



Enforcement of Foreign Judgments

in 28 jurisdictions worldwide

Contributing editors: Mark Moedritzer and Kay C Whittaker

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Ecuador

Rodrigo Jijón Letort and Juan Manuel Marchan

Perez Bustamante & Ponce

1 Treaties

Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties and what if any amendments or reservations has your country made to such treaties?

Ecuador has signed and ratified several international conventions that are relevant to this matter, namely:

- the Havana Convention on Private International Law of 1928 (Sanchez de Bustamante Code);
- the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention);
- the Inter-American Convention on International Commercial Arbitration of 1975 (Panama Convention); and
- the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards of 1979 (Montevideo Convention).

Regarding the New York Convention and the Panama Convention, Ecuador has invoked the commercial and reciprocity reservations.

2 Intra-state variations

Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

Ecuador is a unitary republic, meaning that an internal legal regime resembling any form of federalism is non-existent. There is absolute uniformity on the law on the enforcement of foreign judgments within the single Ecuadorian jurisdiction.

3 Sources of law

What are the sources of law regarding the enforcement of foreign judgments?

The relevant sources of law are the Code of Civil Procedure and the Organic Code of the Judiciary.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

Ecuador is not a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

5 Limitation periods

What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

The law does not establish a limitation period for enforcement of foreign judgments. There is discussion on this matter; some scholars argue that the general statute of limitation for ordinary actions applies and others argue that there is no limitation. Due to the lack of case law, this point remains uncertain.

6 Types of enforceable order

Which remedies ordered by a foreign court are enforceable in your jurisdiction?

Enforceable remedies are orders that contain an obligation to pay a sum of money, orders that contain an obligation to deliver an asset and orders that contain an obligation not to do something. We do not have any knowledge of attempts to enforce injunctions issued by foreign courts. There is no express norm for this purpose, either.

7 Competent courts

Must cases seeking enforcement of foreign judgments be brought in a particular court?

Yes, article 143 of the Organic Code of the Judiciary states that: *Actions for recognition or homologation of foreign judgments shall be heard by a specialized division of a provincial court depending upon the subject matter involved and the defendant's district. Once final judgment is passed recognizing or confirming a foreign judgment, it shall be enforced by a trial judge in the defendant's place of domicile having jurisdiction over the subject matter.*

8 Separation of recognition and enforcement

To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

Once the judgment is recognised by the provincial court under article 143 of the Organic Code of the Judiciary (see question 7), the enforcement phase or legal proceedings for collection commence before first-instance civil judges (trial judges who hierarchically sit under the provincial courts). These proceedings include precautionary measures to ensure debt collection.

The legal proceedings for collection commence when the interested party requests the Ecuadorean judge to enforce the foreign judgment. Once the petition for enforcement is received, the judge issues an order referred to as a writ of execution (ie, 'a writ in which the judge orders, once the judgment has become final, that the debtor designate sufficient assets to cover the debt plus interest and court costs,

if awarded against him, or that he pay within the next twenty-four hours'; Carlos Puig Vilazar, *Índice de Procedimiento Civil Ecuatoriano*, volume V, page 42).

9 Defences

Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

In principle, there are narrow grounds for challenging a foreign judgment, and the only defences should be based on lack of compliance with the requirements for recognition (see question 11); nevertheless, a defence based on constitutional due process guarantees (contradiction, respect to the right of defence) cannot be simply discarded.

In addition, international treaties such as the New York Convention establish grounds for opposing recognition of a foreign judgment.

10 Injunctive relief

May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?

No, according to our law and the international treaties of which Ecuador provide the right of the local party to oppose to the enforcement proceedings. However, there is no injunctive relief to challenge or prevent enforcement of a foreign judgment. What has been recently used by litigators in order to prevent enforcement of judgments are constitutional actions to prevent enforcement based on possible violations of constitutional rights.

