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National and International Arbitration in Ecuador

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The Law on Arbitration and Mediation (LAM), enacted on 4 September 1997,[1] repealed the previous Law on Commercial Arbitration that had been in force since October 1963, as well as several other legal provisions that could be deemed opposed to the new regime.[2]

Later, the LAM was amended in order to strengthen arbitration in Ecuador.[3] The following amendments to the LAM are worth pointing out:

- The possibility of challenging the validity of an arbitral award is clearly defined through a procedural nullity action (acción de nulidad), which cannot be considered an appeal within the same proceeding.
- The president of the Provincial Court of Justice is allowed 30 days to decide on the *acción de nulidad* filed against an award.
- In case a party to an arbitral agreement is sued before the judicial system, the judge will have to decide upon the existence and validity of such arbitral agreement as a pre-trial matter by means of the principle of judicial economy (see article 8, LAM).

It is safe to say that arbitration has had relative success in Ecuador. Probably the reason for this success is the fact that it has proven to be an alternative to the judicial system that allows for a speedy and impartial process. The inherent flaws of the judicial system have contributed to this relative success. However, it is "relative" because statistics show that from the universe of legal conflicts, very few are resolved through arbitration, although the number is rising.[4]

There is still much work that needs to be done to raise the awareness of alternative dispute resolution (ADR) mechanisms in Ecuador in order to further develop and spread the use of arbitration for regular conflict resolution.

One of the major setbacks for the advancement of arbitration in Ecuador is the widespread lack of experience in the field generally, which becomes evident when drafting arbitration clauses and agreements. This often provides great difficulty for arbitral tribunals that cannot declare they have jurisdiction over certain subject matters. Other difficulties arise from a lack of knowledge concerning the differences between the arbitration and the judicial systems.

The arbitration regime in the 2008 Constitution

Ecuador has undergone serious changes in its legal system. In a referendum on 28 September 2008, the Ecuadorean people approved the new Constitution drafted by the National Constituent Assembly (2008 Constitution).

Similar to its predecessor, the 2008 Constitution recognises the existence and validity of ADR mechanisms, expressly including arbitration (see article 190, 2008 Constitution). However, unlike the 1998 Constitution, the 2008 Constitution imposes certain conditions and requirements for arbitration to be viable.

For example, it expressly states that arbitration may only be used for resolving disputes that could otherwise be resolved through a settlement agreement between the parties. Legal issues that cannot be waived or renounced by the parties may not be subjected to arbitration.[5] This requirement of arbitration ratione materiae is already included in the LAM, and embodying it in a constitutional provision is useless or, at least, unnecessary.

The relevant constitutional provision also deals with arbitration with the state or its instrumentalities. The wording in the provision lacks clarity. Article 190 says:

> *In matters of public contracting, arbitration at Law will be available, provided that there is a prior favorable opinion from the Attorney General of the State, pursuant to the conditions set forth in the legal framework.*[6]

This provision requires an opinion from the attorney general of the state (AG) before commencing any arbitration. Furthermore, in conjunction with the provisions of the AG Law,[7] his opinion is necessary before an arbitration clause is agreed in all cases. Therefore, article 190 of the 2008 Constitution expands the requirement of an ex-ante opinion by the AG to all arbitration clauses and agreements, not only to those entered among the parties ex-post the controversy, as the LAM requires.[8] Hence, the AG practice and construction of such constitutional provision is that he must issue his opinion ex-ante the execution of any arbitration clause to be concluded with a state-owned entity, regardless of whether the dispute has already arisen or not.

Constitutional control of arbitration

Subsequent to the 2008 Constitution, a debate commenced in Ecuador on the possibility for judicial intervention in arbitration beyond the exceptional cases set out in the Arbitration and Mediation Law. In particular, the Constitution establishes the extraordinary action for protection.[9] This is a constitutional motion to revise final judgments where constitutional rights have been infringed. In other words, the constitutional motion is admissible against final decisions, thus endangering the *res judicata* effect that characterises arbitral awards.

