel which may be in Ecuador or in a foreign country.*

The above norm sets forth the principle of pre-eminence of free will in matters of international arbitration on the basis of which everything relating to the arbitration proceeding can be freely agreed by the parties, resulting in important consequences including the following:

- Parties may elect any norms to conduct an ad hoc or institutional arbitration proceeding. This attribution would mean that, in principle, the procedural norms for international arbitration chosen by the parties would not clash with local law unless they infringe norms pertaining to public policy – not clearly defined in Ecuador. Despite this lack of definition, we consider that norms such as those relating to the due process (specified below) would be included in this category.
- AML provisions for local proceedings are not necessarily applicable to international arbitration, except restrictedly to the assumptions described in this article.
- Ecuador does not have a law on international arbitration that might limit the prerogatives of article 42 of the AML with respect to an arbitration proceeding.
- Substantive non-procedural provisions in the AML could be important and applicable to international arbitration in certain circumstances.

It is therefore necessary to outline such assumptions where Ecuadorian law could be applicable to international arbitration. In principle, local law is important when it operates as *lex arbitri*, namely, when it is the law of the place where the arbitration is conducted. *Lex arbitri* is fundamental for certain questions that could arise before, during and after arbitration, especially provisions that might be deemed imperative or pertaining to public policy. Although not intending to provide a fully comprehensive list of such questions, it is clear that the rules comprised in Ecuadorian law might include at least the following aspects:

- creation and effects of the arbitration agreement;
- subjective and objective arbitration;
- recusation and excuse of the arbitrators;
- *Kompetenz-Kompetenz* principle;
- due process rules;
- preventive measures;
- judicial assistance;
- formalities for issuing the arbitral award;
- actions and recourses against the award; and
- jurisdiction of the courts.

International commercial arbitration: definition and scope

The AML does not have an explicit definition for international arbitration. It only mentions the requirements for a proceeding to be considered as such. Article 41 sets forth two kinds of requirements: one is subjective and the other is objective. In the former case, the parties must establish in their agreement that the arbitration will be international. In our opinion, this agreement does not have to be explicit – the mere adoption of foreign laws, regulations or other set of rules regarding international arbitration ought to be interpreted as the parties' positive decision that the arbitration is international. In the latter case, it is necessary that the dispute be included within at least one of the following assumptions:

- if at the time of execution of the arbitration agreement the parties are domiciled in different states;
- if the place where a substantial portion of the obligations is to be performed or to which the issue under litigation is most closely related is situated outside the state in which at least one of the parties is domiciled; or
- if the issue being litigated relates to an international trade operation susceptible to compromise and not affecting or impairing national or collective interests.[4]

Characterising an arbitration proceeding as international is vitally important because by virtue thereof the parties may accede to the pre-eminence of the free will principle set forth in the AML and mentioned in the preceding section, as well as to international instruments regarding this issue executed and ratified by Ecuador.

International conventions

According to Ecuador's legal system, international law is subordinated to the Constitution and prevails over and above any other domestic laws,[5] except with respect to human rights where international instruments may prevail over the Constitution if they stipulate more favourable rights to persons.[6]

With regard to international arbitration, Ecuador adopted the main international instruments on this subject quite early, including:

- the 1928 Havana Convention on Private International Law;[7]
- the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention);[8]
- the 1966 International Convention on Settlement of Investment Disputes between States and Nationals of other States (the Washington Convention)[9] (recently denounced);[10]
- the 1975 Inter-American Convention on International Commercial Arbitration (the Panama Convention);[11] and
- the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards.[12]

International arbitration and foreign investment protection

There is a strong political will to withdraw from several bilateral investment treaties (BITs) through which Ecuador gives its consent to international arbitration.[13]

Actually, the Constitutional Court has issued a series of decisions declaring that the dispute settlement provision of BITs[14] is unconstitutional. This is done as part of a major scheme to withdraw from those treaties because they are considered to be the illegitimate cession or waiver of sovereign powers; namely, the power of Ecuadorian courts to exercise their jurisdiction within the territory of Ecuador. Currently, the only BIT that is being denounced is the BIT with Finland; the other treaties have not been denounced by the government. The government is waiting for the Commission for the Citizens' Integral Audit of Treaties on Reciprocal Protection of Investments and of the International Arbitral System on the Subject of Investments' (CAITISA) report.

