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Admissibility of Cassation Recourses against Arbitral Awards in Ecuador: A Backwards Step on the Path towards the Finality of Arbitral Awards?

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Following up on a recent post by Daniela Palacios on 24 May 2016 titled "Emelec vs Canal Uno: How Many Bites Can the Apple Handle?", this article explores: (i) Ecuadorian courts' historic approach to the availability of *cassation* (*recurso de casación*) against decisions that resolve annulment proceedings of arbitral awards, (ii) the change of approach taken in the past year, and (iii) its particular impact on the finality principle essential to arbitration.

Indeed, two recent decisions of the Constitutional Court of Ecuador (Case 1279-11-EP dated 22 April 2015 and Case No. 1139-13-EP dated 30 September 2015) found that judicial decisions on annulment of arbitral awards are subject to review by the National Court of Justice ("NCJ"), by means of the *cassation* recourse. This is directly contrary to the Ecuadorian courts' prevailing practice, which consistently rejected cassation recourses against this type of decisions.

- **Admissibility of cassation recourses against judicial decisions in annulment proceedings**

In Ecuador, pursuant to Article 30 of Arbitration and Mediation Act 1997 ("AMA") parties to an arbitration only have a statutory right to challenge arbitral awards by means of an annulment action; it is expressly provided that no other recourse is available against arbitral awards. Pursuant to Article 31 of the AMA, arbitral awards can be annulled by the domestic courts in Ecuador, on the basis of five specific grounds: (i) failure to serve the claim on the defendant in proceedings heard and terminated in absentia, provided that it limits that party's right of defense; (ii) failure to serve the tribunal's orders on the parties, thus limiting or preventing their right of defense; (iii) failure to summon, notify or present evidence despite the existence of facts that should be proved; (iv) *extra–* or *ultra petita* inconsistencies; and (v) illegal appointment and formation of the arbitration tribunal.

Since the enactment of the AMA, the Ecuadorian arbitration community has debated whether the decision that resolves an annulment action, particularly one that denies a request for annulment, is subject to the *cassation* recourse. In Ecuador, the *cassation* recourse is an extraordinary remedy which only proceeds against judgments and interim decisions that put an end to a contentious matter (*procesos de conocimiento*) decided by the Court of Appeals. *Cassation* recourses are filed before the NCJ (formerly, the Supreme Court of Justice of Ecuador).

Historically, the Ecuadorian Supreme Court of Justice would accept jurisdiction to hear *cassation* recourses filed against decisions denying the annulment of arbitral awards. The rationale behind those judgments was that the decision that resolves the annulment action against an arbitral award is not governed by the AMA, but rather by Article 59 of the Code of Civil Procedure. Thus, since this Article establishes that any dispute that does not have a special procedure will be understood as an ordinary procedure, it was possible for decisions on annulment action to be subject to various remedies, including *cassation.*

This view, however, changed following the Supreme Court of Justice's decision in *La Ganga v. Colonia de Seguros* in 2003. This was a significant step for Ecuador's arbitration framework, since it provided parties with more certainty as to the recourses available against decisions in annulment proceedings. In this case, the Supreme Court dismissed a *cassation* recourse against the decision that rejected the annulment action against the final award. It held that the cassation recourse was only applicable to judicial decisions that decide on the merits of a dispute and not against incidental remedies –such as the annulment action, which does not decide on the merits, but rather decides on the validity of an arbitral award, and only pursuant to the specific grounds for annulment, as provided by the AMA.

However, two recent decisions of the Constitutional Court of Ecuador (issued in April and September 2015), take the courts back to the position prior to the *La Ganga* case, thereby undermining the vital finality principle of arbitration rather than reinforcing it.

- **Procedural history of the Constitutional Court's decision of April 2015**

In 2007 an arbitral tribunal constituted under the Rules of the Arbitral Centre of the Quito Chamber of Commerce issued an arbitral award against the Ministry of Public Works. Thereafter, both the Ministry of Public Works and the Attorney General (who was an interested third party in the underlying dispute representing Ecuador) filed an action to set aside the arbitral award before the Pichincha Provincial Court of Justice. In November 2008 the president of the Pichincha Provincial Court dismissed the action to set aside the award.

On appeal, in February 2011, the First Chamber for Commercial Matters of the Pichincha Provincial Court (in its Court of Appeals capacity) confirmed the ruling of the president of the Pichincha Provincial Court, thus rejecting the annulment action filed by the Minister and the Attorney General. Afterwards, the Minister and the Attorney General filed separate *cassation* recourses against the Chamber's decision. Later, in April 2011, the majority of the Civil Chamber for Mercantile Matters of the Pichincha Provincial Court of Justice rejected the petition, on the basis of the prevailing position at that moment that rejected *cassation* recourses against decisions on annulment actions.

