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Enforcing International Arbitral Awards in Ecuador After Recent Legal Reforms: Is This the End of the Exequatur Process?

Andrés Larrea (Tobar ZVS) · Sunday, May 17th, 2020

In 2015, Ecuador changed its General Organic Code of Processes (procedural law or COGEP) and imposed an exequatur procedure for foreign awards. The Law of Productive Development, Attraction of Investment, Employment Generation and Tax Stability (Investment Law) enacted in 2018 repealed this requirement. Nevertheless, despite this amendment, there are still practical difficulties that parties face when enforcing an international award in Ecuador. This post explores these difficulties.

The Enforcement of International Arbitral Awards under the Investment Law

Foreign investment is integral to Ecuador´s economy. However, during the last administration when President Rafael Correa was in office from 2007-2017, the country exhibited a hostile attitude towards international arbitration which is the preferred mechanism for the resolution of investment disputes. For instance, Ecuador enacted a Constitution which seemed to prohibit the country from submitting disputes to international arbitral tribunals seated outside Latin America (see article 422), passed a procedural law which imposed an *exequatur* process for enforcing international arbitral awards (see COGEP, article 102) and withdrew from the International Centre for Settlement of Investment Disputes (ICSID) Convention.

Fortunately, as soon as President Lenin Moreno took office in 2017, he supported the enactment of some legal reforms which were needed to present investors with a more attractive scenario. One of these reforms is the Investment Law enacted in 2018.

The Investment Law was certainly a positive shift in Ecuador´s legal framework as one of its main objectives was to remove restrictions on foreign investments. The Investment Law offers different levels of benefits depending on the amount of the investment. It also encourages investors to choose international arbitration as a mechanism for dispute resolution.

One of the most important aspects of the Investment Law was the removal of the provisions related to the homologation or *exequatur* process of international arbitral awards contained in the COGEP. In short, the homologation process required a party seeking the enforcement of an international award to file a request before the Provincial Court for its recognition. Said party had to comply

with five requirements: i) the award had to be considered *res judicata* under the jurisdiction in which it was issued; ii) the award had to be translated to Spanish, if applicable; iii) the request presented sufficient documentary evidence showing that the respondent in the arbitration was properly served with the claim and that due process was not violated; iv) the award complied with all the formalities for its validity; and v) the request for homologation had to indicate the place where the person or the company had to be served. During the homologation process, the defendant could file a response and present reasons of why the request should be dismissed. In case the Provincial Court accepted the homologation of the award, then the party could resort to a first level judge for the enforcement.

The Investment Law brought back to life article 42 of the Ecuadorian Arbitration Act which mandates that international arbitral awards shall be enforced in the same manner as domestic arbitral awards. This article is consistent with article III of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which provides for the obligation on the signatory States not to impose more strict conditions for the enforcement of an international award than they would impose for a domestic one. Consequently, the *exequatur* process is no longer applicable in Ecuador for the enforcement of international awards.

The Enforcement of International Arbitral Awards before the Investment Law

As mentioned before, the Investment Law reformed articles 102 to 106 of the COGEP, which required a homologation process for the enforcement of an international award.

The COGEP enacted in 2015 was seen by many as a huge step backward in the development of international arbitration in Ecuador. Some local experts even considered COGEP as a “trojan horse for arbitration in Ecuador” for the following reasons:

1. According to article 104, a party (applicant) seeking the enforcement of an international award was required to fulfill some complex requirements. For instance, the party had to prove that the respondent in the arbitration was duly served with the claim and that due process was not violated. Moreover, the applicant had to present documents proving the award´s finality and that it had *res iudicata* effect under the law of the state of origin. As a result, these requirements imposed a disproportionate burden of proof on the applicant.
2. Contrary to the international trend, the *exequatur* process was slow, and it lacked clarity, which difficulted an expedite enforcement of international arbitral awards.
3. In awards against the state, the applicant faced even more challenges given the excessive amount of formalities. Moreover, the applicant was obliged to prove that the award was not in conflict with the Constitution and domestic laws.

Once the party fulfilled all the requirements and the award was dully homologated by the Provincial Court, then the applicant could resort to a first level judge for the enforcement. The *exequatur* process could take several months and was certainly more burdensome for the applicant compared with the current process because it required a two-step process (homologation and enforcement) instead of only one. Currently, a party seeking the enforcement of an international award is only required to file a petition to a first level judge. Then, the judge issues an order for the immediate enforcement of the international award in the same manner as final judgement or domestic award. The enforcement process is quite simple, and it is usually conducted in a very

expeditious way.

In light of the above, one of the most important reforms introduced by the Investment Law is the removal of the *exequatur* process for international arbitral awards because it is consistent with the New York Convention in the sense that states should not impose more strict conditions for the enforcement of international awards than they do for domestic ones.

Practical Difficulties for the Enforcement of Arbitral Awards due to Judicial Interpretation

Despite the positive legal reforms that the Investment Law brought, the judicial system still makes the enforcement of foreign arbitral awards difficult. Overall, many judges consider that the effect of the reforms contained in the Investment Law is unclear. This misunderstanding by the judges has caused practical problems. For instance, in case number 17113-2018-00003, the Superior Court of Pichincha still made referenceo the *exequatur* process for an international arbitral award delivered in Chile, although these provisions were no longer applicable due to the reform brought by the Investment Law.

Likewise, in case number 17230-2019-03159, the Superior Court of Pichincha claimed that although the Investment Law derogated the *exequatur* process mandated in articles 102-106 of the COGEP, it did not say anything regarding enforceable instruments contemplated under article 363. In a nutshell, the Superior Court said that under article 363 of the COGEP, only final judgments, domestic arbitration awards, domestic transactional agreements and *homologated international arbitral awards* are considered enforceable instruments. Hence, it would go against the law to enforce an arbitral award that has not been homologated because it is not considered as an enforceable instrument. It is obvious that when lawmakers passed the Investment Law, they intended to eliminate all restrictions imposed to international awards and enforce them in the same manner as domestic awards.

Although said decisions are only binding and enforceable upon the parties of the corresponding disputes, these judgements show that judicial interpretation might play an important role in neutralizing the positive reforms brought by the Investment Law. According to article 180 of the Organic Code of the Judiciary, the Plenary of the National Court has competence to issue resolutions in case of doubt or lack of clarity when interpreting the law. These decisions are legally binding in all the country and enforceable since the day of their publication in the Official Registry. Thus, it is necessary that the National Court clarifies the scope of the reforms brought by the Investment Law with respect to the enforcement of international arbitral awards in order to avoid confusion at all judicial levels.

Conclusion

The Investment Law brought many positive changes with respect to the practice of international arbitral in Ecuador. Likewise, it is consistent with the provisions contained under article III of the New York Convention. However, due to the judges' misunderstanding of the legal reforms contained in the Investment Law, enforcing an international arbitral award in Ecuador is still a herculean task. Hopefully, the judicial system will understand soon that there is not any additional requirement that shall be imposed for the enforcement of international awards and that the whole

purpose of the Investment Law was to foster the development of arbitration in Ecuador and to attract foreign investment. In the meantime, a resolution by the National court seems the most effective solution to clarify this issue.

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