The Arbitration Review of the Americas 2020

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The Arbitration Review of the Americas 2020

A Global Arbitration Review Special Report

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The Arbitration Review of the Americas 2020

Account manager J'nea- Louise Wright

Head of production Adam Myers
Editorial coordinator Hannah Higgins
Deputy head of production Simon Busby
Production editor Harry Turner
Chief subeditor Jonathan Allen
Subeditor Janina Godowska

Publisher David Samuels

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To subscribe please contact:
Global Arbitration Review
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London, W11 1QQ
United Kingdom
Tel: +44 20 3780 4134
Fax: +44 20 7229 6910
subscriptions@globalarbitrationreview.com

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Preface vi

Overviews

Addressing Issues of Corruption and Arbitration in Brazil 1
André de Luizi Correia
CFGS – Correia, Fleury, Gama e Silva Advogados

Energy Arbitration in Latin America 7
Claudio Salas
WilmerHale

Enforcement in the United States 18
Jef Klazen, Marcus J Green and Chris Cogburn
Kobre & Kim

International Arbitration in the Caribbean 25
Francois Lassalle
BVI International Arbitration Centre

Investment Treaty Arbitration in the Americas 33
David M Orta, Brian H Rowe, Julianne Jaquith and Kristopher Yue
Quinn Emanuel Urquhart & Sullivan, LLP

Overview: JAMS 41
Robert B Davidson and Matthew Rushton
JAMS

Overview: Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada 45
Eleonora M B L Coelho and Clara Kneese de Moraes Bastos
Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada

The Relevance of Audited Financial Statements in a Valuation Analysis 50
Eddie Tobis
FTI Consulting

The Role of Artificial Intelligence in International Arbitration 56
Meriam Al-Rashid and Ulyana Bardyn
Dentons

Country chapters

Argentina 60
José A Martínez de Hoz and Francisco A Amallo
MHR | Martínez de Hoz & Rueda

Bolivia 65
Andrés Moreno Gutierrez and Daniel Arredondo Zelada
Moreno Baldivieso Estudio de Abogados

Canada 70
Robert J C Deane and Craig R Chiasson
Borden Ladner Gervais LLP

Colombia 79
Alberto Zuleta Londoño and Andrés Nossa Lesmes
Holland & Knight

Ecuador 84
Rodrigo Jijón-Letort, Juan Manuel Marchán, Javier Jaramillo-Troya and Camilo Muriel-Bedoya
Pérez Bustamante & Ponce

Mexico: The judiciary strikes back . . . in aid of arbitration 90
Victor M Ruiz, Gustavo Manuel Llorenz and Maximiliano Pineda
Ruiz-Silva Abogados, SC

Panama 95
José Carrizo
Morgan & Morgan

A Bridge too Far? The European Commission takes its Campaign against Intra-EU Investment Arbitration to US Courts 99
Grant Hanessian, Derek Soller and Kristina Fridman
Baker McKenzie

Welcome to *The Arbitration Review of the Americas 2020*, one of *Global Arbitration Review*'s annual, yearbook-style reports.

Global Arbitration Review, for anyone unfamiliar, is the online home for international arbitration specialists everywhere, telling them all they need to know about everything that matters.

Throughout the year, *GAR* delivers pitch-perfect daily news, surveys and features, organises the liveliest events (under our GAR Live banner) and provides our readers with innovative tools and know-how products.

In addition, assisted by external contributors, we curate a series of regional reviews – online and in print – that go deeper into local developments than our journalistic output is able. *The Arbitration Review of the Americas*, which you are reading, is part of that series. It recaps the recent past and adds insight and thought-leadership from the pen of pre-eminent practitioners from around North and Latin America.

Across 17 chapters, and spanning 107 pages, this edition provides an invaluable retrospective, from 35 leading figures. All contributors are vetted for their standing and knowledge before being invited to take part. Together, our contributors capture and interpret the most substantial recent international arbitration events of the year just gone, supported by footnotes and relevant statistics. Other articles provide valuable background so that you can get up to speed quickly on the essentials of a particular country as a seat.

This edition covers Argentina, Bolivia, Canada, Colombia, Ecuador, Mexico, Panama and the United States; has an overview on Brazil's national obsession with corruption and how that is playing into arbitration; and an update on how Mexico's federal courts have started to deal with the personal injunctions that had brought its prospects to a grinding halt as a seat.

