

To Annul or not to Annul: The Constitutional Court of Ecuador Finally Set Clear Rules for the Annulment of an Arbitral Award

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I .The Annulment of an Arbitral Award under Ecuadorian Law

Pursuant to article 30 of the Arbitration and Mediation Law (AML), arbitral awards are final and binding for the parties. In other words, parties cannot file recourses to challenge an award, with the exception of a clarification or extension petition before the arbitral tribunal. However, article 31 of the AML allows parties to file an action for annulment against an arbitral award under the following grounds: A) One of the parties has not been legally notified with the claim and the arbitration has been conducted in violation of said party's rights; B) One of the parties has not been legally notified with the procedural orders issued by the tribunal and this fact has prevented them from exercising their rights; C) Evidence has not been produced or a party has not been legally notified of a hearing in which said evidence was going to be produced; D) The award refers to matters not submitted to arbitration or grants beyond what is claimed; and E) The procedures to appoint the arbitrators established under AML or agreed by the parties have been violated. According to the AML, the President of the Provincial Court where the award was

rendered is the competent authority to decide on the annulment action. The annulment action was conceived for correcting *in procedendo* and incongruence vices contained in an arbitral award under the previously referred circumstances.

In 2012, a case under the number 169-12-SEP-CC was brought before the Constitutional Court regarding the possibility to file an annulment action on a ground (constitutional violations) different from the ones established under article 31 of the AML. The Court reasoned that the grounds for annulment under article 31 of the AML are exhaustive and that the President of the Provincial Court is not legally entitled to set aside an award under grounds not established in the aforementioned provision. With respect to constitutional violations during an arbitral proceeding, the Court explored the applicability of constitutional remedies against arbitral awards. The Ecuadorian Constitution recognizes the right to challenge any final judgement in which constitutional rights have been violated, through a constitutional remedy called *acción extraordinaria de protección*. In this case, the Court concluded that given the arbitrators have jurisdictional faculties^[fn]See article 7 of the Ecuadorian Code of the Judicial Function.^[/fn] and their decisions are similar to judicial ones, arbitral awards can also be reviewed through a constitutional remedy. Moreover, the Court reasoned that although arbitration is an alternative mechanism of dispute resolution, it has to observe the rights recognized under the Ecuadorian Constitution and, for this reason, constitutional review of arbitral awards is valid.

In 2015, the Constitutional Court changed its previous reasoning and issued the decision 302-15-SEP-CC concluding that the grounds for annulment under article 31 of the AML are not exhaustive and that an award can be set aside in other cases, for instance, when a tribunal lacks competence or when the award has not been sufficiently reasoned. According to the Constitutional Court, the due process rights to a reasoned decision and to be judged by a competent authority, which are recognized under article 76 of the Ecuadorian Constitution, also constitute grounds of annulment although they have not been expressly mentioned under article 31 of the AML. In its decision, the Court also required the exhaustion of an annulment action before a party attempts to challenge an award through a constitutional remedy. This decision certainly set a negative precedent for the development of arbitration in the country, particularly because it opened the door for an excessive judicial interference in arbitral proceedings and denaturalized the purpose of the annulment action. In light of this ruling, confusion among arbitration practitioners

and local courts reigned with respect to the grounds for annulment of an award and the remedies available to challenge arbitral decisions.

II. Local Courts Annulled Awards under Grounds not Established in the AML

Given the lack of clarity regarding the annulment action, in 2017 the President of the Provincial Court of Pichincha decided to set aside two awards on different grounds from those established under article 31 of the AML. In case 17100-2017-00008 the President of the Provincial Court of Pichincha annulled the award, mostly, because he disagreed with the merits of the decision. According to the President of the Provincial Court, the award lacked legal reasoning and thus it violated constitutional rights recognized under article 76 of the Constitution. This decision is not in accordance with the AML, as the judges do not have the legal faculty to call into question the merits of an arbitral decision. As we mentioned earlier, annulment actions were conceived only for correcting *in procedendo* and incongruence vices and should not be used by local courts as vehicles to interfere in the autonomy of an arbitral proceeding.

