GETTING THE DEAL THROUGH

Arbitration

in 57 jurisdictions worldwide

2012

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CONTENTS

Ecuador

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Laws and institutions

1 Multilateral conventions

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

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

With regard to international arbitration, Ecuador adopted the main international instruments on this subject quite early: the 1928 Havana Convention on Private International Law, the 1958 United Nations Convention on 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 Washington Convention) – recently denounced; the 1975 Inter-American Convention on International Commercial Arbitration (the Panama Convention); and the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards.

2 Bilateral treaties

Do bilateral investment treaties exist with other countries?

Ecuador is party to bilateral investment treaties (BITs) with the following states: Argentina, Bolivia, Canada, Chile, China, Costa Rica, the Dominican Republic, El Salvador, Germany, Nicaragua, Paraguay, Peru, Romania, Venezuela, France, the Netherlands, Spain, Switzerland, the United Kingdom and the United States.

Ecuador has not formally withdrawn from these BITs, even though some of them have been declared unconstitutional by the Constitutional Court. This declaration was issued mainly because the BITs provide for international investor-state atrbitration, 'disregarding' the jurisdiction of domestic courts and tribunals.

We believe that an arbitral tribunal could be validly constituted under these BITs (please keep in mind that Ecuador is not a party to the ICSID), but enforcement of the award could face some challenges, especially in Ecuador, on grounds of public policy for the above-mentioned reasons.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

Arbitration in Ecuador is regulated by the Arbitration and Mediation Law of 1997 (the AML). The Law proposes a dualist regime comprising rules governing local arbitration in detail and a few – albeit determinant – rules on international arbitration. Additionally, pursuant to the AML, other bodies of law such as the Code of Civil Procedure (the CCP), the Organic Code for the Judiciary (the OCJ) and the Civil Code may be supplementary to it, provided that arbitration is conducted at law.

With regard to 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, therefore, 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, for example:

- the parties may elect any norms to conduct an ad hoc as well as a regulated arbitration proceeding. As a result, 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 the public policy – not clearly defined in Ecuador. Despite this lack of definition, we consider that norms such as those relating to the due process – to be 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 set forth in this chapter;
- Ecuador does not have a law on international arbitration that might limit the prerogatives of article 42 of the AML with respect to the arbitration proceeding; and
- substantive non-procedural provisions in the AML could be important and applicable to international arbitration in certain circumstances.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The AML took some of the legal provisions of the UNCITRAL Model Law, however it has several variations such as the conduct of the arbitral proceedings, the annulment grounds and the recognition and enforcement of international arbitration awards.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

For local arbitral proceedings the provisions of the AML are of mandatory application. For international arbitral proceedings, however, the AML gives the parties the possibility to choose the arbitral rules that will govern the proceedings. However, due process provision set forth in the Constitution must be applied in all and any cases.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

The parties are only free to decide on the law applicable to the merits of the case in private arbitral proceedings. In case of arbitration where the state is a party, any submission to foreign law must be authorised by the state attorney general according to the Organic Code of Public Finance.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

There are several arbitration institutions in Ecuador able to administer arbitration proceedings. Among them:

- the Arbitration and Mediation Center of the Quito Chamber of Commerce;
- the Arbitration and Mediation Center of the Ecuadorean-American Chamber of Commerce;
- the Arbitration and Mediation Center of the Quito Chamber of Construction; and
- the Arbitration and Conciliation Center of the Guayaquil Chamber of Commerce.

All these arbitral institutions have rules of procedure that are very similar to each other, and there are no special particularities of note.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

Article 199 of the Constitution imposes a parameter to define arbitrability of disputes in Ecuador. Arbitration and alternative procedures for dispute resolution '[…] shall be applied pursuant to the law in such matters where, due to their nature, it is possible to compromise'. This precept is also included in article 1 of the AML. According to Ecuadorean law, therefore, it is possible to submit to arbitration only such matters that can be susceptible to compromise, the limitation of which is mainly included in the section on the Compromise Agreement of the Civil Code.

Instead of determining which matters can be the object of a compromise, the Code preferred to exclude those that cannot be such object, among which are the following:

- criminal matters;
- marital status of persons;
- the right to receive alimonies, unless upon judicial approval;
- inexistent rights or rights of others;
- matters obtained through fraud or violence, or by way of void title; and
- matters already resolved through a judgment passed with authority of res judicata of which the parties had no knowledge at the time of the compromise.