It should be noted that the Constitutional Court has not yet resolved any of the actions for protection brought so far (directly against arbitral awards).[10] There are arguments buttressing each side.[11]

International arbitration and foreign investment protection

In the context of investment treaty arbitration, it must first be noted that Ecuador has withdrawn from the ICSID Convention. The announcement was made in July 2009 and the withdrawal became effective January 2010.[12] (For additional information on Ecuador's withdrawal from ICSID, please see the Ecuadorean chapter on international arbitration in the previous issue of *The Antitrust Review of the Americas*.) Although this notice from Ecuador does not affect the consents provided for in contracts with ICSID dispute resolution clauses in BITs executed by Ecuador,[13] the message that Ecuador has sent to the world and to the parties to the ICSID Convention is clear: it does not like international arbitration.

Additionally, there is a strong political decision to withdraw from several bilateral investment treaties through which Ecuador gives its consent to international arbitration.[14]

Actually, the Constitutional Court has been issuing a series of decisions declaring that the dispute settlement provision of bilateral investment[15] (BITs) are unconstitutional (ie, the Ecuador-UK and Ecuador-Germany BITs and others). This is done as part of a major scheme to withdraw from those treaties because they are considered to be the illegitimate cession or waiver of sovereign powers; namely, the power of Ecuadorean courts to exercise their jurisdiction within the territory of Ecuador.

The Constitutional Court has issued the aforementioned decisions based on article 422 of the 2008 Constitution, which establishes in the relevant part:

> *It shall not be possible to enter into international treaties or instruments in which the Ecuadorean State waives sovereign jurisdiction to international arbitration venues in contractual or commercial disputes between the State and private individuals or corporations.*

The Constitutional Court does not seem to consider that article 422 establishes a prohibition to enter into new treaties; and such a prohibition is related to treaties in which Ecuador waives sovereignty in contractual and commercial disputes. Therefore, in our opinion, current treaties are not against the 2008 Constitution because the prohibition is for future treaties and does not apply to existing ones; and the prohibition refers to contractual and commercial disputes, while the BITs are generally related to investment disputes within the independent and separate discipline of international investment law.

In order to withdraw from the BITs, the Constitutional Court is declaring that the BITs are unconstitutional because they contain provisions that provide for international arbitration for the settlement of investment disputes with foreign investors, disregarding the jurisdiction of the domestic court system.

At the time of writing, the National Assembly International Law Committee has already issued internal reports suggesting the withdrawal of several BITs and has approved the withdrawal of BIT executed with Finland.

The general procedure for withdrawing from the BITs is as follows: The National Assembly International Law Committee issues a recommendation to all the other legislators in the sense that they should approve the withdrawal from each BIT. After voting on the matter, the National Assembly will approve the withdrawal from each BIT and the president of the republic will send the notice of withdrawal to the other contracting party in each BIT.

It is important to say that despite the fact that the Constitutional Court has approved the withdrawal of several BITs, the National Assembly has rejected the request of withdrawal of the BITs executed with China, the Netherlands and Germany.

Recent developments in negotiation and renegotiation procedures for public contracts indicate that Ecuador is willing to submit disputes with foreign investors arising from specific contracts to international arbitration under UNCITRAL rules, having Santiago de Chile as the seat of arbitration. The attorney general has already approved this type or arbitral provision as required by the Constitution.

Also, the recent Production Code approved by the government to reactivate the economy contains some interesting provisions on settlement of investment disputes. Article 27 of the approved Code establishes that conflicts that arise from an investment may be resolved through arbitration, but the arbitration clause must be included in an investment contract. The mandatory applicable law will be Ecuadorean and there is a mandatory mediation phase that needs to be exhausted before the arbitration commences. The arbitration agreement needs to meet some legal requirements in order to be valid, but it is quite evident that the government understands that there is a need for having disputes with foreign investors resolved through international arbitration. Special care will surely be needed when drafting these contracts.

