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National and International Arbitration in Ecuador

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Arbitration and mediation law: Guidelines for applicability

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

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

- Parties may elect any norms to conduct an ad-hoc or 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 (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 paper.
- 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.
- Substantive non-procedural provisions in the AML could be important and applicable to international arbitration in certain circumstances.

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

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

International commercial arbitration: definition and scope

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

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

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

International conventions

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

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

- the 1928 Havana Convention on Private International Law;[7]
- the 1958 United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention);[8]

- the 1966 International Convention on Settlement of Investment Disputes between States and Nationals of other States (the Washington Convention)[9] – recently denounced;[10]
- the 1975 Inter-American Convention on International Commercial Arbitration (the Panama Convention);[11] and
- the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards.[12]

International arbitration and foreign investment protection

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

Actually, the Constitutional Court has issued a series of decisions declaring that the dispute settlement provision of BITs[14] are unconstitutional (ie, the Ecuador-UK and Ecuador-Germany BITs, among 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 International Law Committee of the National Assembly has already issued internal reports suggesting the withdrawal of several BITs and has approved the withdrawal of a BIT executed with Finland.

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, Chile, Venezuela, the Netherlands and Germany. Unfortunately, this initiative has not stopped and the government has started a campaign against the BITs. In fact, on 9 March 2013, during his usual Saturday talks with the people, President Correa urged lawmakers to address – as one of the items to deal with in their agenda – to withdraw from the 23 BITs Ecuador has signed, provided that they are detrimental to the national sovereignty.[15] Within the BITs for which withdrawal has not been yet approved by the National Assembly are the BITs signed with France, USA, Canada, Switzerland and Spain, among others.

Moreover, after the claims filed against Ecuador by oil companies Occidental and Chevron seeking payment of millions of dollars for damages inflicted to their investment, Ecuador is looking for new ways to protect foreign investors without relying on international treaties.

One of them is the Production Code approved by the government to reactivate the economy which 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 arbitration commences. The arbitration agreement must meet some legal requirements in order to be valid, but it is quite evident that the government understands that there is need for having disputes with foreign investors resolved through international arbitration. At this moment, the Coordinating Ministry for Production, Competitiveness and Employment has signed, on behalf of the Ecuadorean state, eight investment protection contracts with Chinese and European investors, with a total investment amounting to US$2.5 billion.[16]

CAITISA

The government's counter-attack mentioned above started with a letter dated 5 October 2012 issued by the National Juridical Secretary on behalf of President Correa, addressed to ministers and public authorities and informing them that 'in future contracts to be executed by them, disputes must be submitted to the local courts and not to arbitral tribunals'.[17]

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

Executive Decree 1506 dated 6 May 2013[18] established the creation of the Commission for the Citizens' Integral Audit of Treaties on Reciprocal Protection of Investments and of the International Arbitral System on the Subject of Investments (CAITISA). The objectives of CAITISA are to examine and evaluate:

- the execution and negotiation process of BITs and other agreements on investment signed by Ecuador, as well as the consequences of their application;
- the content and compatibility of those treaties with Ecuadorean legislation; and
- the validity and appropriateness of the actions and proceedings adopted and of the awards and decisions issued by the entities and jurisdictions that are part of the international arbitral system on the subject of investments which have taken cognizance of arbitral proceedings against Ecuador.

Furthermore, the CAITISA will be able to determine the legality, legitimacy and fairness of the decisions and to identify inconsistencies and irregularities that have caused or may cause impacts on the Ecuadorean state in economic, social and environmental matters.

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

Pending cases against Ecuador

Presently, as we have learned, Ecuador has 13 pending international arbitration cases pertaining to investment.[19]

Enforcement of international arbitral awards in Ecuador

As far as local norms are concerned, the AML does not have a specific system for the 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 AML 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 AML, 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 AML 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 AML 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.[20] For this reason, the AML 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 ongoing ICSID arbitrations 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.[21]

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'.[22] 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.

However, since one of the tasks of the CAITISA is to determine the 'legality, legitimacy and fairness' of decisions issued by arbitral tribunals against the Ecuadorean state, we believe this power will affect the enforcement of foreign awards. We should bear in mind that any local judge who is aware of a negative ruling by the CAITISA will at least think twice before enforcing an award that condemns the state for violating the rights of investors.