In addition to the provisions of the Civil Code, there are other laws that are also important to determine the scope of objective arbitrability, such as for instance:

- the Intellectual Property Law, which states that 'all controversies regarding intellectual property may be submitted to arbitration or mediation pursuant to the Arbitration and Mediation Law';
- the General Insurance Law, which provides that the insured or beneficiary may 'resort to the competent judges in a summary verbal proceeding, or to commercial arbitration or mediation, as the case may be';
- the Modernization Law of the State, which mentions that matters dealing with commercial issues may be resolved 'by national or international arbitration, as established in the respective contract and pursuant to the laws in force';
- the Stock Market Law, which provides that any controversy 'between stock market participants relating to the laws and obligations deriving from this law may be submitted to arbitration in accordance with the Arbitration and Mediation Law and applicable regulations'; and finally
- within the context of arbitration in investments, Ecuador has maintained that there are other matters that cannot be resolved by arbitration such as taxation matters.

On the other hand, and in relation to the type of arbitration that may be agreed upon regarding public contracting, the Constitution and the Organic Law for the National Public Contracting System (the Law on Public Contracting) state that arbitration is only admissible if at law, leaving aside arbitration in equity or ex aequo et bono. Recently, the Constitutional Court clarified that this restriction is limited to public contracting and does not reach other contracts that the state may execute. It should be taken into account that article 3 of the AML mentions that if the parties – in the arbitration agreement – do not agree that arbitration will be at law, 'the award shall be in equity'; thus, it is necessary to avoid incurring this prohibition whether due to action (express agreement that arbitration will be in equity) or due to inaction (failure to select the type of arbitration), because such an agreement would be unconstitutional and, therefore, null and void.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

Article 5 of the AML defines the arbitration agreement as '[…] a written agreement whereby the parties decide to submit to arbitration all disputes or certain disputes arising or that may arise between them with respect to a given juridical relationship – contractual or non-contractual'. Thus, it establishes a difference between a clause relating to the parties' submission to arbitration (*clause compromissoire*) and an arbitration commitment (*compromis*), both having the same legal value and effects.

It has been determined that, among the requirements for validity of the arbitration agreement, the agreement must be in writing. However, a written document is not only one duly signed by the interested parties – as it happens in the majority of cases – but it is also one '[…] resulting from an exchange of letters or other written

communications evidencing the parties' will to submit to arbitration.' Hence, the lawmaker's intention was to record the parties' unequivocal desire to resort to arbitration, no matter if their consent is expressed in one act or in several simultaneous or consecutive acts. Furthermore, in the case of a *compromis*, article 6 of the AML requires that it must be made '[…] in a document stating the name of the parties and an unequivocal definition of the legal transaction to which it refers.' Finally, when the dispute involves civil indemnities for felonies or unintentional tort, that is, for extra-contractual liability, 'the arbitration agreement must refer to the facts with which the arbitration will deal.'

In addition to the above requirements, if the arbitration agreement is within the context of public contracting (where a public entity participates or if entered into with an entity governed by private law where the state has some participation in order to 'purchase or lease goods, perform works and provide services, including consultancy'), the Constitution, the AML, the Law on Public Contracting and the Organic Law for the Office of the Attorney General of the State set forth the following additional requirements for local and international arbitration:

- the 'favorable opinion of Attorney General of the State' must be issued previously;
- the 'express authorization of the highest authority of the respective institution' must be obtained;
- the agreement must refer to a juridical relationship of contractual character, extra-contractual matters not being included;
- it must state how arbitrators are to be selected; and
- it must be executed by 'a person authorized to contract on behalf of the institution'.

It should be noted that, according to article 4 of the AML, 'failure to comply with the requirements set forth above shall bring about nullity of the arbitration agreement'.

