The New General Organic Code of Processes: A Trojan Horse for Arbitration in Ecuador

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On May 22, the new General Organic Code of Processes (GOCP) was enacted (Official Register Supplement N. 506). Excluding constitutional, electoral and criminal matters, the GOCP will regulate all judicial procedures in Ecuador. It is a long expected and generally very welcome reform in the Ecuadorian judicial system. It replaces an outdated spaghetti bowl of judicial norms, some of them rather odd and confusing. In general, the GOCP is a modern code based on an oral and adversarial system, which contains few and simple procedures and is expected to significantly reduce the length of procedures in today's judiciary system. Nevertheless, despite its benefits, one measure was not received with enthusiasm in the arbitral community: the GOCP has substantially changed the rules for the enforcement of international arbitral awards in Ecuador.

Background

Prior to the enactment of the GOCP, Ecuadorian legislation did not have an express procedure designed to recognise and enforce foreign awards. The Arbitration and Mediation Law (AML) assimilated international arbitral awards to domestic arbitral

awards. The final paragraph of Article 42 of the AML stated that "awards pronounced in an international arbitration proceeding shall have the same effects and shall be enforced in the same manner as awards issued in a local arbitration proceeding," which, pursuant to Article 32 of the AML, are enforced in the same way as final judgments rendered by local courts. This is done through the so-called judicial order for enforcement without delay (immediate execution). This mechanism was simple and, to a certain extent, expeditious. This procedure was confirmed by the Ecuadorean courts in the cases Doug W. Cannaday v. Glenn Allan Good and Hampton Court Resources Ecuador S.A. (Procedure No. 812-2006, Decision of 8 February 2008) and Daewoo Electronics America, Inc. v. Expocarga S.A. (Procedure No. 469-2009, Decision of 26 October 2009).

Recognition and enforcement of international arbitral awards under the GOCP

The GOCP has repealed the last paragraph of Article 42 of the AML, which governed the enforcement of international arbitral awards, and has replaced it with a two-fold procedure: first recognition and then enforcement. In a nutshell, a party seeking to enforce an international award has to first initiate an exequatur procedure before a Provincial Court and once it has obtained leave for enforcement, it can resort to a judge of first instance for the enforcement of the award.

Article 104 of the GOCP sets forth the requirements to obtain the recognition and leave for enforcement of an international award. According to this provision, the Provincial Court has to verify that:

1. The award bears all necessary external formalities to be considered authentic in the State of origin.
2. The award is final and has *res iudicata* effect under the law of the State of origin, and all necessary annexed documents are duly legalised.
3. The award, if not in Spanish, is duly translated.
4. The respondent in the arbitral procedure was duly served and the parties' right of defence (due process) was guaranteed. The parties will have to prove this was the case by presenting the necessary documents pertaining to the arbitration in question and pertinent certifications.
5. The request for recognition states the place where the person or legal entity against whom the award will be enforced has to be served.

The last paragraph of Article 104 of the GOCP adds, in a rather confusing language, that:

For the recognition of judgements and arbitral awards against the State, since they do not pertain to commercial matters, it shall also be demonstrated that they do not contravene the provisions of the constitution and the law, and that they are in conformity with treaties and international conventions in force. Where no treaties or conventions exist, they would be fulfilled if they are contained in a letter rogatory or if its efficacy and validity is recognised under the law of the State of origin.

Once the Court has verified that the above requirements have been fulfilled, it will order that the person or legal entity against whom the enforcement is sought be served, granting him 5 days to oppose to the request. As the GOCP is silent on the grounds on which a person might oppose the recognition of arbitral awards, it appears that Article V of the New York Convention (or Article V of the Panama Convention) applies (Article 425 of the Ecuadorian Constitution allows domestic judges to directly apply treaty provisions). Article 105 of GOCP provides that the Court must rule based on the merits of the case within 30 days, however, a hearing can take place if there is a well-grounded opposition and the case has a certain degree of complexity. In this scenario, the hearing date has to be set within 20 days of the filling of the opposition. The decision of the court is final and cannot be appealed.

Once a party has obtained the recognition of an award and its leave for enforcement, it can initiate enforcement proceedings before a judge of first instance for civil matters in accordance with Article 362 *et seq*. of the GOCP.

Commentaries

The new code is indeed a welcomed modernization of the judicial system in Ecuador. It brings various benefits and allows for modern, effective, and more expeditious litigation. But, as Virgil said in the Aeneid, “I fear the Greeks, even when they bear gifts”, because some of them could be Trojan horses. The new two-fold mechanism for the recognition and enforcement of arbitral awards might be such a gift. The new rules on this matter constitute a clear retrogression for arbitration in Ecuador.

First, the new procedure is not simple, clear, nor expeditious. It is far more

complex and burdensome than the former procedure. Second, contrary to the international trend, the new rules impose on the applicant the burden of proof of the legality and finality of the award. Third, many problems will arise with respect to some of the requirements that the applicant must fulfil in order to obtain leave for enforcement. In particular, the requirement of proving that the parties' right of defence was ensured imposes a disproportionate burden of proof on the applicant. It requires to prove a negative fact, *i.e.*, that the parties' right of defence was, in fact, not breached. Furthermore, the manner in which a party is required to do so can become a real obstacle for the enforcement of the award. It is quite possible that the entire arbitration can run up to several thousands of pages and documents; imagine what it would be to file such certified and legalised copies of the file to the court. Fourth, the requirement that the award should be final and should have *res iudicata* effect under the law of the State of origin clearly precludes the possibility of enforcing interim and partial awards that are not final and awards that have been set aside in the place of the arbitration. Fifth, as an international award is deprived of any legal value if it is not first recognised by the local courts, it is highly dubious whether it could be used to obtain provisional measures in order to secure the payment of the awards before starting the exequatur procedure. Sixth, the procedure is more burdensome when it comes to the enforcement of awards against the State. The last paragraph of Article 104 of the GOCP presumes that there cannot be a commercial award against the State, hence, that States always act in a sovereign capacity. This simply does not hold true. Therefore, we can have at least two interpretations of this provision: 1) when enforcing an awards against the State, regardless of the award's nature, the applicant must prove that the award is not in conflict with Ecuador's Constitution and laws; or, 2) that this provision does not apply to commercial matters but only to matters where the State has acted in its sovereign capacity. To the extent that one wishes to have an arbitration friendly jurisdiction (or a degree of it), the second interpretation should be preferred. For these reasons, one might wonder if this new procedure is in conformity with Ecuador's obligation under the New York Convention.

Lastly, it is worth clarifying that this procedure pertains to the recognition and enforcement of international arbitral awards and does not apply to the enforcement of provisional measures ordered by international arbitral tribunals. Article 363 of the GOCP makes clear that provisional measures ordered by international tribunals do not require a prior exequatur for its direct enforcement.