

Arbitration - Ecuador

Guayaquil court enforces award issued in Miami

Contributed by **Coronel & Pérez**

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Author

Hernán Pérez Loose



In a recent case, a court of first instance in the city of Guayaquil successfully applied the flexible regime for the execution of international arbitral awards provided by the Ecuadorian legislation. The judge enforced an award issued in Miami, Florida under the rules of the International Chamber of Commerce (ICC) with the same expeditiousness that is commonly applied to the enforcement of national sentences. This decision constitutes a positive step in the field of international arbitration, especially in view of the scarcity of case law in this field in Ecuador.

Background

A multinational corporation based in the United States and an Ecuadorian distributor signed an agreement which included an arbitration clause under the ICC rules. As result of a dispute between the parties with respect to some unsettled accounts, the Ecuadorian distributor filed for arbitration in Miami. However, in an award issued in July 2008 by an ICC arbitral tribunal seated in Miami, the plaintiff was ordered to pay the multinational corporation more than \$3 million, including post-award interest on undelivered commissions. In view of the distributor's refusal to honour the award, the US corporation requested a judge in Guayaquil to enforce the award.

Arbitration rules

According to Article 42 in fine of Arbitration and Mediation Law, "the awards issued in an international arbitral proceeding, will have the same effects and will be enforced in the same manner than the awards issued in a national arbitral proceeding". For the purpose of its enforcement, the law gives national awards the same status as sentences of the last instance which have been issued by a national court. Article 32 states that:

"Arbitral awards have the effect of a final sentence and res judicata and will be enforced by the same mode as sentences of last instance, following the compulsory procedures, with no possibility for the judge in charge of the enforcement to accept any defense, except those that have arisen after the award was issued".(1)

The compulsory procedures mentioned by Article 32 include a wide range of options, such as the handing over of the losing party's real estate, movables and bank accounts in order to satisfy the creditor. Such procedures are not subject to appeal or other similar recourse.

Decision

In the case at hand, the winning party filed a request of enforcement. It attached to its petition a declaration by an official of the tribunal as to the authenticity of the document, a Spanish-language translation of the award and certain consular certifications. After serving and hearing the distributor with the request of enforcement, the judge issued an order of payment. Following the wording of the law, the judge noted that the arbitral award was an international one and, as such, it was to be enforced in the same way as a national award – that is, it was to be enforced as a sentence of the last instance. The judge gave the defendant 10 days to pay capital and interest.

The losing party's arguments to resist the enforcement were essentially procedural and formalistic and did not place in question the enforceability of the award in the way it was sought by the plaintiff and accepted by the judge. The judge rejected the defences. The judge also rejected an appeal and other recourses filed by the defendant after the order

was rendered.

Comment

Although Ecuador has been a member of the New York Convention since 1962, until recently its national legislation has been virtually silent on the enforceability of international awards.⁽²⁾ The introduction of Articles 32 and 42, the implications of which are discussed above, were among the most significant changes that the Arbitration and Mediation Law brought into the field of arbitration. Both articles were welcomed by the arbitration community because they gave clear guidance to judges regarding the enforcement of international arbitration awards.

This panorama was somewhat clouded when the new Organic Code of the Judicial Function came into force.⁽³⁾ The new law established an *exequatur* proceeding for foreign sentences which implies a preliminary decision by the court of appeal recognising the sentence before commencing its enforcement.⁽⁴⁾ The fear among arbitration practitioners was that judges will, by analogy, apply the same requirement to international arbitration awards.

The judge in the case at hand did not follow that route and instead correctly applied only those rules that must be applied to international arbitration awards; those contemplated in the specific legislation on arbitration. These rules made clear that the mode of enforcement must be the same as a sentence of last resort. In other words, if international arbitration awards were to require a phase of recognition, that phase would be merged with the same proceeding of enforcement.

For further information on this topic please contact [Hernán Pérez Loose](#) at Coronel & Pérez by telephone (+593 4 2519 900), fax (+593 4 2320 657) or email (hperez@coronelyperez.com).

Endnotes

(1) Eighth Judgeship for Civil Matters of Guayaquil. Trial 469-2009, Judge Carlos Salmon.

(2) However, it is important to note that in 1972 the Supreme Court issued an important ruling confirming a decision of a lower court in Guayaquil that enforced an arbitral award issued in the state of New York by applying the rules of the New York Convention in conjunction with the rules of the Code of Civil Procedure that regulates the enforceability of foreign sentences (*General Cocoa Company Inc v José Jorgge Arévalo*, Supreme Court of Justice, First Chamber, June 27 1972 Trial 320).

(3) The code was adopted in 2009 (*Official Register* 544, Supplement, March 9 2009).

(4) Article 208(6) of the code.

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