With the above requirements in context, it is possible to evidence that Ecuador's body of laws still has misgivings about arbitration in matters involving public contracting. While, for private individuals, the formalities required for an arbitration agreement to be valid are common to those pertaining to the general regime of contracts, the requirements are substantially more stringent in the case of public contracting.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

An arbitration agreement will not be enforceable in the following circumstances:

- in a general sense, if the clause is 'pathological' (meaning that it does not contain the express and unequivocal will of the parties to submit the dispute to arbitration; if its vagueness renders it unenforceable, or if it does not allow a tribunal to find that it has jurisdiction over a certain dispute);
- when the agreement is not in writing;
- in consumer claims, when the arbitration is not expressly ratified by the consumer;
- in contracts with public entities, the arbitration agreement must be previously approved by the Attorney General's Office, and it must indicate the method for selecting arbitrators, otherwise, it will not be enforceable; and
- when the arbitration agreement has been considered as 'waived' by the parties (eg, when the respondent is sued before the court system, and he or she does not contest the court's jurisdiction on the grounds of the arbitration agreement), it will not be enforceable.

The arbitration agreement need not be inserted in the main contract; reference thereto, or to specific events and circumstances is sufficient to have a valid arbitration agreement.

Please note the arbitration agreement will be valid and enforceable even if the contract is void. The arbitration system avails the principle of Kompetenz-Kompetenz and the principle that in case of doubt, arbitration as an agreed-upon dispute settlement mechanism will be honoured. It is also worth keeping in mind that if the arbitral agreement is contested before the court system, the otherwise competent judge will have to summarily decide on the existence, validity and enforceability of the arbitration agreement – failure to do so could result in nullity of the entire case before that court.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

Ecuadorean law does not regulate the instances in which third parties or non-signatories will be bound by an arbitration agreement. To determine when third parties could be bound by an arbitration agreement we must refer to other laws such as the Civil Code, the Insurance Law, and other laws that regulate legal or mandatory assignment of rights under contracts.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

No there is no reference.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

We have not been aware of any case law that may have dealt with these particular aspects.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

No, the AML does not regulates multiparty arbitration agreements.

Constitution of arbitral tribunal

15 Appointment of arbitrators

Are there any restrictions as to who may act as an arbitrator?

Article 3 of the AML mentions that 'if the award is to be issued on the basis of equity […] the arbitrators do not necessarily have to be lawyers. If the award is to be issued at law, then the arbitrators […] must be lawyers.' Consequently, when the AML is applicable in international arbitration according to what has been mentioned above, it is necessary to comply with this professional requirement in the case of arbitration at law.

Active judges are not allowed to act as arbitrators and arbitrators need to be either selected from a list or appointed by the parties.

16 Appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

In case of failure of the parties' agreement to appoint arbitrators, Ecuadorean law establishes in article 16 that arbitrators will be selected from a list following a ballot procedure. Each Chamber of Commerce has a list of qualified individuals that are able to act as arbitrators in local or international arbitral proceedings.

There is no court involvement for the appointment of the arbitral panel.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

The Ecuadorean Law on Mediation and Arbitration contemplates a specific procedure for requesting the removal of arbitrators if they incur the inabilities or causes for excuse contemplated in general civil procedure. In the case of institutional arbitration, the director of the centre must resolve this request. In ad hoc arbitration, the request must be resolved by the other members of the tribunal, or by the director of the closest arbitration centre to the domicile of the plaintiff.

The reasons or causes are the general causes set forth in the Civil Procedure Code.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

Arbitrators have duties and responsibilities derived from their appointment under Ecuadorean law.

Duty of complying with arbitration mandate

Compliance with the arbitration mandate is, doubtless, an arbitrator's most important duty who, in turn, has a number of obligations towards the parties. In this regard, article 18 of the AML states the following:

> *Once the arbitrators accept their position as such, they have the unrestricted obligation to comply with the functions established in this Law and shall be held liable to the parties if failing to comply with such obligations for any damages caused by their action or inaction, unless a justified impediment exists.*

In our opinion, compliance with such functions pursuant to Ecuadorean law at a minimum and fundamentally includes the following:

- to adjudicate the dispute in binding and definitive fashion;
- to implement the foregoing strictly in keeping with the applicable principles and rules;
- to conduct the proceedings in an impartial, independent and diligent manner;
- to observe the guarantees of the due process;
- to complete the arbitrator's task until the respective arbitral award is issued, unless there are justified reasons to discontinue the task pursuant to applicable principles and rules; and
- to see that the award can be recognised and enforced in the respective jurisdiction.

As mentioned in article 18 of the AML, the arbitration mandate is a source of civil liability in relation to the parties to a dispute. Therefore, the parties are entitled to request indemnity for damages generated by an eventual breach of the arbitrator's obligations.