Among the other nuggets it contains:

- a deep dive on the battle playing out, in the US courts, between owners of intra-EU investment awards and Spain and the European Commission;
- the strides being taken across the Caribbean to embrace international arbitration;
- a technique arbitrators can use to sense check a valuator's assertions, using a company's audited financial statements; and
- a comparison of USMCA (the new NAFTA) with NAFTA, and what the changes mean – along with an analysis of one of the first case to consider the clash between the environmental and the investor pledges in DR-CAFTA.

Plus much, much more. We hope you enjoy the review. If you have any suggestions for future editions, or want to take part in this annual project, my colleague and I would love to hear from you. Please write to insight@globalarbitrationreview.com.

David Samuels
Publisher
July 2019

Ecuador

Rodrigo Jijón-Letort, Juan Manuel Marchán, Javier Jaramillo-Troya and Camilo Muriel-Bedoya
Pérez Bustamante & Ponce

Arbitration and mediation law: guidelines for applicability

Arbitration in Ecuador is regulated by the Arbitration and Mediation Law of 1997 (AML).[1] The AML 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 General Organic Code of Procedures (COGEP), the Organic Code for the Judiciary and the Civil Code,[2] may be supplementary to it.[3]

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

- Parties may elect the rules to govern an ad hoc or institutional arbitration proceeding. 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 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 strictly to the assumptions described in this article.
- Ecuador does not have a law on international arbitration that might limit the prerogatives of article 42 of the AML with respect to an 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 where Ecuadorian 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 chosen by the parties to govern the arbitration or, in its absence, as the law of the place where the arbitration has its seat. 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 public policy. Although not intending to provide a fully comprehensive list of such questions, it is clear that the rules comprised in Ecuadorian law might include at least the following aspects:

- creation and effects of the arbitration agreement;
- subjective and objective arbitration;
- excuse of the arbitrators;
- *Kompetenz-Kompetenz* principle;
- due process rules;
- 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: subjective and 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 explicit – the mere adoption of foreign laws, regulations or other set of rules regarding international arbitration ought to be interpreted as the parties' positive decision that the arbitration is international. In the latter case, it is necessary that the dispute be included within at least 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 proceedings as international is vitally important because by virtue thereof the parties may accede to the pre-eminence 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 Ecuadorian Constitution (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 the 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] (denounced in 2009);[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

Ecuador's former president, as one of his last actions in office, concluded the bilateral investment treaty (BIT) denunciation process initiated in 2008.[13] Denunciation is based on the idea that dispute resolution clauses included in the BITs violate article 422 of the Constitution, which provides:

> *Treaties or international instruments where the Ecuadorian State yields its sovereign jurisdiction to international arbitration, in contractual or commercial disputes, between the State and natural persons or legal entities cannot be entered into.*

The Constitutional Court has issued a series of decisions declaring that the dispute settlement provision of BITs[14] is unconstitutional.

Since the 1960s, Ecuador has negotiated 30 BITs, 27 of which have entered into force. Only one of them – executed with Egypt – terminated in 1995, and in 2008, Ecuador denunciated nine of these BITs: those executed with Uruguay, the Dominican Republic, Guatemala, El Salvador, Cuba, Nicaragua, Honduras, Paraguay and Romania (the last six will still be in force until 2018, due to their survival clauses).

Consequently, 17 BITs remained in force and a second denunciation round took place in 2017. The National Assembly's special committee in charge of analysing the denunciations issued several reports, recommending the termination of the remaining BITs entered into with Argentina, Bolivia, Canada, Chile, China, Finland, France, Germany, Italy, the Netherlands, Peru, Spain, Sweden, Switzerland, the United Kingdom, the United States and Venezuela. Finally, on 3 May 2017, the National Assembly's Plenary approved the termination of all these BITs.

CAITISA

Back in 2013, President Correa created the Commission for Comprehensive Audit of the Reciprocal Investment Treaties and the Investment International Arbitration System (CAITISA). CAITISA finally made public its report and conclusions on 8 May 2017.[15] Among the general recommendations, CAITISA proposes to eliminate or limit certain BIT provisions, namely:

- to exclude dispute resolution clauses;
- to include rights to be claimed by host states;
- to give standing to the indigenous communities; and
- to establish performance standards for investors such as technology transfer obligations, capital flow regulations and others.

However, CAITISA's main recommendation focused on sponsoring an Alternative Model BIT (AMB), suggesting a reinforced focus on human and labour rights, together with protections for the indigenous communities and nature. Also, the AMB proposes giving host states standing to bring claims under the BIT, enforcing sustainable development standards and supports the creation of an international investment court.

Moreover, the AMB suggests including a specific and strict definition of 'investment', requiring two-year minimum duration and limited to direct property owned by the investor. Also, the AMB recommends limiting the 'investor' definition by requiring potential investors to have active operations in the host state for at least two years, revealing ownership information and providing the possibility of losing investor standing if fraud or corruption in the management of the investment is proven.