It is also worth mentioning that Ecuador is a party to the World Trade Organization[16] and more than once it has applied state-to-state arbitration as set forth in WTO treaties.[17]

Pending cases against Ecuador

Presently, as we have learned, Ecuador has nine pending international arbitration cases pertaining to investment.[18]

Enforcement of international arbitral awards in Ecuador

On 19 August 1961, Ecuador ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the 1958 New York Convention (NYC).[19] At the time of ratification, Ecuador submitted the reservation on reciprocity as allowed by article 1.3 of the NYC.[20] We still do not have any cases in Ecuador relating to enforcement of awards issued under the NYC.[21]

On 30 January 1975, the Inter-American Convention on International Commercial Arbitration, or Panama Convention (PC), entered into force and was ratified in 1978.[22] It is a second tool for enforcing foreign arbitral awards. The PC was executed by the Organization of American States (OAS) member countries and, therefore, its application is limited to arbitral awards pronounced in one of the OAS member countries that entered into the PC.[23] The PC applies to arbitral decisions resulting from disputes of a commercial character.[24] Article 4 of the PC provides that recognition and enforcement of arbitral awards that meet the requirements and limitations of the Convention must be recognised in the same manner as national or foreign judgments are recognised and enforced.[25]

On May 1982,[26] the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, or the 1979 Montevideo Convention[27] (MC), came into effect in Ecuador. In addition to the coverage provided by the MC to judgments and awards pertaining to other matters, it also applies to enforcement of foreign arbitral awards relating to commercial issues. The MC, just as in the PC, only applies to judgments and awards issued in OAS member countries. The MC's intention is to cover judicial judgments and awards issued in civil, commercial or labour proceedings in one of the member states.[28]

As far as local norms are concerned, the LAM does not have a specific system for recognition and enforcement of foreign awards but, rather, it gives them the same treatment as the process for enforcing local judicial judgments passed in last instance. Article 42 of the LAM states that "awards issued in an international arbitration proceeding shall have the same effects and shall be enforced in the same manner as awards issued in a national arbitration proceeding". According to article 32 of the LAM, that procedure for enforcing arbitral awards will be the same as for enforcing local judgments passed in last instance; that is, through a judicial order. The LAM sets forth the judge's duty to recognise and enforce foreign awards through a judicial order, without the possibility of applying any other procedure.

Therefore, we believe that the LAM provides a mechanism that is more expeditious and direct than those provided in international conventions, which can be applied to international arbitration awards in Ecuador.

The judicial order procedure is commenced by the judge who allows a very short period of time for the debtor to pay what is due or otherwise to designate property for attachment and subsequent auction. This proceeding does not admit any opposition from the debtor, while the NYC does.[29] For this reason, the LAM presents an alternative that could be more expeditious to enforce awards before the lex fori. According to the foregoing, it can be argued that

the exequatur procedure for enforcement of international arbitral awards is not necessary in Ecuador.

When analysing the law applicable to the enforcement of awards in Ecuador, a distinction should be drawn between awards rendered by ICSID tribunals and awards rendered by UNCITRAL or ICC tribunals.

Although Ecuador withdrew from the ICSID Convention effective in January 2010, there are still a few ICSID arbitrations ongoing and clauses in effect. Therefore, ICSID awards are binding and final for the contracting parties. Furthermore, the enforcement process provided for in the ICSID Convention remains effective for those cases and treaties in which Ecuador has given consent prior to the notice of withdrawal effective since January 2010.[30]

ICSID awards do not require an *exequatur*, that is, a judgment by a local court that a decision issued by a foreign judicial court or arbitration tribunal should be executed before local tribunals in order to be enforced because it does not contradict the Ecuadorean legal system. In other words, domestic courts are not entitled to review the awards rendered by ICSID tribunals, only to enforce them.

Hence, the enforcement of an ICSID award in Ecuador will be made as if it was a "final judgment of a court in that state".[31] Needless to say, an ICSID award entails crucial benefits for the investor: local courts are not empowered to revise the award; consequently, enforcement of ICSID awards may be more expeditious than enforcement of other international awards.