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.[23] Furthermore, Ecuador is in favour of a Latin American self-contained dispute settlement mechanism, which is still under analysis.

In 2013, Ecuador has seen an increase of cases being litigated in several international fora and condemned by international tribunals to pay millionaire indemnifications to investors such as Occidental Exploration and Production Company and Burlington Resources Inc. Those decisions have given rise to a political reaction from the local government against international and local arbitration.

The issuance of an official letter by the National Juridical Secretary forbidding arbitration in administrative contracts and the creation of the CAITISA, among other things, have created a hostile environment against arbitration in Ecuador.

In spite of all the countermeasures taken by the government, a favourable aspect is that Ecuador is still accepting that all new contracts with foreign investors be subject to international arbitration in Chile and offering to enter into investment protection contracts.

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

Notes

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

2 Official Register Supplement 46, 24 June 2005.

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

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

5 Article 425, Constitution: 'The hierarchical order for the application of norms shall be as follows: The Constitution, international treaties and conventions, organic laws, ordinary laws, regional rules and district ordinances, decrees and regulations, ordinances, agreements and resolutions, and other acts and decisions of the public powers.'

6 Article 417, Constitution: 'International treaties ratified by Ecuador shall be subject to the provisions of the Constitution. In the case of treaties and other international instruments on human rights, the principles pro human being, no restriction of rights, direct applicability and open clause established in the Constitution shall apply.' This principle has been developed further in article 5 of the Organic Code for the Judiciary, which states that: 'The judges, administrative authorities and officials of the Judiciary shall directly apply constitutional norms and those set forth in international instruments on human rights if the latter are more favourable to those established in the Constitution, even if not expressly invoked by the parties.' Organic Code of the Judiciary, Official Register Supplement 544, 9 March 2009.

7 Official Register Supplement 1201, 20 August 1960.

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

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

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

11 Official Register 875, 14 February 1992.

12 Official Register 153, 25 November 2005.

16 Article 94, Constitution.

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

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

15 President Correa's speech in his usual Saturday talk with the people on 9 March 2013. See a press article at www.planificacion.gob.ec/category/sin-categoria/page/2/.

16 Public information provided by the Coordinating Ministry for Production, Competitiveness and Employment.

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

18 Official Register 958, 21 May 2013.

19 Source: www.pge.gob.ec/es/patrocinio-internacional/casos-internacionales-activos.html, last visit 04 July 2013.

20 See article 5 of the NYC.

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

22 Id.

23 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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Pérez Bustamante & Ponce resulted from the merger, effective in 2001, of two law firms providing complete services and having complementary philosophies: Pérez Bustamante y Pérez (which dates back to 1916 when it began to act professionally) and Fabián Ponce O & Asociados (founded in 1959).

Furthermore, our office combines the experience and prestige of several of the most reputed lawyers in Ecuador with the credit provided by young attorneys. Thus, our members have accumulated many years of experience in connection with the most important litigation and transactions carried out in and related to the Ecuadorean legal market, and have shared their knowledge and professional practice as university chairs and in seminars and lectures. Several members of Pérez, Bustamante & Ponce are or have been lecturers, experts, arbitrators or secretaries in arbitration tribunals.

Pérez, Bustamante & Ponce firmly believes in high-quality legal services, the importance of our clients' trust and confidence, the necessity of technological developments and the practice of law with an emphasis on internationalisation. Against this background, we belong to several international organisations: Lex Mundi, Club de Abogados and Interlaw.

The firm has recently participated in cases such as an arbitration proceeding by Murphy Exploration and Production Company International against the government of Ecuador before ICSID; two UNCITRAL proceedings by a multinational oil firm against the Republic of Ecuador; an ICC case against an Italian company with seat of arbitration in Ecuador; ICSID arbitration process by a multinational US oil firm, based in the Midwest, on the basis of breach of contract and violation of the US–Ecuador BIT; and an ICSID arbitration case, filed on behalf a multinational oil firm against the Republic of Ecuador and the state-owned company Petroecuador, among others.

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