

## Arbitration - Ecuador

### Right to arbitration unaffected by ambiguous arbitration clause

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### Introduction

The Constitutional Court has vacated a Supreme Court ruling which confirmed the opinion of the lower courts in holding that in the face of a poorly written arbitration clause, ordinary judges are competent to hear a contract dispute<sup>(1)</sup>. The Constitutional Court remarked that the constitutional safeguards established by the due process clause are equally applicable to arbitration, including the right to be tried by a competent judge who has previously been appointed in accordance with the law. For the court, this means that where the parties have agreed that their disputes be heard by an arbitrator, the right to resort to arbitration enjoys constitutional protection. The court found that this constitutional right was infringed in a case in which an ordinary judge – despite the defendant's opposition – ruled on a dispute notwithstanding the parties' agreement to arbitrate. The fact that the arbitration clause had been ambiguously written was insufficient to deprive the defendant of its right to have the dispute resolved by an arbitrator.

### Facts

The case arose out of a dispute between two groups of shareholders that had signed an agreement to operate and manage a closely held corporation. The contract included a poorly worded arbitration clause. The clause provided that any disputes which arise would be settled by a single arbitrator. That arbitrator was to be chosen by two arbitrators, who in turn were to be selected by the parties. However, the parties also agreed that while the single arbitrator was being selected, a particular individual, Mr Pedro Pinto, would act as the sole arbitrator.

As a result of some disagreements, one party filed a lawsuit for breach of contract before a first instance judge in Pichincha Province. The defendant moved to halt the proceeding, invoking the arbitration clause. Contrary to the Law of Arbitration and Mediation, the judge did not rule on this defence when it was raised, but rather decided to postpone his decision on the issue until his final ruling. The judge dismissed the arbitration defence, arguing that the defendant had waived the arbitration clause because, when a dispute arose between the parties while the contract was in force, he had sent a letter to Pinto stating that no dispute existed and that no arbitration was needed. The judge went on to rule on the merits of the dispute and ordered the defendant to pay damages.

On appeal, the Court of Pichincha Province confirmed the first instance judge's ruling. The case reached the Supreme Court after the defendant filed a cassation petition.

### Supreme Court decision

On May 28 2008 the court found that while the judge's decision not to rule on the arbitration defence right after its submission amounted to a violation of the Law of Arbitration and Mediation, it did not significantly affect the defendant's rights. On the issue of whether the controversy should have been arbitrated, the court downplayed the issue of the waiver of the arbitration clause on which the lower courts based their decisions. Instead, it focused on the fact that the wording of the arbitration clause was obscure and subject to contradictory interpretation. The court viewed the clause as a typical example of a so-called 'pathological clause' (ie, a clause that is unenforceable due to its ambiguity). Therefore, the court denied the defendant's petition.

Following this ruling, Ecuador adopted a new Constitution. The Constitution, which entered into force in October 2008, establishes a so-called 'extraordinary action of protection' – that is, a special action through which to set aside judicial rulings that are found to breach constitutional guarantees. The law regulating the exercise of this new action – the Organic Law on Constitutional Guarantees – entered into force on October 22 2009.(2)

In August 2009 the defendant filed a petition before the Constitutional Court arguing, in essence, that the Supreme Court's decision had violated Article 76(k) of the 2008 Constitution, which recognizes the right of all persons to be tried by a competent judge, and that in the case of arbitration, the judge must be established in accordance with the arbitration clause.

### Constitutional Court decision

The court accepted the petitioner's argument. In its ruling, the court underlined the fact that arbitration, as a mechanism for alternative dispute resolution, receives particular recognition both in the new Constitution and its predecessor. The court also noted the importance of the parties' will in arbitration, as evidenced by the references made to it by the Law of Arbitration and Mediation in defining the various forms that an arbitration agreement may take. In the Constitutional Court's view, the Supreme Court had overlooked the fact that the law contains certain provisions which are designed to fill the gaps in arbitration clauses. It also observed that the parties had agreed on the name of a particular individual to act as arbitrator, in a clear demonstration of their disinclination to have their disputes decided by ordinary judges.

The court then made an extensive interpretation of the due process clause of the Constitution to conclude that the defendant's right to be tried by a competent judge had been violated. Once the intention to arbitrate is clear, ordinary judges are prevented from hearing any disputes between the parties "because of their lack of jurisdiction and competence". The court remanded the case back to the first instance judge to rule in accordance with its decision.

### Comment

When the new Constitution was approved, there was some apprehension in arbitration circles with respect to the possible misuse of the extraordinary action of protection by the losing parties in arbitral proceedings. Although the Constitutional Court ruling was not issued in response to a petition challenging an arbitral award, the remarks made by the court, and its decision to favour arbitration despite the ambiguity of an arbitration clause are welcome developments. It remains to be seen whether this amenable attitude to arbitration will endure.

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### Endnotes

(1) Constitutional Court, Sentence 006-10-SEP-CC. Official Register 159, Supplement, March 26 2010.

(2) Official Register 52, Supplement, October 22 2009.

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