

Arbitration - Ecuador

Court enforces arbitration clause in consumer contract

Contributed by **Coronel & Pérez**

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Background

Decision

Comment

An ordinary court in Guayaquil annulled a proceeding initiated before the Office for the Defence of Consumers because the underlying contract provided for arbitration in case disputes between the parties should arise. The court reprimanded the first-instance court for not giving full effect to the consumer contract and inviting the claimant to file for arbitration before the chamber of commerce arbitration centre. The decision is a welcome development in the conflicting area of arbitration in consumer contracts.

Background

For years the municipality of Guayaquil, in partnership with private developers, has been promoting and developing large-scale housing projects for low-income families. On June 10 2011 Danicia Barahona and one of the developers signed a reservation agreement for the construction of a house under such the programme. The agreement included an arbitration clause under the rules of the Guayaquil Chamber of Commerce Arbitration Centre.

In March 2012 a disagreement between Barahona and the construction company occurred after the latter decided to increase the house price. The developer argued that the increase was due to inflation and was within the range permitted by the contract. Barahona challenged this position.

In April 2012 Barahona filed a complaint with the regional office of the ombudsman agency, which is by law in charge of hearing consumer complaints. In July 2012 the consumer agency, after it had conducted an investigation into the situation, concluded that judicial action could be initiated against the construction company. The agency filed a request for minor infractions before Judicial Unit No 1 of the Guayaquil canton, a first-instance court that has jurisdiction for matters, including consumer complaints.

In submitting its defence, the construction company did not question the characterisation of the construction agreement as a consumer contract. The company underlined the fact that the agreement included an arbitration clause and argued that the proper venue to hear the complaint was the chamber of commerce arbitration centre.

On December 20 2012 the court ruled in favour of Barahona. It found that the construction company had increased the house price without the proper authorisation of the municipality of Guayaquil and not in accordance with the contract. In its ruling, the court did not address the defence raised by the construction company in connection with the arbitration clause in the construction contract and its effects. The construction company was directed by the court to deliver the house to Barahona without the price increase, and was issued with a fine.

The defendant appealed the decision to a criminal court. It argued, among other things, that the judge had no jurisdiction to hear the complaint because of the arbitration clause. Under the Organic Law for the Consumer Defence, first-instance criminal courts have jurisdiction to hear appeals filed against consumer agency decisions. However, the procedure is not criminal and does not lead to a criminal judgment.

Decision

The court annulled the proceedings of the first-instance court, and ruled that it had lacked jurisdiction to hear Barahona's complaint because the construction contract she had entered into included an arbitration clause. According to the agreement, the parties had agreed to submit their disputes to the Guayaquil Chamber of Commerce Arbitration

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Centre. The court asked Barahona to bring her complaint before the centre.

Comment

The appeal court's decision is a welcome development for arbitration. Despite the well-known problems that arbitration has in the area of consumer contracts, under Ecuadorean law such clauses are valid as long as they are in writing and inserted in a way that attracts consumers' attention. In this case, the court did not address the issue of whether the way in which the arbitration clause was included in the construction contract complied with this requirement. It appeared to leave this issue for the arbitral tribunal to decide.

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