The AMB recommends to expressly and strictly define the fair and equitable treatment standard, to exclude umbrella and most-favoured nation clauses, to limit survival clauses by establishing fixed-term provisions requiring the states' express intent for renewal, and to exclude protection for indirect expropriation. Interestingly, the AMB suggests replacing full protection and security clauses with provisions enforcing the international minimum standard of treatment of foreign investors.

Finally, on 16 May 2017, President Correa issued the executive decrees that order the termination of the BITs and the notification to the treaties' state parties. The formal notifications have already been made, concluding with the denunciation process with the exception of BITs executed with Italy, Netherlands and Spain.

The new Model Bilateral Investment Agreement

As a consequence of CAITISA's report, on 9 March 2018, the Ecuadorian Minister of Foreign Affairs, presented, to all the ambassadors of the states with which Ecuador had executed bilateral investment treaties that were denounced, the new Model Bilateral Investment Agreement (BIA) that Ecuador seeks to negotiate with said states.

The BIA provides changes to a BIT's regular provisions. Some of the changes are the following.

- Regarding the definition of 'investment', to be considered as such, the BIA requires for the transfer of assets to comply with Ecuador's regulations on environment, human rights and corruption.
- As per the 'investor' definition, the BIA embraces the effective nationality and effective control tests for persons and legal entities, respectively.
- As per the fair and equitable treatment standard, the BIA limits its protection to cases of denial of justice and discriminatory treatment.
- Regarding expropriation, the BIA excludes protection for indirect expropriation and defines a method for compensation of direct expropriation measures.
- As per dispute resolution, the BIA provides for international arbitration requiring a Latin American seat and administration (a Latin American institution).
- The BIA provides a statute of limitations of three years counting from the date of the trigger letter for the investor to submit a demand for arbitration. Additionally, it requires objective and subjective identity between the trigger letter and the demand for arbitration.
- The BIA provides standing for host states to bring claims or counterclaims under the treaty.
- Additionally, the BIA requires, as a condition precedent, for the investor to exhaust the administrative local proceedings.
- Also, the BIA limits the sanctions to be imposed by arbitral tribunals to monetary compensation, excluding, for example, specific performance sanctions.

- Finally, the BIA provides for annulment proceedings and also appeals proceedings before an ad-hoc arbitral tribunal.

Actions to foster foreign investment

Since President Moreno took office, it appears no effort has been made to pursue the negotiation and execution of BIAs. On the contrary, subsequent actions suggest said project by his predecessor has been dropped.

In this sense, Ecuador has recently stated its intent to renegotiate BITs without regard to BIA provisions, join the EU-Perú-Colombia Free Trade Agreement, negotiate a commercial agreement with Brazil and enact the Law to Incentivize Production and Investments (LIPI), with the goal of fostering foreign investment.

LIPI amended certain provisions of the Organic Production and Investment Code, which regulates investment contracts. It establishes that all investment contracts must include arbitration agreements that provide for national or international arbitration procedures in law for the resolution of disputes. In this sense, and unlike other provisions related to arbitration in contracts of a public nature that establish the possibility, under the word 'may', of the parties to agree arbitration as a method of resolution of contractual disputes, LIPI establishes, in an imperative manner, under the word 'shall', the obligation of the parties to agree on national or international arbitration as a method of resolution of disputes under investment contracts.

LIPI does not make any reference to the seat of arbitration within international arbitration proceedings, therefore this must be agreed by the parties in each case. In the case of investment contracts exceeding $10 million, LIPI mandates that the arbitration agreement contains the possibility of the claimant, as its sole option, to opt for an arbitration procedure regulated by, 'among others':

- the UNCITRAL Arbitration Rules;
- the Arbitration Rules of the International Chamber of Commerce; and
- the Rules of Procedure of the Inter-American Commercial Arbitration Commission.

The words 'among others' open the possibility for the arbitration agreement to allow the claimant to agree on a different set of arbitration rules, such as the Arbitration Rules of the London Court of International Arbitration. However, LIPI makes it clear that in no case will the rules of emergency arbitration apply.

Pending cases against Ecuador

According to the latest statement, Ecuador has 38 active international proceedings as reported by the Attorney General's Office.[16]

Enforcement of international arbitral awards in Ecuador

The rules for recognising and enforcing international arbitration awards were set out in the General Organic Code of Procedures (GOCP).

Under GOCP provisions, before a foreign award's enforcement, it must be subject to a recognition process or exequatur, which is a declaration by which the award is given the same status as a national judgment.