As regards the ICSID Convention, articles 53 and 54 have specific provisions that make it a special and unique self-contained system. Many practitioners choose ICSID based on these provisions, which are one of the most relevant improvements of the ICSID Convention regarding other arbitral organs and procedures. These provisions mandate that ICSID awards may only be reviewed under the rules of the ICSID Convention: the parties recognise the award and any contracting state enforces the pecuniary obligations awarded as if they were res judicata from any domestic tribunal. If that is not the case and a domestic court (for public order or constitutional reasons) allows a review, the award may be enforced in any other contracting state of the ICSID Convention and such enforcement may not be opposed by Ecuador. In other words, the fact that there is a domestic procedure aimed at reviewing the award does not pre-empt any other contracting state or its judiciary to grant the enforcement.[32]

Therefore, in Ecuador, an international award not protected by a specific treaty providing for its own enforcement mechanism (ie, the ICSID Convention) has to be enforced by applying the LAM and, thus, by filing the proper petition to the judiciary in an enforcement process,[33] in which the merits of the arbitration cannot be discussed or revised unless they contravene public policy and due process, as set forth in the Code of Civil Procedure[34] and the New York and Panama Conventions.[35] Once the international award has gone through the enforcement process without going through a review on the merits of the case, it is fully enforceable.

Since the current government took office, Ecuador has become one of the principal sponsors of an international political campaign that seeks to transform the current international dispute settlement for foreign investment disputes.[36] Furthermore, Ecuador is in favour of a Latin-American self-contained dispute settlement mechanism, which is still under analysis.

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In 2011, arbitration in Ecuador has been under the public eye. Important arbitral awards in investment cases have been issued where Ecuador has obtained favourable decisions, and the government has concluded several contracts in which international arbitration in Chile is the alternative selected by the attorney general. This has been welcomed by the arbitral community because the government accepts international arbitration as a forum for contractual and investment disputes.

On the local arena, arbitrators and practitioners are still waiting for the developments as to whether there is room for a constitutional revision of local arbitral awards. Also during this year we have seen good decisions issued by the actual president of the Provincial Court of Quito regarding the annulment of arbitral awards.

We believe that these changes will lead arbitration and its users through complex and uncertain yet interesting times.

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Notes

1 Later on, the LAM was amended on 25 February 2005 and was codified on 14 December 2006.

2 Article 1505 of the Civil Code, as applied by the Supreme Court of Justice, established that submitting a dispute to international arbitration constituted illicit object.

3 See supra note 1.

4 Arbitration statistics are provided below.

5 Article 190 of the Constitution establishes that "[a]rbitration, mediation and other alternative dispute resolution procedures are recognised. They shall apply in accordance with the law on matters when, due to their nature, it is possible to compromise."

6 See section 2 of article 190 of the Constitution.

7 See article 11 of the Organic Law of the Office of the Attorney General of the State, published in Official Register issue 312, dated 13 April 2004. See also LAM, article 4.

8 Section a) of article 4 of the LAM.

9 Section a) of article 4 of the LAM.

10 In the *Misle* case, the Constitutional Court reviewed a decision taken by the Provincial Court regarding a nullity action of an arbitral award. In other words, the Court reviewed a pure judicial decision, but not the underlying arbitral award. See Constitutional Court of Justice, Judgment 06-10-SEP-CC of 24 February 2010.

11 Accordingly, in 2009 the Organic Code of the Judiciary was enacted. The Code – which is also an organic law – provides that arbitration is part of the state's bodies for the administration of justice and that arbitrators exercise jurisdictional duties. Thus, awards can misguidedly be considered equal to judicial rulings. See Organic Code of the Judiciary, article 17, which says: "[t]he administration of justice by the Judiciary is a public service, [...]. Arbitration, mediation and other alternative dispute resolution mechanisms established in the law constitute a form of public service, just like the duties relating to justice exercised by the authorities of indigenous peoples".

12 Please visit the ICSID webpage at URL: http://icsid.worldbank.org/ICSID/, search for the "News Releases" section and access the post dated 9 July 2009 titled "Denunciation of the ICSID Convention by Ecuador".

13 See article 25 (1) of the ICSID Convention.

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

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

16 Protocol of Adhesion to the WTO, published in Official Register issue 852, dated 29 December 1995.

17 Ecuador has participated 15 times in the WTO Dispute Resolution System: three times as claimant, three times as defendant, and nine times as a third party. See www.wto.org/spanish/thewto_s/countries_s/ecuadoir_s.htm#disputes.