Duty of revealing ineligibilities

As a consequence of the duties of impartiality and independence mentioned above, an arbitrator is compelled to reveal if '[…] he is included in [any] ineligibility to perform his office' so he may be replaced. Article 19 of the AML makes reference to circumstances occurring after the arbitrator's appointment, because the objective of such disclosure is to replace the arbitrator then in office.

Duty of rejecting incidents

In keeping with the nature of arbitration and diligent management of the arbitration proceedings, the arbitrator has the duty and the power to reject '[…] any incidents caused by the parties to delay the proceeding or to hinder any actions' that could bring about the imposition of fines.

Power to request evidence at all times

Article 23 of the ALM contemplates the arbitrator's power to request any kinds of evidence deemed pertinent 'in order to clarify the events' prior to issuing the arbitral award, whether requested by the parties or decided ex officio. Due to its usefulness, the power of requesting further evidence to better decide is used repeatedly by arbitrators and parties in Ecuador, which also results in abuse by the litigant that the arbitrators must control.

Power to order precautionary measures

The AML allows the arbitrators to adopt precautionary measures as deemed necessary in an arbitration proceeding. We will make reference to this power in further detail below.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Arbitrators are subject to the general rules of liability that regular judges are subject to under the Civil Procedure Code. Under Ecaudorean law, arbitrators are not immune from liability for their conduct in the course of the arbitration.

Jurisdiction

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

A valid arbitration agreement is also a source of obligations of not doing, not only with respect to the parties but also to the judiciary. Thus, article 7 of the AML – on the one hand – compels the parties 'not to submit the case to the ordinary justice' and, on the other hand, requires the judges to 'abstain from hearing any claim dealing about juridical relations' that are the subject matter of the arbitration agreement, 'save in the cases of exception established in this Law', by referring this exception to the action of nullification. This rule even characterises the favor arbitralis principle, whereby if in doubt about the existence of an arbitration agreement or of the will of the parties '[…] the respective judicial organ shall be in favor that any controversies should be resolved by arbitration.'

Under article 8 of the AML, when a party files a lawsuit in violation of an arbitral agreement, the defendant must file an answer to the claim in which the defendant will have to argue that there is a

binding arbitral agreement. Such argument will have to be resolved by the court as a threshold matter, which will require both parties to submit evidence about the existence and application of the arbitral agreement without dealing with the merits of the case. If the court concludes that the arbitral agreement is valid, the lawsuit will be filed.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

The Kompetenz-Kompetenz principle is clearly set out in the AML. According to article 22, one of the first actions of the arbitration panel during the hearing to try the case is to resolve about 'its own competence'.

In *Latin American Telecom Inc v Pacifictel SA*, the National Court of Justice ratified this principle and declared that 'only the arbitration panel is competent to decide about its competence on the matter submitted for resolution, a decision that took place during the hearing to try the case in the arbitration proceeding.'

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Pursuant to article 36 of the AML, local arbitration proceedings must be held in Spanish.

International arbitration proceedings can be held in the language agreed upon by the parties as long as it is considered an 'international arbitration' under article 41 of the AML and if the arbitral institution's rules permit the use of languages different from Spanish.

Regarding the place of the proceedings, local arbitral proceedings need to be seated in the domicile of the arbitral institution that administers the case. In case of international arbitration, the rules selected by the parties will apply.

23 Commencement of arbitration

How are arbitral proceedings initiated?

The AML provides that the proceeding commences upon submission of the arbitral claim, which must be signed by the plaintiff's representative and a registered attorney. One particular aspect of Ecuadorean law is that all proofs known at the time the claim is filed must be attached to the claim. It is exceptional to submit them after the period to produce evidence. According to Ecuadorean law, there is no discovery proceeding. All proofs must be attached to the claim, to the answer to the claim, to the counterclaim, and to the answer to the counterclaim.

Payment of arbitral fees is to be submitted together with the claim. Such fees will depend on the quantum of the claim.

24 Hearing

Is a hearing required and what rules apply?

