

# Kluwer Arbitration Blog

## Emelec vs. Canal Uno: How Many Bites Can the Apple Handle?

Daniela Palacios · Tuesday, May 24th, 2016

In general terms, a couple of the known advantages of arbitration are: (i) normally it is faster than adjudication before national courts and, (ii) the arbitral award is final. Now, both of these perceived advantages are often tested by local courts and losing parties. Ecuadorian players are not the exception. In the case of *Emelec vs. Canal Uno*, the Constitutional Court of Ecuador found that parties can file an appeal, *casación* and constitutional actions against the decision issued by the courts on the question of annulment of the arbitral award.

For a few years, Ecuador's position regarding arbitration has been a little blurry. Maybe the country's "bad" experiences have made law makers and courts a little skeptical, to say the least, about arbitration. In any case, it seems like its courts, particularly the Constitutional Court, are holding on to every bit of their jurisdictional powers, making sure they give the losing party one more bite of the apple.

### General Remarks

Before looking at the decision issued by Ecuador's Constitutional Court, it is always important to make a distinction between the different recourses available to the losing party. On one hand, arbitral awards can only be annulled, while on the other hand, the decision issued by the courts to grant or deny the annulment can be subject to different recourses such as appeal, *casación* and constitutional actions. In any case, this "additional" actions? slows down arbitration and can reduce the effect of the finality of the award. Many things could happen while the courts decide on whether or not an award can be annulled or whether or not constitutional rights have been violated.

Now, this does not mean that an award should never be reviewed. God forbids! We know that there are all kind of tribunals making all sort of decisions. Consequently, it is necessary to always have an extra pair or eyes looking at the proceedings and making sure no gross violations have taken place. Nevertheless the question of how many actions can a losing party file before the award is final remains... at least in Ecuador.

### Case No. 1139-13-EP: The Fourth Bite

On September 28, 2009 Club Sport Emelec ("Emelec") (one of Ecuador's local soccer teams) filed a request for arbitration against RELAD S.A. ("Canal Uno") (one of Ecuador's local TV stations) for royalties allegedly owed arising out of a contract signed between the parties on February 24,

2005. The arbitral tribunal issued its decision on March 15, 2012.

On May 14, 2012 Emelec filed a request for annulment (**the first bite**). The request was decided by the President of the Superior Court of Justice of Guayas (competent court in accordance with the Arbitration and Mediation Law of Ecuador). Considering that there were no grounds to annul the award, the court denied the request filed by Emelec.

The decision issued by the court was appealed on July 6, 2012 (**the second bite**). The same court that issued the decision on annulment (which is the competent court in accordance with the law) denied the request of appeal. The court argued that arbitral awards are not subject to appeal. After this, Emelec filed a *casación* appeal (**the third bite**).

The Civil and Commercial Chamber of the National Court of Justice did not admit this request on February 1<sup>st</sup>, 2013. The court argued that annulment requests are meant to be extremely brief (the judge only has 30 days to issue a decision). Furthermore it argued that *casación* is a recourse available for cases on which the courts have decided over the actual dispute (*procesos de conocimiento*) (see art. 2 of Ecuador's Cassation Law). In this case, no such decision was made since the grounds for annulment of an arbitration award are limited to the ones listed in article 31 of Ecuador's Arbitration and Mediation Law (although some practitioners in Ecuador believe that there are also grounds listed in Ecuador's Constitution). Furthermore, the President of the Superior Court of Justice of Guayas was not allowed, by law, to look at the merits of the dispute, since that is exclusively within the jurisdiction of the arbitral tribunal and not the local courts.

Finally, Emelec filed a fourth recourse: *acción extraordinaria de protección* (**the fourth bite**). Which is a constitutional action where the Constitutional Court analyzes whether a final judicial decision has violated constitutional rights (see art. 94 Ecuador's Constitution). This action was admitted on November 14, 2013 with number No. 1139-13-EP.

The Constitutional Court reviewed the decision issued on February 1<sup>st</sup>, 2013 and **found** that:

1. Although it was not requested by Emelec to review or set aside the decision on appeal, the Court found that the denial of Emelec's request of appeal amounted already to a breach of Emelec's constitutional rights. According to the Court, the lower court violated the right of review which is warranted under Ecuador's Constitution. Furthermore, the Court argued that an important distinction must be made between: (i) the appeal of the arbitral award, which is not allowed and; (ii) the appeal of the decision regarding the request of annulment. In accordance with the Constitutional Court, this is subject to review in accordance with Ecuador's legislation.
2. The National Court's Justices also infringed Emelec's constitutional rights to review the decision issued by the lower court and its due process. The Constitutional Court held that Ecuador's legislation provides for a hierarchical order of the courts. These courts can and should review the decision issued by the lower courts in accordance with the law. According to the Court, if the lower courts do not admit a recourse, without providing for sufficient basis, this denial of admission, amounts to a violation of constitutional rights. In this case, Emelec was denied such access to review and consequently its rights were violated.

The Court emphasized on the importance of the judicial review of arbitral awards, without reviewing the merits of the dispute, through annulment proceedings. The Court also issued the following orders:

1. Annulled the decision issued on February 1<sup>st</sup>, 2013 and all of the decisions and decrees issued until July 6<sup>th</sup>, 2012.
2. Ordered one of the Chambers of Civil, Commercial, Tenancy and Neighboring Matters of the Provincial Court of Guayas to decide over the appeal.

## Conclusions

After this decision a few things are clear for arbitration in Ecuador: (i) a decision issued by the Ecuadorian courts on the issue of annulment of an arbitration award can be subject to appeal and to *casación*; (ii) either party (normally the losing party) can also file a constitutional action against any decision or order issued by the courts.

Now that this case is back to the jurisdiction of the Superior Court of Guayas, if the parties do not like the decision issued by the court, they can file a request for *casación* and if they are still not satisfied with that ruling, there might be room for a new constitutional action. This implies more or less six recourses. It will certainly take at least a couple extra years before we know the final outcome of this case. Almost 7 years have passed since the arbitration was commenced in *Emelec v. Canal Uno*. How many more do we have to wait until the award is enforced?

With the clock ticking, time passing by and considering how many recourses are available, it is easy to wonder what happened to the perception of arbitration being faster than litigation, or the expectation of a final enforceable award. Arbitration is an adequate and flexible dispute resolution mechanism, law and decision makers should go easy on additional requirements that trump the normal flow of these proceedings and burden the parties.

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