CAITISA

After unfavourable judgments from a number of international tribunals, the government moved to limit its international liability by denouncing a number of treaties. The attack began with a letter dated 5 October 2012 issued by the National Juridical Secretary on behalf of President Correa, addressed to ministers and public authorities, informing them that 'in future contracts to be concluded by Ecuador, disputes must be submitted only to local courts and not to arbitral tribunals.'[15]

The letter does not distinguish between local or international arbitration, so we can infer it applies to any kind of arbitration clause that may be included in an administrative contract. Despite this, Ecuador's initiative to submit disputes with foreign investors arising from specific contracts to international arbitration under UNCITRAL rules, having Santiago de Chile as the seat of arbitration, remains unaltered. The Attorney General has already approved this type of arbitral provision as required by the Constitution in several contracts.

Executive Decree 1506, dated 6 May 2013,[16] established the creation of CAITISA. The objectives of CAITISA are to examine and evaluate:

- the execution and negotiation process of BITs and other agreements on investment signed by Ecuador, as well as the consequences of their application;
- the content and compatibility of those treaties with Ecuadorian legislation; and
- the validity and appropriateness of the actions, proceedings and awards issued by international investment tribunals and arbitral bodies where Ecuador has been a party.

CAITISA's objective is to determine, from a legal, social, economic and political perspective, the legality, legitimacy and fairness of the decisions, and to identify inconsistencies and irregularities that have had, or may have, an impact on the Ecuadorian state in economic, social and environmental matters.

To complete its tasks, CAITISA will have an eight-month period (extendable for additional eight months) and broad access to 'the entire content of instruments for treatment of foreign investment and dispute resolution on the matter'. All public institutions are obliged to provide CAITISA with the information it requests. Up to this date, CAITISA has not issued a formal declaration on any matter.

This period has been extended and CAITISA was scheduled to render its final report at the end of 2015. The issuance of the report will be very relevant for the development of international arbitration in Ecuador and for the future of bilateral investment treaties – subjects that will certainly be mentioned in the report. At the time of writing, the final report has purportedly been finished. However, it has not been published by any public entity and there are doubts that said publication will be circulated considering that Ecuador has initiated negotiation rounds with the EU promoting a commercial agreement that establishes arbitration as the method for dispute resolution. Moreover, Ecuador's Congress has recently enacted a public-private partnerships bill seeking the promotion of foreign direct investment. Said bill expressly recognises international arbitration, both contractual and treaty-based, as a method for settling disputes related to PPP contracts.

Finally, CAITISA drafted a bill that is yet to be introduced before Congress that grants immunity from civil and criminal liability to all of its members for any results the report may contain. This type of immunity is common for truth and reconciliation commissions but not for this type of administrative commission.

It is important to note that one of the tasks of CAITISA is to determine the 'legality, legitimacy and fairness' of decisions issued by arbitral tribunals against the Ecuadorian state. This power will affect the enforcement of foreign awards. Any local judge who is aware of a negative ruling by CAITISA will at least think twice before enforcing an award that orders the state to compensate investors for violations of their rights.

Pending cases against Ecuador

To date, Ecuador has 32 active arbitration proceedings as reported by the Attorney General's Office.[17]

Enforcement of international arbitral awards in Ecuador

Under the recently enacted COGEP there is doubt about the new mechanism for the enforcement of international arbitral awards. Article 103 states that international awards will be enforced according to international conventions ratified by Ecuador. This seems to be a direct reference to the New York Convention; unfortunately, article 104 says that to enforce an international award, a judge must verify that the following conditions have been met:

- that all the formalities required by the state where the award was rendered were observed;
- that the award is firm;
- that the award is translated; and
- that due process was observed.

For awards rendered against the state, COGEP sets the bar even higher and requires demonstration of the fact that the awards are in accordance with domestic law. It seems that this provision was introduced in light of the possible unfavourable international investment awards against Ecuador.

Other aspects worth mentioning

The development of arbitral proceedings has recently been disturbed by a series of constitutional actions impeding the regular development of arbitral cases. Judges are currently invoking constitutional rights to force arbitrators to refrain from entertaining certain arbitral proceedings or force them to make important jurisdictional decisions in the nascent stages of the proceedings.