Yes, under our local procedure there is a first hearing called the *Audiencia de Sustanciacion*, where the arbitrators declare that they have jurisdiction to hear the case and order that all evidence is produced as requested by the parties in their respective pleadings.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

The rules of evidence are the general rules that are established in the Civil Procedure Code and in the regulations of the chambers that administer arbitral proceedings. There are no specific rules regarding witness, experts or production of documents. However, the local arbitral tribunals are usually very keen on accepting broad international arbitration standards.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

According to Ecuadorean law, the courts do not intervene or assist the tribunal in the normal course of arbitral proceedings. What could happen is that arbitrators require the assistance from court officers to enforce precautionary measures in arbitral proceedings.

27 Confidentiality

Is confidentiality ensured?

According to the provisions of article 76(7)(d) of the Constitution and article 34 of the AML, arbitration proceedings in Ecuador are public, unless the parties have reached an agreement to the contrary. Therefore, if they wish to maintain the confidentiality of the issues to be heard during the arbitration, it is advisable to express this fact in the arbitration agreement.

Interim measures

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Courts are entitled to order interim measures before the arbitral tribunals are appointed or in the arbitral proceedings when the parties do not expressly authorise the arbitrators to enforce the precautionary measures requested.

29 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

The AML establishes the very broad power of arbitrators to order and to enforce precautionary measures in an arbitration proceeding in Ecuador. Article 9 allows the arbitrators to so order '[…] pursuant to the rules of the Code of Civil Procedure or those deemed necessary for each case', and therefore they are not limited to those listed in the Code but may comprise any measures that will contribute to '[…] secure the goods that are the subject matter of the proceeding or to guarantee its results.' It should be noted that the arbitration panel can request bonds from the parties to guarantee the appropriateness of the measures requested or to suspend their effects, as the case may be.

However, the AML even goes beyond as regards the powers of the arbitrators in these matters and, as long as the parties have established this fact in the arbitration agreement, it allows the arbitrators to enforce those measures, for which purpose '[…] they shall request the aid of public, judicial and administrative officers as shall be necessary, without having to resort to any ordinary judge at the place where the property is located or where it is necessary to adopt

those measures.' This rule has been the object of intense academic discussions because, as it is known, arbitrators lack imperium, which is understood to be the power of enforcing what is adjudged that is normally entrusted to the ordinary judges only. Some see this prerogative as innovative and a positive trend, while for others it is an ultra vires expression that denaturalises the functions of arbitrators.

It has not been possible to identify Ecuadorean case law regarding precautionary measures issued during international commercial arbitrations. However, we believe that the decision of the National Court of Justice in *City Oriente Limited v Republic of Ecuador and Empresa Estatal Petroleos del Ecuador (Petroecuador)* with respect to precautionary measures issued by an ICSID tribunal is important for this study. In this case, the arbitration panel ordered provisional measures, among others, that Ecuador should refrain from 'initiating or continuing, if already initiated, all judicial proceedings or actions of any kind directed to or involving City Oriente Limited and/or its officers and employees […]'. At the same time, the Office of the State Prosecutor commenced an evidentiary proceeding on grounds of embezzlement against officers of the company benefiting from said measures. In view of this fact, the National Court of Justice stated that 'since the ICSID resolution determines a legal obstacle for the action due to the aforementioned facts, the Prosecutor should have not initiated this evidentiary proceeding until the obstacle is removed' and, consequently, he declared the 'nullity of all actions during the evidentiary proceeding.'

Awards

30 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Yes, please see question 33.

31 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

The AML establishes that awards will be rendered by the majority of members of the tribunal, and in case of a dissent the dissenting arbitrator will prepare a separate reasoning that will be deemed a part of the award.

32 Form and content requirements

What form and content requirements exist for an award?

The AML only deals in definitive awards, which are decisions whereby the arbitrators definitively resolve the dispute. Furthermore, article 28 of the Law refers to awards by consensus, which include a compromise between the parties, although they are in fact a subspecies of the definitive award. The Ecuadorean legal framework does not consider partial or interlocutory awards customary in international arbitration. Despite this fact, we believe that rules governing arbitration may contemplate other types of awards because the issuance of the award is a phase within the arbitration proceedings regulated by the autonomy of the parties' will.

