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Reference

Arbitration 2011 – Ecuador

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LEGISLATION

1. Which legislation governs the enforcement of international commercial arbitration awards and arbitral agreements in international business contracts, and international commercial arbitration proceedings?

A variety of mechanisms is available for purposes of recognising and enforcing foreign arbitral awards in Ecuador, depending on the international instruments of which the country is a party as well as on its own internal regulatory framework. In our case, Ecuador has signed and ratified the principal conventions on international arbitration, including the New York and Panama conventions. These two instruments contemplate mechanisms for recognition and enforcement of awards. Additionally, the Arbitration and Mediation Law (AML) also establishes another mechanism for enforcement of arbitral awards.

Although the New York, Panama and Washington Conventions establish substantive conditions for recognition and enforcement of foreign awards, they do not determine any specific procedural channel to be applied by the signatory nations and they let each nation decide under its own internal laws.

2. Has the UNCITRAL model arbitration law been adopted in your jurisdiction?

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.

CONVENTIONS

3. Is your jurisdiction a party to both the New York Convention and the Panama Convention? Is it a party to any other conventions or treaties governing international commercial arbitration agreements, awards or proceedings?

In 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 (New York Convention), the 1966 International Convention on Settlement of Investment Disputes between States and Nationals of other States (Washington Convention) - recently denounced; the 1975 Inter-American Convention on International Commercial Arbitration (Panama Convention); and the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards.

4. Is your jurisdiction a party to the ICSID Convention? Have steps been taken to renounce the Convention or withdraw from ICSID?

On 3 June 2009, the president delivered a request to the Legislative and Auditing Committee of the National Assembly asking it to denounce the 1966 International Convention on Settlement of Investment Disputes between States and Nationals of other States, 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 issued Executive Decree No. 1823 on 2 July 2009, where he resolved:

> *"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, and since 6 January 2010, Ecuador is no longer a party to the convention.

5. Has your jurisdiction refused to honour an international arbitral award issued against it? If so, please provide a brief explanation.

We have not been aware of any judicial decision that refuses to honour and enforce an international arbitration award.

COMMERCIAL ARBITRAL AGREEMENTS AND ARBITRABILITY

6. Is a pre-dispute clause or separate agreement to resolve international commercial disputes by arbitration enforceable?

Yes, a dispute clause or separate agreement to resolve international commercial disputes by arbitration is enforceable under our AML. There are a few requirements that need to be met in order to have full validity of a separate arbitral agreement. 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 Organic Law for the National Public Contracting System (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 "favourable opinion of attorney general of the state" must be issued previously;
- the "express authorisation of the highest authority of the respective institution" must be obtained;
- it must refer to a juridical relationship of contractual character, extra-contractual matters apparently staying out of it;
- how arbitrators are selected; and
- it must be executed by "a person authorised 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".

7. Is a pre-dispute clause or separate agreement to resolve disputes by arbitration enforceable in consumer cases? Is there any legislation in your jurisdiction governing the arbitrability of consumer disputes?

Yes, a pre-dispute clause or separate agreement to resolve disputes by arbitration is enforceable in consumer cases in Ecuador. There are not any legal provisions regarding arbitrability of consumer disputes.

8. What are the requirements for an enforceable arbitral agreement?

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."

9. Is there subject matter that is not legally subject to arbitration in the context of an international business transaction?

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 Ecuadorian 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 which are among 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.

10. Does the law specify whether an arbitration will be in equity or under law if the parties do not expressly specify the nature of the arbitration in the agreement?

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.

According to our law public entities can just convene to arbitration under the law for public contracting affairs. Any other areas of public contracting, such as finance or debt agreements, the state entities are allowed to agree to arbitration in equity.

11. How does the law limit party autonomy with respect to the terms of an arbitral agreement?

Yes, the parties are free to specify and agree the terms of the arbitral agreement within the legal frame provided by the AML. For instance parties are entitled to establish the form for the selection of the arbitrators or to establish an special timeline for the arbitrators to render its award (fast-track arbitration).

12. Under what circumstances does the law allow a non-signatory to an arbitral agreement to pursue a claim in an international arbitration against a party that signed the arbitral agreement?

There are no regulations in our AML regarding the incorporation of non-signatory parties to arbitration proceedings.