11 Basic requirements for recognition

What are the basic mandatory requirements for recognition of a foreign judgment?

The basic mandatory requirements are:

- the judgment must not contravene Ecuadorian public law or any national law and should be in keeping with the international treaties and conventions currently in force;
- the judgment must have force of *res judicata* in the jurisdiction of issuance; and
- the judgment must have been passed in a personal action.

12 Other factors

May other non-mandatory factors for recognition of a foreign judgment be considered and if so what factors?

There are no other non-mandatory factors that are considered by Ecuadorian courts for recognition.

13 Procedural equivalence

Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction, and if so, how is that requirement evaluated?

A minimum standard of procedural equivalence could be imposed by the judge who is asked to recognise the judgment. This standard will mostly reflect the Ecuadorian constitutional provisions on due process guarantees (such as legality, presumption of innocence, right to be heard by a competent judge, proportionality, right to be heard under equal conditions, right to be assisted by counsel, *non bis in idem*, sufficient motivation of the judgment and right to appeal).

14 Personal jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant, and if so, how is that requirement met?

The court could examine the jurisdiction of the court of issuance under the general requirements of procedural equivalence (see question 13).

15 Subject-matter jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy, and if so, how is that requirement met?

The court could examine the jurisdiction of the court of issuance under the general requirements of procedural equivalence (see question 13).

16 Service

Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

Service of summons will be carried out locally in accordance with the Code of Civil Procedure as follows.

Once the claim is filed with the provincial court, the court is under an obligation to assign the case by the casting of lots to one of its chambers with jurisdiction over the subject matter. Following the casting of lots, the chamber to which the claim was so assigned determines whether the claim meets all legal requirements established in article 67 of the Code of Civil Procedure. In a case of recognition of a foreign judgment, a certified copy thereof, legalised and apostilled, must be added.

Once the claim is qualified, the provincial court must serve the summons upon the defendant, providing him or her with the contents of the claim so that he or she may know the plaintiff's pretensions and contradict them at the proper time. Service of summons upon the defendant may be carried out personally, that is, by personal delivery of the notice of claim; if service of process upon the defendant cannot be carried out personally, it may be carried out by leaving three notices at his or her domicile on three different days; and finally, if the defendant's domicile is unknown, article 82 of the Code of Civil Procedure provides for service of summons by means of three publications of an abstract of the claim in the major newspaper in the defendant's place of domicile.

Once the defendant is summoned, he or she may answer the claim or make a pronouncement on the plaintiff's pretensions. If, notwithstanding his or her being legally summoned, the defendant fails to answer, the lawsuit will continue in contempt of court. In other words, the judge is under an obligation to continue to process the case until a confirmation of the foreign judgment is obtained.

Finally, once the foreign judgment has been confirmed, the provincial court is under an obligation to send the case to a trial judge in the defendant's domicile as provided for in article 143 of the Organic Code of the Judiciary. Since this recognition process is a continuation of the enforcement process, the defendant need not be summoned because he or she is presumed to have indicated his or her legal domicile in the process for confirmation of the foreign judgment.

The correct service of process in the main claim is always a requirement for proper recognition and enforcement.

17 Fairness of foreign jurisdiction

Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

The court could examine the process from which the judgment emerged under the general requirements of procedural equivalence (see question 13) and the requirement that a foreign judgment must not contravene Ecuadorian public law.

18 Vitiating by fraud

Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

The court will examine an allegation of fraud in the light of the requirement that a foreign judgment must not contravene Ecuadorian public law or any national law and should be in keeping with the international treaties and conventions currently in force.

19 Public policy

Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

Yes, it will examine the foreign judgment for consistency with laws of public order.

20 Conflicting decisions

What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

If there are conflicting decisions, the judges will apply the public order principle and refuse enforcement and execution of both decisions or awards.

21 Enforcement against third parties

Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

No, the courts will not apply in these type of proceedings principles of agency of alter ego. We have not seen any case law where these principles have been applied and the court in these type of proceedings is bound to follow the procedure established in the Organic Code of the Judiciary.