With respect to the requirements that ought to be observed at the time of issuing an arbitral award, articles 26, 27, 28 and 29 of the AML mention the following:

- that it be adopted by the majority. If an arbitrator does not agree with the decision of the majority, he or she will state this fact for the record by reserving his or her vote and explaining his or her reasons;
- that it be signed by the arbitrators. The AML does not expressly mention that the award should be in writing, but several rules lead one us believe that this was the lawmaker's intention, such as in article 26, which makes it obligatory that the award should bear the arbitrators' signature. In the case of an award by consensus, that requirement is set out expressly;
- that it be motivated. As already mentioned, article 76(7(l) of the Constitution and article 130(4) of the OCJ deal about this duty and the breach thereof would bring about nullity of the award. The former Superior Court of Justice of Quito has mentioned that arbitrators are compelled to resolve 'with exactness, precision, no subterfuges the pretensions set forth in the claim for which resolution it declared itself competent'; and
- that it be notified to the parties during a hearing called to that effect, and that a copy of the award should be delivered to each party.

As we have reiterated, the issuance of the award would be governed by rules selected by the parties, but if it is an award intended to be recognised or enforced in Ecuador, or if Ecuadorean law is lex arbitri, it seems reasonable to recommend the arbitrators to observe those formalities – which, besides, are common to the majority of arbitration regulations – in order to prevent problems.

33 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law?

Article 25 of the AML states that the arbitral panel 'shall be allowed a maximum 150-day period to issue the award', beginning on the date of the hearing to try the case and extendable for the same number of days 'in strictly necessary cases […] whether by specific agreement of the parties or because the panel declares it ex officio.' Thus, we must understand that except upon the agreement of the parties – that may well be reflected on a reference to arbitration regulations establishing different terms – the panel will be deemed functus officio after such periods have expired.

34 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

According to Ecuadorean law, the decisive date is the date of delivery of the award. From this date parties have 10 days to request the annulment of the award before the provincial courts of the place of the seat of the arbitratation.

35 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

Ecuadorean law only contemplates definitive awards that are decisions whereby the arbitrators definitively resolve the dispute. No interim awards or preliminary awards are possible in the Ecuadorean legal system.

36 Termination of proceedings

By what other means than an award can proceedings be terminated?

The proceedings may end by a settlement or when the claimant desists of the claim and this is accepted by the tribunal.

37 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Yes, the arbitral tribunal is empowered to award attorneys' fees in the final award.

However, usually attorney fees are granted if one of the parties litigated in bad faith or delayed the normal course of the proceedings.

38 Interest

May interest be awarded for principal claims and for costs and at what rate?

Yes, if the award embodies a monetary obligation, post-award interest accrues until the sum is paid to the creditor. The award needs to establish the date from which the interest runs and in the enforcement proceedings the judge will make a liquidation of interest at the 'legal rate', until payment is made.

Proceedings subsequent to issuance of award

39 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Article 30 of the AML, considered jointly with article 282 of the OCJ, establishes horizontal recourses for clarification of and expansion upon the award. The former, for purposes of 'correcting numerical errors, mistakes of calculation, typos or similar errors' or if the award is obscure, and the latter for purposes of amending an award that 'has not resolved a controversial issue or if it omits a decision on fruits, interest or court costs.' Once the award is notified, the parties are allowed three working days to submit those recourses, and the arbitrators are allowed that same period of time to resolve. Pursuant to article 30 of the AML, 'arbitral awards shall not be susceptible to any other recourse not established in this law.'

40 Challenge of awards

How and on what grounds can awards be challenged and set aside?

Besides the legal grounds established in the international conventions, the AML established a list of grounds for requesting the annulment of an arbitration award.

The reasons or causes to request annulment of an award are listed restrictively determined in article 31 of the AML, which includes the following procedural irregularities:

- failure to serve the claim to the defendant in a process heard and terminated ex parte, provided that it limits that party's right of defence;
- failure to serve the court's orders to the parties thus limiting or preventing their right of defence;
- failure to summon, notify or present evidence despite the existence of facts that must be justified;
- extra or ultra petita inconsistencies; and
- illegal constitution of the arbitration panel. In keeping with the international trend, it can be noted that reasons for annulment have two fundamental features:
  - they are restrictive; and
  - they refer to adjective irregularities or errors in procedendo, and not to substantive irregularities or errors in judicando.

41 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

There is no appeal from the arbitral award rendered in local arbitral proceedings. There is a possibility to appeal from the ruling that resolved an annulment action before the courts, but there is no appeal from the tribunal decisions.

