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The Wait is Over: Ecuador Enacts Regulations to its Arbitration and Mediation Law

Andrés Larrea (Tobar ZVS) · Wednesday, September 1st, 2021

Ecuador´s Arbitration and Mediation Law ("AML") was enacted in 1997 and amended in 2015. However, the AML did not count with regulations until August 2021. Given that some provisions contained in the AML are vague, arbitrators, counsel and judges interpreted them in different ways, many of them in contradiction with the very nature of the arbitral process. On August 18, 2021, President Guillermo Lasso issued Executive Decree Nº 165 containing the regulations to the AML (the "Regulations"). The Regulations clarify important aspects for the practice of arbitration in Ecuador, such as the process for enforcing international arbitral awards, requirements for arbitration with public entities, and the process for annulment actions. This post explores the novel aspects brought by the Regulations regarding arbitration.

The Regulations will officially enter into force in the upcoming days once published on Ecuador's Official Registry.

Arbitration involving the State and State entities

According to article 190 of the Constitution, public entities require the Attorney General of the State to approve any arbitration agreement the entity might include in a contract. In 2014, the Attorney General of the State issued an internal resolution clarifying that his prior approval is mandatory if a public entity wants to enter into an agreement for submitting disputes to international arbitration, or if a public entity wants to submit its dispute to arbitration once the dispute has already begun. However, it was not clear if a public entity required the prior approval issued by the Attorney General of the State before the conflict had arisen.

In addition, in case No. 17711-2016-0049 the National Court of Justice confirmed the setting aside of an award holding that in public contract matters the prior approval issued by the Attorney General of the State is always mandatory and impacts the validity of the arbitration agreement. In this regard, the Regulations now clarify that there are three ways in which public entities can submit their disputes to arbitration: *first,* by entering into an arbitration agreement before the dispute arises; *second,* by entering into an arbitration agreement once the dispute has arisen; and *third,* when the law of an international treaty so provides. Only in the second way and for international arbitration agreements the Attorney General of the State´s approval is required.

In terms of arbitrability of disputes involving State entities, the Regulations clarify that in matters of public contracts, arbitrators shall have the power to decide on the facts, acts or administrative actions that are related to the controversy, including administrative acts for termination, unilateral termination of contracts (*caducidad*), or the imposition of penalties. Another aspect of great relevance is that when an arbitration agreement has not been included in a contract entered with a public entity, the contractor may request the contracting party to agree to arbitrate. If the contracting party (public entity) remains silent for the next thirty days after such request has been made, then it will understood that it has agreed to arbitrate the dispute. This provision is likely to face some controversy, mostly because arbitration is a creature of consent, and this involves this idea of the existence of a "tacit consent."

International arbitration and enforcement of international awards

Regarding international arbitration, the Regulations clarify that public entities may enter into international arbitration agreements as long as they have the Attorney General of the State´s approval. The Regulations establish that in order to obtain said approval, the Attorney General of the State shall review whether the arbitration agreement is valid in accordance with the law of the seat. Parties are free to agree on the seat of the arbitration.

With regards to the enforcement of international arbitral awards, the Regulations clarify that they will be enforced in the same way as domestic awards and no particular formalities will be required. Domestic awards are enforced before the lower civil court from the domicile of the respondent/losing party or the place where they have assets capable of being seized. This provision is in harmony with Article III of the New York Convention and confirms that the "exequatur" process is no longer needed. In addition, judges will reject and sanction any attempt by a party looking to obstruct the enforcement process. The party against whom the award is being enforced may only challenge the enforcement process if they prove that the award has been suspended or set aside by a competent authority.

Annulment actions

The Regulations clarify that during the annulment action against an award, judges shall observe the principle of minimal judicial intervention. The Regulations confirm that annulment actions may not be used as a mechanism to delay the enforcement of an award and in case a party tries to do that, they will be sanctioned. During the annulment proceedings, the President of the Provincial Court shall determine (i) whether the party who is seeking the annulment has claimed in a timely manner before the tribunal the occurrence of the event which supposedly caused the nullity, (ii) if the cause for annulment causes an irreparable damage to the party, and (iii) if the annulment ground could have been raised or corrected during the arbitration proceedings and the party now complaining failed to do so. The Regulations state that in case of doubt, the President of the Provincial Court shall opt for refusing the annulment of the award.

In terms of the procedure, once the annulment petition has been filed, the tribunal shall keep a certified copy of the arbitration record (hard copy or electronic) at the arbitration center and then send the original file to the corresponding Provincial Court. From the date of the receipt of the file, the President of the Provincial Court will have five days to review if the annulment petition

complies with all legal requirements and then, he will have thirty additional days to reach a decision. Parties may submit written pleadings during this time and will also have time to present their arguments orally before the Court. In the author´s view, these provisions are important because they finally clarify procedural aspects regarding annulment actions.

Precautionary measures

The Regulations establish that the tribunal or an emergency arbitrator (the AML does not make any reference to emergency arbitrators) shall issue precautionary measures in order to: (i) maintain the *status quo* until the dispute has been finally resolved; (ii) prevent the continuation of any current damage or an imminent one; (iii) preserves assets in dispute; (iv) preserve evidence; (v) ensure that the parties will comply in the future with the obligations that are being disputed.; (vi) preserve the tribunal's jurisdiction. In the author´s view, it is positive that the Regulations established the general requirements for granting precautionary measures because this was vaguely addressed in the AML. The arbitrators may revoke, modify or suspend the measures either at a party's request or *sua sponte*.

Scope of the Arbitration Agreement, Confidentiality, Party Autonomy and Arbitrator´s Duties

The Regulations establishes that the arbitration agreement may cover those parties whose consent is implied according to the principle of good faith, or from their substantial role in the participation, negotiation, execution, performance or termination of the contract, or exercised rights or acquired benefits from it (e.g. successors). This provision may open the door for extending arbitration agreements to non-signatories or third parties using theories such as the group of companies, estoppel, alter-ego or piercing of the corporate veil, which was a controversial issue and on-going topic for discussion among the local arbitral community.

In terms of confidentiality the regulation brings important aspects such as the possibility for parties to request either arbitration centers or Provincial Courts during annulment actions, to take specific measures in order to protect their identity and preserve the confidentiality of the arbitration.

The Regulations also guarantee party autonomy and allow parties to agree to any institutional rules or agree on their own procedural rules if interested in a more flexible process. It also guarantees that local courts will not interfere in the administration and autonomy of arbitration centers, which is positive given that in the past the Judiciary has tried to interfere in the conduct of arbitration centers.

Finally, the Regulations establish that once an arbitrator has been appointed and accepted said appointment, he or she has a duty to comply with their legal obligations, including personal liability for damages caused by fraud or gross negligence. The arbitral institution, their director and employees face the same responsibility.

Conclusion

In the author´s view, the new Regulations to the AML will bring many positive changes for the practice of arbitration in Ecuador because it limits judicial intervention, promotes international arbitration, reinforces party autonomy, and sends a positive message to the country and to the whole world that Ecuador is an arbitration-friendly jurisdiction.

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