Additionally, we have learned about an attempt from the disciplinary board of the judiciary to initiate administrative proceedings against an arbitral tribunal. The judiciary has no right to rule or entertain disciplinary actions against arbitrators.

Notes

1 Official Register 145, 4 September 1997. Codification was published in Official Register 417, 14 December 2006.

2 The Organic Code of Procedures was recently published on 22 May 2015.

3 Article 37, AML: 'The provisions of the Civil Code, Code of Civil Procedure or Commercial Code and other related laws are supplementary and shall be applied on all matters not set forth in this Law, provided that arbitration at law is involved.' It is not possible to understand the objectives of the lawmaker's limitation because, in practice, supplementary norms also are – and should be – used in arbitration ex aequo et bono or in equity, especially if the judiciary intervenes during any stage.

4 Article 41, AML. The terms 'if susceptible to compromise and not affecting or impairing national or collective interests' in the last assumption are the result of a hasty legal amendment in 2005 within the context of international arbitration claims that the Ecuadorian State was beginning to confront at that time. There is no case law providing clarity for its application. See such amendment in Law No. 2005-48, Official Register 532, 25 February 2005.

5 Article 425, Constitution:

> *The hierarchical order for the application of norms shall be as follows: the Constitution, international treaties and conventions, organic laws, ordinary laws, regional rules and district ordinances, decrees and regulations, ordinances, agreements and resolutions, and other acts and decisions of the public powers.*

6 Article 417 of the Constitution:

> *International treaties ratified by Ecuador shall be subject to the provisions of the Constitution. In the case of treaties and other international instruments on human rights, the principles pro human being, no restriction of rights, direct applicability and open clause established in the Constitution shall apply.*

This principle has been developed further in article 5 of the Organic Code for the Judiciary, which states that:

> *The judges, administrative authorities and officials of the Judiciary shall directly apply constitutional norms and those set forth in international instruments on human rights if the latter are more favourable to those established in the Constitution, even if not expressly invoked by the parties.*

Organic Code of the Judiciary, Official Register Supplement 544, 9 March 2009.

7 Official Register Supplement 1201, 20 August 1960.

8 Official Register 43, 29 December 1961. Ecuador ratified the New York Convention resorting to the commercial and reciprocity reservations set out in article I(3).

9 Official Register 386, 3 March 1986. Note that this Convention only pertains to disputes relating to investments between contracting states and nationals of other states, as specified in its provisions.

10 On 3 June 2009, the President of the Republic delivered a request to the Legislative and Auditing Committee of the National Assembly asking it to denounce the Washington Convention, claiming that it infringes the interests of Ecuador and violates article 422 of the Constitution. The request was considered by the National Assembly on 12 June 2009. Subsequently, the President of the Republic issued Executive Decree No. 1823 on 2 July 2009, where he resolved: '(1) To denounce and, therefore, to declare the termination of the Convention on Settlement of Investment Disputes ICSID ...' Notice of the denunciation was served to ICSID on 6 July 2009.

11 Official Register 875, 14 February 1992.

12 Official Register 153, 25 November 2005.

13 President Correa's speech to Congress on 10 August 2009 contained a strong message against bilateral investment and commercial treaties. See a press article at: www.asambleanacional.gov.ec/20090810235/noticias/rotativo/discurso-del-presidente-de-la-republica-economista-rafael-correa.html.

14 See the article by *Global Arbitration Review* at the following URL: www.globalarbitrationreview.com/news/article/28642/ecuador-champing-bits.

15 Oficio No. T.1-C.1-SNJ-12-1134 issued by the National Juridical Secretary on 5 October 2013.

16 Official Register 958, 21 May 2013.

17 Source: www.pge.gob.ec/images/publicaciones/2016/Rendicion_de_Cuentas_2015.pdf

Rodrigo Jijón-Letort
Pérez Bustamante & Ponce Abogados

Rodrigo Jijón is a partner and president of the board at Pérez Bustamante & Ponce, a leading law firm in Ecuador. He leads the dispute resolution practice, which covers litigation, arbitration and mediation.

Rodrigo is an active arbitrator of the main arbitration centres in Ecuador including those of the Quito Chamber of Commerce, the Ecuadorian–American Chamber of Commerce and the International Arbitration Centre, sponsored by the Pichincha Chamber of Industry and the London Court of Arbitration.

