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Procedure of Annulment of an Arbitral Award in Ecuador: An Arbitral Odyssey

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The Odyssey is one of the most famous epic poems of the classic era. Attributed to Homer, it describes the journey of Odysseus from Troy to Ithaca, his homeland. It took the hero about ten years to complete his journey. This history is full of unexpected events, sudden changes and new obstacles that Odysseus must overcome in order to reach his final destiny. This is why, nowadays, when we refer to a long and eventful journey or experience, we use the word "odyssey". Some practitioners would not disagree with the idea that, in certain situations, to litigate an arbitral-related matter before local courts can end up being quite close to an odyssey. This was the case in relation to the procedure for the annulment of an arbitral award in Ecuador until recently. On 22 April 2015, the Constitutional Court of Ecuador rendered a judgment that put an end to the uncertainty and contradictory case law that abounded in this field.

Background

Article 31 of the Ecuadorian Arbitration and Mediation Law (AML) states that an arbitral award can only be challenged through an annulment procedure. The grounds for annulment of an arbitral award are *numerus clausus* and they refer exclusively to *in procedendo* errors, i.e., (i) failure to serve the claim to the defendant provided that (i.a) the process started and ended without the participation of the defendant, and (i.b) it has limited the defendant's right of defence; (ii) failure to notify one of the parties with an order of the Tribunal provided that this fact has limited or prevented the exercise of that party's right of defence; (iii) failure to hear or take evidence despite the existence of facts that must be justified; (iv.a) the arbitral award decided matters that fall outside the scope of the arbitral agreement; (iv.b) *extra* or *ultra petita* decision; and, (v) breach of the procedure for the appointment of the arbitral tribunal.

According to the same article, a request for annulment has to be filed within 10 days of the day on which the award has become final. With the request for annulment and subject to post a security, a party can also request a stay of enforcement of the award. The decision on annulment has to be delivered by the President of the respective Provincial Court -court of appeal- within 30 days of receiving the file.

The Odyssey: History of a Problem

The first problem that litigators faced with the annulment procedure of arbitral awards related to the procedure to be followed by the President of the Provincial Court. Some Courts used to apply

the so-called *procedimiento ordinario* procedure instead of the procedure established in article 31 of the AML. The application of this procedure used to cause a considerable delay in the resolution of annulment proceedings. On 5 May 2009, the Constitutional Court ruled (Judgment No. 0008-2008-DI) that the annulment proceeding was a special procedure, and therefore the *procedimiento ordinario* was not applicable to the annulment of arbitral awards.

The second problem was whether or not there could be an appeal against the decision of the President of the Provincial Court. Traditionally, when the President of the Provincial Court was the judge of first instance, the Specialized Chamber of the Provincial Court could hear the dispute on appeal. The case law concerning the admissibility of an appeal against the decision of annulment of an arbitral award was absolutely divided. Whether the appeal was admitted or not, depended on the chamber that heard the case. Even the National Court of Justice rendered contradictory decisions in the matter (see *Asociación Ecuatoriana de Ecoturismo ASEC v. Ministerio de Turismo, 2 March*, 2010; and *Latin Amercia Telecom Inc. v. Pacifictel S.A.*, 11 June 2007).

The final problem concerned whether or not a *Casación* recourse could be filed against the final decision on annulment. *Casación* is a special recourse intended to control the legality, uniformity and properness of judicial decisions. *Casación* allows the National Court of Justice to make a *de iure* review of a lower court's decisions. In the case of annulment of arbitral awards, the discussion centred on the nature of the annulment procedure and if the annulment decision was one of the decisions that could be subject to *Casación*. It may not come as a surprise to learn that case law in this matter was divided as well. Some decisions established that, since the annulment procedure did not resolve or refer to the underlying rights of the dispute nor to the dispute in itself – it was not a *conocimiento* procedure – an annulment decision was not subject to Casación (see for instance *Colonial Compañía de Seguros y Reajustes S.A. v La Ganga Rca. Cía. Ltda.*, 10 October 2001; *Inmodiursa S.A. v. Compañía Alfredo Ribadeneira Arquitectos Cía. Ltda.*, 13 May 2013). The other side of the argument contended that an annulment decision was subject to *Casación* because it fundamentally decided over the parties' rights – therefore it was a conocimiento procedure (see *Impocomjaher Cía. Ltda.*, Judgment No. 10-2009, 5 February 2009; *Trasinvest S.A. v. BMI Financial Group Inc.*, 18 January 2010).

The Constitutional Court Decision

On 22 April 2015, the Constitutional Court of Ecuador rendered a judgment in the case *Ministerio de Transporte y Obras Públicas y Procuraduría General del Estado v. Fiduciaria Ecuador Fiduecuador* (Judgment No. 124-15-SEP-CC, 22 April 2015) clarifying the procedure for the annulment of arbitral awards. In this judgment the Court ruled that (i) there can be an appeal from the annulment decision of the President of the Provincial Court, (ii) there can be *Casación* over the final decision on annulment, and, (iii) in all cases – the decision of the President, the decision of the Specialized Chamber, and the *Casación* – judges cannot review the Tribunal's decision on merits of the dispute.

One could certainly disagree with the Constitutional Court's reasoning, or – policy wise – consider it inappropriate to admit all these recourses into an annulment procedure. Nonetheless one thing holds true, this decision will bring more certainty and predictability to this conflicted area. Yet, since the procedure confirmed by the court is a lengthy and complex one, it is still to be seen whether this decision has put an end to or ratified what has been, for quite a few years, an arbitral odyssey.

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This entry was posted on Thursday, August 13th, 2015 at 6:35 pm and is filed under Annulment, Arbitral Award, Ecuador
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