13. Under what circumstances does the law allow a signatory to an arbitral agreement to pursue a claim in an international arbitration against a party that did not sign the arbitral agreement?

There are no regulations in our AML that allow a signatory to an arbitral agreement to pursue a claim in an international arbitration against a party that did not sign the arbitral agreement

14. Is there a concept in your jurisdiction providing for class-action arbitration or group arbitration?

No, there is no provisions in our jurisdiction that allow of permit class-action arbitrations or group arbitrations.

ARBITRAL INSTITUTIONS AND ARBITRATORS

15. Are foreign arbitral institutions authorised to administer arbitrations in your jurisdiction? Does the law require that a foreign institution be licensed under local law in order to administer an arbitration seated there?

Yes, according to our law the parties are able to resort international commercial arbitration and to agree that a determined set of Rules will apply and govern the proceedings. So any foreign institution will be able to administer arbitration proceedings in Ecuador. There is no need for a special permission or registration.

16. Is an arbitral award issued in an arbitration seated in your jurisdiction under the auspices of a foreign institution such as the ICDR, the ICC or the LCIA vulnerable to challenge?

Under Ecuadorian law, an arbitral award granted by a registered foreign institution would be valid and therefore subject to the mechanisms of execution and appeal provided for in Ecuadorian law and international treaties.

17. Does the law require that arbitrators in international arbitrations be citizens or residents of your jurisdiction?

Ecuadorian law does not hold a specific requirement as to the legal status of arbitrators in local arbitrations.

18. Does your law require that arbitrators in international cases be lawyers?

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.

19. Are the fees of foreign arbitrators serving in an arbitration seated in your jurisdiction subject to taxation?

The fees of foreign arbitrators rendering services in Ecuador would be subject to taxation. The amount and specific taxes to be applied would depend on the nationality of the arbitrator and the existence of conventions or tax treaties with those countries. In most of the cases the fees are not paid locally or the arbitrators has a tax domicile in a third country, so there would not be any tax concerns.

20. Must arbitrators in international arbitrations be independent and impartial? What is the legal standard governing conflicts of interest and disclosure by arbitrators in international arbitrations?

Article 76(7)(k) of the Constitution of Ecuador provides that all persons are entitled: "to be judged by an independent, impartial and competent judge …". This rule represents one of the guarantees of the due process and is applicable to all judicial proceedings such as arbitration. For this reason, article 19 of the AML compels the arbitrator to reveal any reasons that might disqualify him from performing his functions due to absence of such qualities.

21. Will courts entertain requests to disqualify an arbitrator during an arbitration?

The Ecuadorian Law on Mediation and Arbitration contemplates a specific procedure for requesting the removal of arbitrators if they incur in 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 closes arbitration centre to the domicile of the plaintiff.

ARBITRAL PROCEEDINGS

22. Does the law require that arbitral proceedings be held in a specific language?

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 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.

23. Can foreign lawyers serve as advocates in arbitral proceedings in your jurisdiction? If so, can they do so alone or must a local lawyer serve as co-counsel?

A foreign lawyer can serve as an advocate in a local arbitral proceeding only if he/she has homologated his/her foreign law degree before the Ecuadorian Superior Education Council.

International arbitral proceedings are subject to institutional rules and for that matter are not subject to the above mentioned restriction.

24. Are the fees of foreign lawyers earned for services rendered in connection with an arbitration seated in your jurisdiction subject to local taxation?

Yes, legal fees earned by foreign lawyers for services rendered in connection with arbitrations seated in Ecuador are subject to two taxes:

- income tax withholding equivalent to 25 per cent; and
- currency exit tax equivalent to 2 per cent.

However as mentioned above in most of the cases the attorneys fees are not paid locally and the lawyers have a tax domicile in a third country. If payments are made locally taxes will apply.

25. In what circumstances, if any, does your law allow the consolidation of multiple arbitral proceedings?

The AML does not contain any relevant provisions in this regard. However, the Code of Civil Procedure, which is subsidiarily applicable to arbitration, includes four situations in which consolidation is possible.