18 Source: www.pge.gob.ec/es/patrocinio-internacional/arbitrajes-en-curso.html, last visit 4 September 2011.

19 Legislative Resolution published in Official Register issue 293, dated 19 August 1961.

20 Id. The Legislative Resolution establishes that Ecuador "[r]atifies the execution of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, taking into account that Ecuador, on the basis of reciprocity, will apply such Convention to recognition and enforcement of arbitral awards pronounced in the territory of another contracting state only when such awards involve litigations arising from juridical relations deemed to be commercial by Ecuadorean law."

21 The final award in *Occidental Exploration and Production Company v Ecuador* (also known as *OXY 1*), was subject to a revision process under the NYC in London (lex arbitri). However, it was not examined under Ecuadorean law because the parties reached a compromise. Source: www.bittium-energy.com/cms/content/view/6944/1/.

22 Supreme Decree No. 3019, published in Official Register issue 729, dated 12 December 1978.

23 See articles 7 and 9.

24 Article 1 of the PC establishes that "an agreement between the parties whereby they undertake to submit to arbitral decision the differences arising or having arisen between them with relation to a commercial business is valid. The respective agreement shall be included in a written document signed by the parties or in an exchange of letters, telegrams or telex communications". See also declaration included in the ratification instrument dated 6 August 1991, published in Official Register No. 729, dated 12 December 1991, related to state-owned entities.

25 Article 4 of the PC provides that "arbitral judgments or awards that cannot be challenged according to the law or applicable procedural rules shall have the force of res judicata. Their enforcement or recognition may be demanded in the same manner as judgments pronounced by national or foreign ordinary courts according to the procedural rules of the country where they are enforced and to what is established by international treaties in this respect".

26 Executive Decree No. 853, published in the Official Register issue 240, dated 11 May 1982.

27 This convention was executed in Montevideo, Uruguay, on 8 May 1979. Source: http://untreaty.un.org/unts/60001_120000/22/28/00043359.pdf.

28 Article 1 of the MC establishes that "[t]his Convention shall apply to judicial judgments and arbitral awards issued in civil, commercial or labour proceedings in one of the member states unless at the time of ratification one of them has made an express reservation to limit it to judgments pertaining to convictions on equity matters. Likewise, any of them may declare, at the time of ratification, which it also applies to resolutions culminating the proceeding, those issued by authorities that exercise some jurisdictional function, and to criminal sentences as regards indemnities of damages deriving from the offense. The rules of this Convention shall apply as regards arbitral awards on everything not set forth in the Inter-American Convention on International Commercial Arbitration executed in Panama on January 30, 1975."

29 See article 5 of the NYC.

30 See articles 25 (1) and 72 of the ICISID Convention. See also supra note 12. Ecuador withdrew from the ICSID Convention on July 7th of 2009 and such withdrawal became effective six months later (January 2010), as per the ICSID Convention. See http://icsid.worldbank.org/ICSID/.

31 Id.

32 Id.

33 Id.

34 See article 32 of the LAM. See also article 414 of the Code of Civil Procedure, codified through Law No. 2005-010, published in Official Register issue 46, dated 24 June 2005, which states: "Foreign judgments shall be enforced if not contrary to Ecuadorean public law or any local law and if in keeping with international treaties and conventions as in force. In the absence of international treaties and conventions, in order for foreign judgments to be enforced not only shall they not contravene public law or Ecuador's local laws, but also the following shall be stated in the pertinent letters rogatory: a) that the judgment was passed as res judicata in accordance with the laws of the country where it was issued; and b) that judgment was passed in relation to a personal action."

35 See Michael Reisman et al, International Commercial Arbitration, University Casebook Series, New York, 1997, at 691.

36 See press article at the following URL: www.hoy.com.ec/noticias-ecuador/ecuador-propondra-nuevo-sistema-de-arbitraje-durante-su-presidencia-en-unasur-357247.htm.

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