Then, the Minister and the Attorney General filed an Extraordinary Protection Action before the Constitutional Court of Ecuador. This remedy is different from the *cassation* action and can only be filed against final decisions of national courts that have allegedly violated rights enshrined in the Ecuadorian Constitution. This remedy should be filed after all other remedies have been exhausted.

The Constitutional Court then ordered the Pichincha Provincial Court to grant the *cassation* recourse, initially denied to both petitioners.

- **Procedural history of the Constitutional Court's decision of September 2015**

In October 2009, football club Emelec initiated a commercial arbitration against a national television station (Canal Uno) before the Guayaquil Chamber of Commerce due to Canal Uno's alleged breach of a contract signed by the parties in 2005. The arbitral tribunal ruled for Canal Uno. In May 2012, Emelec moved to set aside the award. The president of the Guayas Provincial Court (formerly Superior Court of Guayas) dismissed the action for lack of merit.

Emelec then appealed the Guayas Court president's decision. However, on July 6 2012, the magistrate refused to grant the appeal on the grounds that arbitral awards are not subject to appeal even though it was clear that Emelec had appealed the judicial decision that denied the annulment action and not the arbitral award. Emelec therefore filed a *cassation* recourse against that ruling before the National Court of Justice. The Chamber of Civil and Commercial Matters of the National Court of Justice dismissed the *cassation* on the basis that *cassation* recourses were not available against decisions issued in incidental (and summary) proceedings, such as the annulment action.

Emelec subsequently filed an extraordinary protection action with the Constitutional Court in order to quash the NCJ's decision. According to Emelec, the Guayas Court decision had breached rights and guarantees established in the Constitution. In particular, Emelec argued that the decision breached Article 76(7) of the Constitution, which guarantees the right to appeal all judicial decisions, as well as Article 8(h) of the InterAmerican Convention of Human Rights, which establishes a similar guarantee.

The Constitutional Court vacated the ruling of the NCJ and ordered the president of the Guayas Court to allow the plaintiff's appeal. One of the chambers of the Guayas Court should hear the appeal. If after hearing the appeal, the Court rules against Emelec, it will be entitled to file a *cassation* recourse before the National Court of Justice.

- **The reasoning of the Constitutional Court decisions**

In both cases the Constitutional Court found that the cassation recourses were wrongly denied by the lower courts. Although the Constitutional Court clarified that arbitral awards cannot be subject to any other recourse than the annulment action provided in the AMA, the denial of appeal and *cassation* recourses against the decision on the annulment action violated the parties' constitutional rights of due process and effective judicial protection (Articles 75 and 76.7(a) and (m) of the Constitution of Ecuador).

Specifically, in its decision of 22 April 2015, the Constitutional Court held that the decision rendered by the Provincial Court denying the cassation recourse against the decision on the annulment action violated both petitioners' right of due process. According to the Constitutional Court, the Pichincha Provincial Court erred when it found that the fact that an arbitral award was not subject to appeal was a sufficient reason to deny the cassation recourse. The Constitutional Court reasoned that the cassation recourse should be granted because the petitioners did not file the recourse directly against the arbitral award, but rather against the decision on the annulment action. Similarly, in its decision of 30 September of 2015, the Constitutional Court found that both the

Guayas Court and the NCJ's decisions violated Emelec's constitutional right to recourse judicial decisions and due process. The Constitutional Court once again emphasized that the appeal had to be granted because it had been filed against the judicial decision that denied the annulment action, instead of against the arbitral ward itself.

- **Comments**

These decisions could be rightly seen as a step back for Ecuador's arbitration framework since it provides losing parties with an extra recourse against the decision on annulment actions and thus lengthens the annulment process. It also changes the (more arbitration-friendly) prevailing position as to the inadmissibility of *cassation* recourses against this type of judgment.

Although Ecuador does not have a case-law-based system, the weight of the Constitutional Court's decision will without doubt influence lower judges in deciding on whether to admit or reject a *cassation* recourse against decisions on annulment actions. This not only provides the losing party with another recourse against arbitral awards rendered in Ecuador (which was not available until recently), but also allows a losing party to delay the enforcement of an unfavorable award.

While it is yet to be seen whether the National Court of Justice will accept the Constitutional Court's ruling, this decision takes Ecuador at least one step backwards in terms of finality of the awards rendered in Ecuador, thereby providing parties with an additional (discouraging) issue to consider when choosing Ecuador as the seat of arbitration. This trend contrasts with other Latin American jurisdictions, like Mexico, where the arbitration law expressly denies any judicial recourse against a decision on annulment actions (except in very extraordinary circumstances where recourse by means of a writ of *amparo* might be available).

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