42 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Ecuadorean legislation does not have any procedural channels specially designed to recognise and enforce foreign awards but, rather, it gives them a sort of equal treatment as for enforcement of local judicial judgments passed in a last instance. In this connection, article 42 of the AML states that 'awards pronounced in an international arbitration proceeding shall have the same effects and shall be enforced in the same manner as awards issued in a local arbitration proceeding', which, pursuant to article 32 of the Law, are enforced just as local judicial judgments passed in a last instance, that is, through the judicial order for enforcement without delay (*via de apremio*).

In the present case, the judicial order for enforcement begins with a written document wherein the interested party asks the judge to enforce the foreign award. There are no requirements or formalities for this petition in Ecuadorean legislation. However, if the plaintiff bases his or her petition on mechanisms provided by an international convention, its formalities must be met. Once the petition is received by the judge, he or she must make a pronouncement by means of a writ known as an injunction (*mandamiento de ejecución*).

Once the injunction has been issued, the person compelled to enforce will only be allowed 24 hours to oppose recognition and enforcement of the award according to the mechanism selected by the plaintiff.

43 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

We are not aware of any terminated proceedings for recognition and enforcement of international arbitration awards, since the enactment of the AML in 1997. We are therefore not in a position to determine the attitude of domestic courts in enforcement proceedings.

44 Cost of enforcement

What costs are incurred in enforcing awards?

There are no fees or taxes to be paid to the court for the enforcement process.

Other

45 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Arbitration, as a modern dispute settlement mechanism, is relatively new (the AML was enacted in 1997) and the justice system is beginning to cope with it. Consequently, there are many grey areas as to the influence that the justice system may exert over an arbitrator or an arbitral procedure.

As a general rule, arbitrators will have the power to order provisional measures of protection and execute them with the aid of law enforcers only if they are expressly authorised to do so by the parties in the arbitration agreement. If no such authorisation is given, the arbitral tribunal will need the assistance of a judge.

There are no statutory provisions for US-style discovery in an arbitral procedure, mainly because Ecuadorean procedures are conducted under civil law rules. Each party to the dispute has the burden of proving its allegations and its facts, and each party has the burden of producing the evidence to that effect. Each party will have to produce its documentary evidence and each party will present its witnesses (the other party may cross-examine the witness; party

Update and trends

Ecuador is experiencing a difficult period with regard to international arbitration. The government has denounced the ICSID Convention and all bilateral investment treaties are in the process of being denounced. The advice to foreign clients is to include arbitration clauses in all contracts to the executed with the government and be aware that local laws that regulate the main economic sectors are constantly changing.

officers may testify, there is no impediment). In any case, documentary evidence will outweigh fact testimony. Normally, producing evidence is not a very expensive or time-consuming phase in the arbitral proceeding.

Expert witnesses may be appointed by the artbitral tribunal, or they may be presented by each party, this largely depends on the artbitral rules of each centre, and the decision of the artbitral tribunal. Written statements are common for expert witnesses but the general practice for receiving testimony is through oral examination.

The arbitral tribunal has the power to order the production of any evidence it considers necessary, and depending on the method for producing such evidence, court intervention through court orders may be necessary.

Since the entry into force of the new Constitution, a new possibility for court intervention has arisen (please note, we are referring to court intervention during the proceeding, and not for the purposes of enforcing the award). A party that feels its constitutional rights are in jeopardy (inmmediate and grave threat) may request any judge to issue an 'an order for precautionary measures to protect constitutional rights'. There have been few cases in which the artbitral proceedings have been suspended for this reason.

46 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Any foreign national (save for very few exceptions) may enter the country for 90 days in one year since his or her first entry without any visa. Normally, this will be enough for counsel or arbitrators to attend meetings, hearings or other matters. If additional time is required counsel or arbitrators may apply for a 'business' visa that will grant them multiple entries for up to six months in one year. This visa may be obtained in Ecuador or abroad, and it is granted in approximately six working days.

Fees earned by arbitrators or counsel for services rendered in Ecuador will be subject to overseas remittance tax (5 per cent), VAT will also apply (12 per cent). However if payments are made abroad other tax rules will apply.

There are no 'unusual' ethical rules worthy of mentioning. Ethical rules are determined by each centre. Compliance with commonplace international ethical standards should be sufficient.

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