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Constitutional Review of Arbitral Awards: Between Protectionism and Interventionism

Camilo Muriel-Bedoya (Pérez Bustamante & Ponce) · Thursday, March 5th, 2015

Could protectionism turn into interventionism? There is a fine borderline between helpful assistance of the courts and abuse of the available judicial remedies within arbitration. If crossed, the entire purpose of opting for such an institution is undermined and its essentialness is jeopardised. The title of this post refers to an uncommon practice that has taken place in Ecuador, as an unusual review mechanism is being applied to arbitration through a special constitutional remedy. As a result, Ecuador is facing a delicate tension between arbitration and constitutional law where a dualism between long procedures (though full of remedies) and arbitration's principles, such as celerity and finality, collide. The position taken by the Ecuadorian legal system embraces the former scenario, making it appear to be a protectionist jurisdiction; however, important questions have arisen regarding the endangerment of arbitration and its nature.

Ecuador's new Constitution entered into force in 2008 and brought with it a number of reforms. The 2008 Constitution defines Ecuador as a "constitutional State of *rights* and justice," which differs from the wording of the 1998 Constitution that defined Ecuador as a social state "*de derecho.*" The use of the plural in the former completely changes the meaning of the original text in Spanish, as the latter phrase refers to what would be understood in English as *the rule of law*; thus, the 1998 Constitution was based on the rule of law, whilst the 2008 Constitution took a different approach where the centre of the juridical framework is not the law, but the *rights* protected by the Constitution. This modification does not mean that Ecuador does not embrace the rule of law; however, this approach seeks to establish a protective constitutional framework where the rights guaranteed are the axis of the State.

Following this rationale, the Ecuadorian Constitutional Court is conceived as the highest body of constitutional control, interpretation and administration of justice in Ecuador. It exercises several tools regarding its constitutional control powers and the Constitution has set different *jurisdictional guarantees* that seek the protection of constitutional rights. One of these is the *Extraordinary Action of Protection* (EAP). Under this special constitutional action, a person may challenge judgments or final decisions within which there have been violations of constitutional rights. Hence, the EAP can be sought once every available remedy has been exhausted (i.e. horizontal, vertical, ordinary and extraordinary recourses), unless these are not attributable to

the negligence of the party that seeks the EAP.

Additionally, the Constitution determines that an EAP can be filed against resolutions *with the force of a judgment* and that its admissibility will depend on the fulfilment of formal requirements: (i) that the judgments, decisions and resolutions are firm and binding; and (ii) that the party who files the EAP demonstrates the violations of due process or other recognised constitutional rights.

Against this backdrop, the EAP was seen as a new mechanism to challenge arbitral awards and related judgments (e.g. judgments regarding annulment proceedings against arbitral awards) and constitutional norms were extensively interpreted to expand the powers of the Constitutional Court due to the purported protectionism proposed by the Constitution. Regarding this last matter, the position of the Ecuadorian Professor Edgar Neira is notably sensible. He considers that the EAP is not applicable to arbitral awards nor to any decision issued by an arbitral tribunal due to various reasons: (i) the Constitution does not consider this specific scenario; (ii) the alternative nature of arbitration; (iii) the nature of the subject matter of the arbitration; and (iv) because the Constitutional Assembly, which enacted the 2008 Constitution, did not establish the application of the EAP against arbitral awards.

Nonetheless, the Constitutional Court has considered that the EAP is applicable not just to arbitration, but even noted that constitutional violations could take place at pre-arbitral phases during administered proceedings (Judgment No. 123-13-SEP-CC, issued on December 19 2013). Accordingly, arbitral awards may be under its control and it seems to be that pre-arbitral phases could be subject to its review as well. The Court has determined that this should not be understood as an evaluation on the merits or a determination on how the judge should decide the case, but there are several obscurities that still need to be clarified.