In case 17100-2017-00005, the President of the Provincial Court annulled the award by taking a liberal interpretation of article 31 (d) of the AML, which refers to incongruence vices. The President of the Provincial Court of Pichincha basically questioned the merits of the award and the legal reasoning of the arbitrators in light of the evidence presented during the course of the arbitration. This conduct by the President of the Provincial Court of Pichincha constitutes a violation of the principle of judicial non-interference in arbitral proceedings and denaturalized the purpose of the annulment action. Moreover, this decision, which is more similar to an appeal judgement rather than to an annulment action, contradicts the legal certainty right of the parties submitting their dispute to final and binding arbitration.

Both of these decisions violate the doctrine of the autonomy of the parties' will, as well as the legal certainty and legality principles recognized under the Ecuadorian Constitution.

III. The Constitutional Court Finally Set Clear Rules for the Annulment of an Arbitral Award

In 2019, the Constitutional Court issued three of the most relevant and positive decisions (31-14-EP, 323-13-EP, and 1703-11-EP) for the development of arbitration in the country, because they finally clarified the treatment of the annulment action.

In November 2019, the Constitutional Court issued decision number 31-14-EP, in which it reasoned that:

- The constitution recognizes arbitration as an alternative mechanism of dispute resolution, but it is still subject to constitutional review. This reasoning does not violate the judicial non-interference principle, but rather ensures that arbitral proceedings will respect constitutional rights.
- The constitutional remedy known as *acción extraordinaria de protección* is applicable to control and correct constitutional violations in arbitral awards. Given the extraordinary nature of constitutional remedies there is a legal requirement to exhaust any ordinary available recourses before filing them. However, a party shall not be forced to file an annulment action in order to comply with this legal requirement before filing a constitution remedy in cases where the grounds of annulment are not sufficient to correct the constitutional violation.
- An award shall only be set aside on the exhaustive grounds established under article 31 of the AML because this guarantees the legal certainty principle in arbitration. Hence, a party shall not invoke different grounds to annul an award.
- In order to correct potential constitutional violations in an arbitral proceeding, such as lack of competence of the tribunal or lack of reasoning in the award, parties shall resort to the constitutional remedy known as *acción extraordinaria de protección*. In consequence, the review that the Constitutional Court makes during a constitutional remedy is different from the one in the annulment action.

This decision shows a different approach from the one contained in case 302-15-SEP-CC, in which the Court concluded that the grounds for annulment under article 31 of the AML were not exhaustive.

In November 2019, the Constitutional Court issued decision number 323-13-EP, in which it dissented from the case 302-15-SEP-CC and reasoned that:

- Although it is not necessary to exhaust the annulment action before filing the constitutional remedy, it is worth noting that the lack of notification with the arbitration claim is considered under article 31, (b) of the AML for the annulment action. Hence, the respondent did have an ordinary recourse available (annulment action) to challenge the award on the grounds of lack of notification.
- The annulment action imposes a civil sanction to the award. Hence, it shall only be applicable on the grounds established under article 31 of the AML, because this guarantees the legal certainty and legality principles. Depending on the situation, parties can either choose the annulment recourse (under the specific grounds of article 31 of the AML) or the constitutional remedy (constitutional violations not contained under article 31 of the AML).

In December 2019, the Constitutional Court issued decision number 1703-11-EP in which it reasoned that:

- The annulment action is an especial procedure reserved for the grounds established under article 31 of the AML. The annulment action will only correct *in procedendo* or incongruence vices contained in the award.
- Due to its very nature, parties cannot resort to other ordinary recourses (e.g. appeal or cassation) during the annulment process. However, if there has been a violation of constitutional rights during the course of the arbitration, particularly, lack of competence of the tribunal or lack of reasoning in the award, then a constitutional remedy could be filed in order to correct said violation.

IV. Conclusion

Article 31 of the AML provides only 5 grounds for annulment of an arbitral award in Ecuador, all of which are related to procedural matters, such as lack of notification with the arbitration claim or violations in the procedures for an arbitrator's appointment. Since 2012, the Constitutional Court issued contradictory decisions on whether these grounds were exhaustive or not, which not only caused

confusion among practitioners and arbitrators, but also opened the door for local courts to interfere in the merits of arbitral awards. Fortunately, this situation came to an end in 2019, when the Constitutional Court developed jurisprudence clarifying that awards may only be annulled under any of the grounds contained in article 31 of the AML. In case the award contains another vice (e.g. constitutional rights violation) not specifically established in article 31, then it was subject to be challenged through a constitutional remedy.