Unlike the New York Convention, the exequatur process puts the burden of proof on the petitioner, which must demonstrate that:

- the award complies with all the formalities required by the state in which it was rendered;
- the award is final and has a res iudicata effect under the law it was rendered;
- the documentation attached is translated (if applicable);
- the due process rights of the parties were met; and
- the request indicates the domicile of the respondent for service of process purposes.

If the arbitral award was rendered against the state, the petitioner must also demonstrate that the award does not contravene any constitutional, treaty, or legal provision.

Once the competent court decided favourably on the recognition, the petitioner had to file an enforcement petition before the correspondent trial judge according to the procedure indicated for domestic awards.

Recently, the Ecuadorian Assembly enacted the Law to Incentivize Production and Investments, which amended all the mentioned provisions about recognition and enforcement of foreign awards and judgments, eliminating the words 'arbitral award' in all of them. In this way, LIPI made the recognition and enforcement procedure set out in the GOCP inapplicable for foreign arbitral awards

Additionally, LIPI reinstated the last paragraph of article 42 of the Ecuadorian Arbitration and Mediation Law, which provided that the enforcement procedure for international awards would be the same as the one for domestic awards. This article was repealed in May 2015 with the promulgation of the GOCP rules mentioned above and has since been brought back into force.

Therefore, as a matter of Ecuadorian law, an award rendered under by an international arbitration tribunal will be directly enforced by means of the executive process established under the GOCP without the need for a previous recognition phase.

This is consistent with article 7 of the New York Convention, under which local provisions are applicable in cases where the result is more favourable than the Convention itself.

Other aspects worth mentioning

The development of arbitral proceedings has recently been disturbed by a series of decisions by the annulment courts, especially in cases against state entities related to public contracts.

The annulment courts have breached the ultima ratio character behind the actions to set aside an arbitration award by means an overreaching construction of causes brought by the AML for an award to be set aside, as well as considering different causes not expressly provided under AM.

For example, the annulment courts have reviewed, without legal faculty, the tribunal's decision on jurisdiction as well as the motivation behind the award. In line with this, the annulment courts have ruled administrative acts (eg, unilateral termination of contracts), although produced in a public contract containing an arbitration agreement, not to be arbitrable under Ecuadorian law. These decisions expressly contravene the Ecuadorian Constitution, which allows arbitration in public contracts.

Notes

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

2 The Organic Code of Procedures was recently published on 22 May 2015.

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 Ecuadorian 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 of the 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.

13 www.asambleanacional.gov.ec/20090810235/noticias/rotativo/discurso-del-presidente-de-la-republica-economista-rafael-correa.html. See, http://kluwerarbitrationblog.com/2017/05/26/ecuadorian-bits-termination-revisited-behind-scenes/.

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

15 See, www.caitisa.org/index.php/noticias/boletines/informeejecutivo

16 See www.pge.gob.ec/index.php/component/k2/item/902-rendicion-de-cuentas-2016.

Rodrigo Jijón-Letort
Pérez Bustamante & Ponce

Rodrigo Jijón is a partner and president of the board at Pérez Bustamante & Ponce, a leading law firm in Ecuador. He leads the dispute resolution practice, which covers litigation, arbitration and mediation.

Rodrigo is an active arbitrator of the main arbitration centres in Ecuador, including those of the Quito Chamber of Commerce, the Ecuadorian–American Chamber of Commerce and the International Arbitration Centre, sponsored by the Pichincha Chamber of Industry and the London Court of Arbitration.

Rodrigo presided over the arbitration tribunal in an International Centre for Settlement of Investment Disputes arbitration case between IBM and Ecuador, and has participated as litigating attorney in a large number of national and international arbitration proceedings. Likewise, he has acted as legal counsel to international corporations in several international arbitration proceedings.

Rodrigo has served as professor of procedural law in several graduate and postgraduate universities in Ecuador. He has contributed numerous articles on procedural law and arbitration to different magazines in Ecuador and abroad, and regularly participates as speaker in seminars and conferences on procedural law and arbitration.

He is recognised as a seasoned litigator and arbitrator in the Ecuadorian and Latin American markets, with a remarkable track record representing local and foreign clients in matters ranging from investment protection to contractual, civil, environmental and constitutional matters. Clients applaud his strategic and implacable approach to cases, and he is forthcoming with his clients and team in stressful situations. Rodrigo is past president and the current vice president of the Ecuadorian Arbitration Institute and a full member of the Ecuadorian Procedural Law Institute. He has also been a member of the Court of Honour of the Quito Bar Association.