Rodrigo presided over the arbitration tribunal in an ICSID arbitration case between IBM and Ecuador and has participated as litigating attorney in a large number of national and international arbitration proceedings. Likewise, he has acted as legal counsel to international corporations in several international arbitration proceedings.

Rodrigo has served as professor of procedural law in several graduate and postgraduate universities in Ecuador. He has contributed numerous articles on procedural law and arbitration to different magazines in Ecuador and abroad, and is constantly participating as speaker in seminars and conferences on procedural law and arbitration.

He is recognised as a seasoned litigator and arbitrator in the Ecuadorian and Latin American markets, with a remarkable track record representing local and foreign clients in matters ranging from investment protection, to contractual, civil, environmental and constitutional matters. Clients applaud his strategic and implacable approach to his cases, while being forthcoming with his clients and team in stressful situations. Rodrigo is past president and the current vice president of the Ecuadorian Arbitration Institute and a full member of the Ecuadorian Procedural Law Institute. He has also been a member of the Court of Honour of the Quito Bar Association.

Juan Manuel Marchán
Pérez Bustamante & Ponce Abogados

Juan Manuel Marchán is a partner at Pérez Bustamante & Ponce, leading law firm in Ecuador. He has a wide experience in international arbitration, M&A and infrastructure projects. He usually represents clients in local and international arbitrations focusing mainly in investment protection. He has experience in investment and commercial disputes under ICSID, UNCITRAL, CIAC and ICC rules.

Juan Manuel served as chief of staff at the Ministry of Oil and Mines of Ecuador. Currently he teaches international arbitration and international law at the University of San Francisco Quito and the Pontifical Catholic University of Ecuador. He is constantly invited as panellist in arbitration and litigation events in the country and abroad. He also collaborates in numerous publications on international commercial arbitration.

Juan Manuel graduated as doctor at law from the the Pontifical Catholic University of Ecuador and completed an LLM programme at Columbia University School of Law.

Juan Manuel is recognised as a key figure in the arbitration arena. His knowledge as well as his remarkable capacity to work under pressure are features frequently noted by clients.

Juan Manuel is member and current executive director of the Ecuadorian Arbitration Institute and a full member of the Ecuadorian Procedural Law Institute. He has also been a member of the Court of Honour of the Quito Bar Associate.

PÉREZ BUSTAMANTE & PONCE PBP 100 AÑOS

Av República de El Salvador No. 36-140
Ed Mansión Blanca, Piso 9
Quito
Ecuador
Tel: +593 2 3827 640
Fax: +593 2 2559 092

Rodrigo Jijón-Letort
rjijon@pbplaw.com

Juan Manuel Marchán
jmarchan@pbplaw.com

www.pbplaw.com

PBP is the largest firm in Ecuador, considered a market leader and a trusted advisor for national and international clients. It has offices in Quito and Guayaquil and outreach throughout Ecuador. Specialisation is one of its core values. The firm has an extensive group of specialists across 17 practice areas. Each practice works in coordination with other areas to provide comprehensive and effective legal advice.

The team has local and international experience. Many professionals at PBP attended renowned local and international universities and have worked at first-rate law firms around the world.

PBP has been awarded Ecuadorian Firm of the Year six times by *Chambers Latin America* (2009, 2010, 2011, 2013, 2014 and 2015) and six times by *Who's Who Legal* (2010, 2011, 2012, 2013, 2014 and 2016).

PBP has been very active in the arbitration arena, representing, among others, MAESSA and SEMI (Consorcio GLP's foreign investors) in an international investment-treaty arbitration against state-owned FLOPEC, brought under the Ecuador-Spain BIT; Teikoku Oil Ecuador and Cayman Exploration in the international arbitration under UNCITRAL Rules for the breach of the Oil Services Agreement executed with Ecuador (Petroecuador); Mexico's largest soda bottling company in an ICC arbitration resulting from a SPA; subsidiaries of Hong Kong conglomerate CK Hutchison Holdings, knocking out the bulk of a US$200 million claim brought by an Ecuadorian port authority over their early termination of a port upgrade project – a split tribunal awarded just US$35 million in damages; Tuscany International Drilling in an arbitration against Consorcio CYA under the rules of the Quito Chamber of Commerce; and Nestle Ecuador in an arbitration proceeding against Etinar SA brought under the rules of the Quito Chamber of Commerce.

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