22 Alternative dispute resolution

What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

The Arbitration and Mediation Law establishes that (for instance) if one of the parties argues the existence of an arbitral clause the courts need to open a short evidentiary process to prove the existence of the clause. If such clause is proven, the judge will refrain from hearing the case and will order the parties to resort to arbitration.

23 Favourably treated jurisdictions

Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

Generally, every jurisdiction is given the same treatment for recognition and enforcement. This does not mean that execution from certain jurisdictions may not be simpler or easier due to the existence of specific bilateral or multilateral treaties.

24 Alteration of awards

Will a court ever recognise only part of a judgment, or alter or limit the damage award?

Ecuadorian courts could limit the execution of the award under public order laws (for example, awards that include recognition of punitive damages or compound interest (or both), which are contrary to the strictly compensatory principles and nature of Ecuadorian civil laws).

25 Currency, interest, costs

In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls? If interest claims are allowed, which law governs the rate of interest?

Ecuador's currency is the US dollar, and no conversion is made unless the quantum of the award is expressed in another currency, such as euros. Any judgment rendered by a local Ecuadorian court will be expressed in US dollars.

26 Security

Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

A judgment passed by a provincial court in an action for recognition is subject to appeal to one of the chambers of that same court, in which case the process would last approximately two additional years. The appeal would be tried by one of the chambers of that same court where evidence would be produced and hearings would be carried out.

Against the judgment passed by the appropriate chamber of the court, an appeal of cassation may be filed to the National Court of Justice, in which case the process would be extended for approximately one additional year.

27 Enforcement process

Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

Within the enforcement process, the parties may request the adoption of enforcement measures that depend on the type of obligation required to be performed.

If the obligation required to be performed by the defendant is an obligation to pay a sum of money, the judge shall fix the sum to be paid as interest and order the debtor, if the award is against him or her, to designate assets equivalent to the value of the principal, interest and court costs within 24 hours. If deemed necessary, the judge may appoint an expert for settlement of interest. If the defendant fails to designate the assets that are to be attached, if such designation is malicious or if the assets so designated are insufficient to cover the debt or are located outside the country, the plaintiff shall be entitled to designate the assets to be attached. Once the debtor's assets are attached, they are appraised and sold at auction and the debt is paid to the creditor out of the proceeds of the auction sale. If the judge orders the seizure of the debtor's funds, payment will be made with those funds.

Where the obligation involved is to deliver an asset, the defendant will be forced to deliver it (if necessary, by the use of law enforcement officers). As concerns obligations of doing that are to be performed, the judge will order that they be performed on account of the debtor. If the assets cannot be delivered or the obligations cannot be performed on account of the debtor, the judge will determine the indemnity to be paid for noncompliance and order the relevant collection through the sale of attached real property. If the obligation is an

obligation to grant or execute an instrument, the judge will perform this on behalf of the party required to do so.

Finally, if the obligation is an obligation not to do, the judge must determine the amount of damages resulting from the breach if the action cannot be undone.

28 Pitfalls

What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?

Common pitfalls include the following:

- lack of a specific procedure – since article 143 of the Organic Code of the Judiciary does not establish a procedure to be used by the Provincial Court of Pichincha, such court may be under
- an obligation to process the recognition through ordinary proceedings (article 59 of the Code of Civil Procedure provides that ‘All disputes for which the law does not establish a special procedure shall be resolved through ordinary proceedings’). However, due to the recent approval of this norm, we do not have case law that indicates the time frame that such proceedings will take;
- timeframe for recognition and enforcement procedures – as stated above, since the procedure for recognition of foreign judgments is established in the recently enacted Organic Code of the Judiciary, there is no case law that would otherwise indicate the time the process would take; and
- regarding a judgment subject to appeal and appeal of cassation – see question 26.

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