Juan Manuel Marchán
Pérez Bustamante & Ponce

Juan Manuel Marchán is a partner at Pérez Bustamante & Ponce, a leading law firm in Ecuador. He has a wide experience in international arbitration, M&A and infrastructure projects. He usually represents clients in local and international arbitrations focusing mainly on investment protection. He has experience in investment and commercial disputes under International Centre for Settlement of Investment Disputes, UNCITRAL, Construction Industry Arbitration Council and International Chamber of Commerce rules.

Juan Manuel served as chief of staff at the Ministry of Oil and Mines of Ecuador. Currently he teaches international arbitration and international law at the University of San Francisco Quito and the Pontifical Catholic University of Ecuador. He is constantly invited as a panellist in arbitration and litigation events in the country and abroad. He also collaborates on numerous publications on international commercial arbitration.

Juan Manuel graduated as doctor at law from the Pontificia Universidad Católica del Ecuador and completed an LLM programme at Columbia University School of Law.

Juan Manuel is recognised as a key figure in the arbitration arena. His knowledge as well as his remarkable capacity to work under pressure are features frequently noted by clients.

Juan Manuel is a member and current executive director of the Ecuadorian Arbitration Institute and a full member of the Ecuadorian Procedural Law Institute. He has also been a member of the Court of Honour of the Quito Bar Association.

PÉREZ BUSTAMANTE & PONCE PBP

Av. República de El Salvador No. 36-140
Edif. Mansión Blanca, Piso 9
Quito
Ecuador
Tel: +593 2 400 7800
Fax: +593 2 225 8038

Rodrigo Jijón-Letort
rjijon@pbplaw.com

Juan Manuel Marchán
jmarchan@pbplaw.com

Javier Jaramillo-Troya
jjaramillo@pbplaw.com

Camilo Muriel-Bedoya
cmuriel@pbplaw.com

www.pbplaw.com

PBP is the largest firm in Ecuador, considered a leader in the legal market and a trusted advisor for national and international clients. It has offices in Quito and Guayaquil and outreach throughout Ecuador.

PBP endeavours to understand clients' challenges and needs. Its multi-practice teams – integrating expertise in 13 practice areas and nine industries – have an in-depth understanding of the specific challenges of each sector.

PBP's team has both local and international experience. Several members have attended renowned local and international universities and have worked at first-rate law firms around the world. Furthermore, a number of its attorneys have been admitted to practise in the State of New York, District of Columbia, Spain, Chile, Colombia and other jurisdictions.

PBP has consistently been honoured as Ecuadorian Firm of the Year by *Chambers Latin America* (2018, 2017, 2016, 2015, 2014, 2013, 2011, 2010 and 2009) and by *Who's Who Legal* (2019, 2018, 2017, 2016, 2014, 2013, 2012, 2011 and 2010).

Social responsibility is a part of its professional culture. Through the Fabián Ponce O Foundation (FPO), founded in 1987, the firm encourages and optimises its social responsibility work. It represents fair causes with an emphasis on family law.

PBP strives to be an increasingly inclusive firm and endeavours to promote the leadership and professional development of women.

Javier Jaramillo-Troya
Pérez Bustamante & Ponce

Javier is dual-qualified attorney in Ecuador and New York. He is a senior associate in the dispute resolution unit of Pérez Bustamante & Ponce. He has experience and is in charge of sponsoring clients in local and international arbitration proceedings. Before joining the firm, Javier served as an international lawyer at Latham & Watkins's international arbitration unit, Paris office. He is a professor of arbitration and oral advocacy at Universidad San Francisco de Quito and serves as arbitral secretary at the main arbitration centres in Quito.

Javier graduated as a lawyer summa cum laude and valedictorian of the Class of 2011 at Universidad San Francisco Quito. He holds an LLM from Harvard Law School where he was recognised with the Dean's Scholar Award in international arbitration. He also holds a superior diploma in alternative dispute resolution from Universidad Andina Simón Bolívar where he was valedictorian of his class.

Camilo Muriel-Bedoya
Pérez Bustamante & Ponce

Camilo is an associate at Pérez Bustamante & Ponce. His practice is focused on corporate law, M&A, insurance law and dispute resolution. He is experienced in domestic and international negotiations, mediations and arbitrations. Within the corporate field, he advises national and foreign investors both on local and transnational transactions. Camilo pursued his studies in Ecuador, the United Kingdom and the United States. Before joining PBP he served as clerk at the Constitutional Court of Ecuador. He is regularly invited as a lecturer of modules such as conflict prevention, arbitration, rhetoric and corporate law.

Camilo is a lawyer from Pontificia Universidad Católica del Ecuador. He holds an LLM degree from University College London.

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