Under article 108 of our Code of Civil Procedure, applicable to arbitration proceedings to be held in Ecuador, consolidation is possible when:

- a judgment in another case would produce res judicata;
- the object in dispute is also under dispute in a previous case;
- the object in dispute is part of a creditor's meeting; and
- if the matter under dispute would be divided if it would be solved in different proceedings.

26. Please describe common practice and usage in international arbitrations seated in your jurisdiction with respect to a party's right to require an opposing party to produce documents pertinent to the dispute.

The AML does not contain any rules in regard to the request of evidence to the opposing party. Article 42 of the AML states that international arbitral proceedings are regulated by the treaties, conventions, protocols and other international law agreements that Ecuador has signed and ratified.

COURT SUPPORT FOR ARBITRATION

27. Is the principle of 'Kompentenz-Kompetenz' followed in the courts?

The 'Kompetenz-Kompetenz' is fully applicable in Ecuador and is consistently followed by local courts. Article 22 of the AML determines that the first thing an arbitral tribunal must do once it has been composed is to determine its own jurisdiction, and this legal provision is followed by local courts.

28. Do the courts follow the principle of the independence and separability of the arbitration clause?

The independence and separability of the arbitral agreement are not expressly recognised in the AML.

29. If a party files a lawsuit in violation of an agreement to arbitrate, will a petition by the defendant to remit the lawsuit to arbitration be granted by the courts under normal circumstances? If so, will that petition be treated as a threshold matter or will it be rolled into the merits of the litigation such that the defendant will also need to defend the merits of the lawsuit in court?

Under AML article 8, when a party files a lawsuit in violation of an arbitral agreement, the defendant must file an answer to the claim in which defendant will have to argue that there is a binding arbitral agreement. Such argument will have to be resolved by the judge or court as a threshold matter which will require both parties to submit evidence about the existence or application of the arbitral agreement without dealing with the merits of the case. If the judge or court concludes that the arbitral agreement is valid, the lawsuit will be filed.

30. Are arbitral tribunals empowered to grant interim relief? If so, how is that relief enforced in the courts?

AML's article 9 gives tribunals wide powers to grant interim relief. In accordance to article 9, parties can include in the arbitral agreement a provision by which the arbitral tribunal can request the assistance of public official (administrative and judicial employees, police) to enforce interim relief. If the possibility of interim relief is not included in the arbitral agreement, the party who requires interim relief will have to file a request before a judge or court. Local judges and courts will lend their enforcement authority to arbitral tribunal in such situation.

31. Can arbitrators issue orders, subpoenas or use other legal processes to compel the production of evidence by a third party or compel a third-party witness to appear before them? If so, will a court lend its aid in enforcing such an order against a recalcitrant third party?

Pursuant to article 23 of the AML, arbitral tribunals have the power to request from the parties all the evidence they deem necessary. If a third party or a third-party witness does not want to provide the requested evidence, the tribunal may request the assistance of the judicial police in application of articles 924-937 of the Code of Civil Procedure.

32. Can a party to an arbitration seek relief from the court to obtain evidence in aid of an international arbitration? What is the scope of such relief?

In most of the cases the tribunal will have enough powers to obtain or order the parties to produce documents or submit evidence. However, a party may seek relief from local courts to obtain evidence in aid of an international arbitration as long as the relief that is being sought is not contradictory with the

tribunal's orders. If the arbitration has not started yet or if the tribunal has not been appointed yet, the relief will be aimed to the preservation of evidence. If the tribunal is already appointed, the aid of local courts may be helpful to obtain any evidential information requested by the tribunal as long is such request is not a violation of public order.

33. Can a party in an international commercial arbitration seek interim or provisional relief from a court without first seeking relief from the arbitral tribunal?

The AML does not contain any rules in regard to the request of interim measures in international arbitral proceedings. Article 42 of the AML states that international arbitral proceedings are regulated by the treaties, conventions, protocols and other international law agreements that Ecuador has signed and ratified.

Ecuador has signed and ratified the Inter-American Convention on the Taking of Evidence Abroad which is in force since 1975. This Convention is applicable to arbitral proceedings by Ecuador's express declaration.

34. Have the courts issued injunctions enjoining arbitral proceedings from going forward?

Yes, we are aware of one case where a judge in a constitutional action requested a local chamber of commerce to suspend the arbitration proceedings as request of one of the parties that argued that the submission to the case to arbitration violated its constitutional rights. The judge ordered the director of this chamber of commerce to suspend the arbitration until the constitutional action was resolved by a higher court.