The extraordinary and residual nature of the EAP is ambiguous. The Constitutional Court has not clearly determined when proceedings should be considered exhausted or when these are ineffective or inadequate. For instance, it is uncertain whether an annulment action, which is the only available remedy against an arbitral award under the Ecuadorian Arbitration and Mediation Law, should be filed, even if the law does not establish a particular ground (*e.g.* the lack of a reasoned award or public policy; these are not expressly determined as grounds for annulment); moreover, it is still not apparent whether the decision on the annulment action is subject to appeal. Additionally, the current trend seems to consider that *casación* (*i.e.* the legality control of judgments exercised by the Ecuadorian National Court) is unavailable against arbitral award annulment judgments, but there have been different and even opposite positions rendered by the courts.

Consequently, there is not harmony amongst the courts and some EAPs have been filed against the rejection of an annulment action, others after long procedures against a dismissed *casación* or against the denial of leave to appeal that denied the appeal of the annulment decision, which, in turn, rejected the annulment of an arbitral award. Furthermore, other EAPs have directly challenged arbitral awards and in some cases the EAP was not admitted because the annulment action was not exhausted, although the ground of challenge was not one of those determined in the law and

therefore, the annulment action was in principle ineffective. Yet, the Constitutional Court has also admitted a direct EAP against an arbitral award.

As noted, there are a number of issues that the Ecuadorian arbitral system faces. The obscurity and lacunas of the law, though extensively, permitted the application of inappropriate ordinary rules and remedies against arbitration, creating a further constitutional challenge-regime through a constitutional action which was never intended to by applied against arbitration nor to pre-arbitral phases. Arbitration was never meant to be isolated from the Constitution, as all the parties involved are not exempted from applying it. Furthermore, party autonomy is not absolute and judicial review is needed, hence the rationale of annulment proceedings.

Accordingly, *constitutional* control is not the appropriate mechanism to review decisions within which the goal is usually to avoid compliance with an arbitral award or an annulment decision regarding a *commercial* dispute, no matter how many technicalities and forced interpretations are attempted. This does not mean that violations could not be committed within arbitration, but allowing the abusive filing of EAPs results in a *constitutional torpedo*, as the constitutional action may be used to avoid compliance with previous adjudicative decisions, or at least attempted in order to severely delay proceedings until the Constitutional Court considers the case. As a noteworthy fact, the constitutional control exercised through an EAP is already present in international investment arbitration proceedings, where provisional measures proceedings were asked to be suspended because of the EAP (Constitutional Court judgment No. 028-14-SEP-CC and PCA case No. 2012-10: Merck Sharpe & Dohme Corporation v. The Republic of Ecuador).

The fine boundary between politics and law ought to be considered at all times. Looking at the bigger picture, there are several events that are not isolated from each other, nor from the issues previously exposed. The actions taken by Ecuador, such as the termination of several BITs, the denouncement of the Washington Convention, the creation of a special commission for the audit of BITs and the investment arbitral system (CAITISA), the apparently future establishment of an international arbitration centre by the Union of South American Nations (UNASUR), and the new bill project on the enforcement of awards and judgments (which is being revised by the Ecuadorian National Assembly) have already attracted national and international attention and will surely lead to interesting judicial outcomes and academic debates in the future.

In conclusion, judicial review is necessary as long it truly contributes to judicial harmony; thus, proper control is vital for a healthy adjudicative system. The excessive and helpless intervention by the courts is negative, as it undermines arbitration's principles and benefits. The consequence of the denaturalization of a dispute settlement mechanism such as arbitration through an invasive system might result in reluctance towards this institution and in the unattractiveness of the legal framework that embraces it, which in turn could eventually be avoided for its lack of certitude. Accordingly, the courts should condemn the abusive conduct against arbitration's nature and render judgments that provide judicial certainty.

Correspondingly, arbitration must not be seen as a mechanism alienated from the Constitution, nor as an instrument to evade fundamental rights or principles. The

Ecuadorian experience shows that the balance between party autonomy and reviewability must be sensible, otherwise an uncertain legal and judicial environment might prevail. It follows that clear norms are desirable, but this is not the ultimate solution either, since it is meaningless if these are not applied or if these are given distorted interpretations that disregard their purpose. Likewise, the remedies for violations of constitutional rights or due process do not reside on an absolute constitutional control, but on the correct application and understanding of the Constitution and the institutions recognised by it.

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