

Arbitration - Ecuador

It Is for the Arbitrators, Not the Court, to Rule on the Validity of a Contract

Contributed by **Coronel & Pérez**

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In a terse ruling the Supreme Court recently confirmed lower court decisions that an arbitration clause prevents ordinary judges from hearing an action seeking to declare that the contract containing the arbitration clause is null and void.

Facts

In order to mitigate the effects of the 1999 banking crisis, the Ecuadorian Congress established the Agency for the Guarantee of Deposits. Among other things, the agency was directed to take over and manage financial institutions that were on the verge of insolvency and ensure the collection of credits. On April 18 2002 Makro SA, a commercial entity engaged in the home goods retail business, placed all its inventory as collateral in a trust in order to secure payment for any liability that the former administrators of Banco del Azuay SA may have incurred during their tenure. The agency was named as beneficiary of the trust and Administradora de Fondos Fodeva SA was appointed as trustee. The trust agreement contained an arbitration clause whereby all disputes would be resolved by arbitration.

Decisions

On April 3 2003 Makro filed an action before the Eighth Judgeship of Guayaquil, asking the judge to declare that the contract was null and void. It also sought compensatory damages from the defendant. The plaintiff alleged that the trust agreement was null and void because it had been executed by Makro's previous legal representative under duress on the part of the agency. The plaintiff requested over \$11 million in compensatory damages, which was the value of the merchandise that it handed down to the trustee. The judge, citing Articles 7 and 8 of the Arbitration and Mediation Law, declined to hear the case based on the arbitration clause.

The plaintiff appealed to the Guayaquil Superior Court. The Second Chamber for Mercantile and Civil matters of the Superior Court confirmed the decision of the judge of first instance. The plaintiff thus filed for cassation before the Supreme Court. In a brief opinion the court found that the judge of first instance had correctly stated that his refusal to hear the action did not infringe the plaintiff's right to due process. The court added that this ruling was final, but not definitive, as the plaintiff could seek redress through arbitration. The court found that this prevented it from considering the cassation recourse. The ruling was published in *Official Gazette* 436 on January 12 2007.

Comment

Although the decision was rather straightforward and did not cover new ground, it is one of the few decisions on arbitration issued by the Supreme Court since the promulgation of the law 10 years ago. In all such decisions the court refused to hear the case based on the arbitration clause or agreement. The same position has been adopted in various superior court rulings (which were not challenged before the Supreme Court and thus became final) and certain Constitutional Tribunal decisions.

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