AWARDS – CONTENT

35. Does the law provide that post-award interest accrues on an unpaid arbitral award?

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

36. Is an arbitral tribunal empowered to award attorneys' fees to the prevailing party or is that power reserved to the courts?

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.

AWARDS – CHALLENGES AND VACATUR

37. What are the grounds for challenging an international award issued in an arbitration seated in your jurisdiction?

Besides the legal grounds established in the international conventions, our 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.

38. Is 'lack of reasonableness', manifest disregard or a mistake in the application of the substantive law to the dispute of an international award grounds to vacate it?

No, lack of reasonableness or manifest disregard of the law are not grounds to vacate an award under Ecuadorian Law.

39. To what degree have international awards rendered in your jurisdiction been vacated on the grounds of 'public policy?

We have not been aware of any judicial decision that vacates or annuls an international arbitration award.

40. What is the period of time a party has to challenge such an award?

According to our law a party has 10 days from the day that the award ought to be enforced, to file, before the same arbitral tribunal, the claim for annulment of the arbitral award. Within three days, the arbitration panel must deliver the proceeding to the president of the provincial court in the respective jurisdiction who must adopt a decision within 30 days. Additionally, whoever files an action for annulment may ask the panel to suspend the enforcement of the award by rendering a sufficient bond. Despite how brief the procedure for an action for annulment seems to be, the time frame is hardly ever met and there are possibilities for appeal and other judicial actions.

41. Please describe the standard used by the courts in deciding whether to vacate an international arbitral award.

We have not been aware of any judicial decision that vacates or annuls an international arbitration award.

42. Please describe any recent significant experiences or cases that illustrate the attitude of your courts towards the annulment of international awards rendered in your jurisdiction.

We have not been aware of any judicial decision that vacates or annuls an international arbitration award.

43. Do the courts consider themselves empowered to vacate an arbitral award rendered in another jurisdiction?

We have not been aware of any judicial decision that vacates or annuls an international arbitration award, so it's difficult to assess whether local courts consider themselves empowered to vacate international arbitral awards.

AWARDS ENFORCEMENT

44. Please describe the process for enforcing an arbitral award rendered in another jurisdiction.

Ecuadorian legislation does not have any procedural channels especially 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 so-called 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 Ecuadorian legislation. However, if the plaintiff bases his petition on mechanisms provided by an international convention, its formalities must be met. Once the petition is received by the judge, he 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.

45. Assuming that the award is covered by a convention applicable in your jurisdiction, how long does it take to obtain an order of enforcement in the first instance? How long does it take for the enforcement process to run its full course through to the last instance?

We have not been aware of any terminated proceedings for recognition and enforcement of international arbitration awards, since the enactment of the AML in 1997.

46. Please compare how long it takes to enforce an arbitral award rendered abroad with how long it takes to domesticate a foreign judgment?

We have not been aware of any terminated proceedings for recognition and enforcement of international arbitration awards, since the enactment of the AML in 1997. A process of homologation of a foreign judgment may take from four to six years.

47. Please describe some significant recent experiences with the enforcement of foreign arbitral awards.

We have not been aware of any terminated proceedings for recognition and enforcement of international arbitration awards, since the enactment of the AML in 1997.

48. To what degree has 'public policy' been a ground to refuse enforcement of an international award rendered abroad?

We have not been aware of any terminated proceedings for recognition and enforcement of international arbitration awards, since the enactment of the AML in 1997.

49. Can a foreign arbitral award be enforced if the award has been set aside by the courts at the seat of the arbitration?

There are not precedents regarding a possible enforcement of an award that has been set aside by courts at the seat of the arbitration. There is also no legislation that may regulated this type of actions.

THE OUTLOOK

50. What is your view of the future of international arbitration and is the trend positive in your jurisdiction? What advice do you have with respect to dispute resolution for a foreign lawyer advising a foreign client contemplating entering into a business deal with a company from your jurisdiction?

Ecuador is passing through difficult times regarding international arbitration. The government has denounced the ICSID Convention and all bilateral investment treaties are in 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 in change.

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