

Arbitration - Ecuador

Supreme Court Rules on Nullity of Arbitral Awards

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Ecuador's highest court has ruled in a recent case that the annulment of an arbitral award should have been handled by the judge as an action, not as an appeal. The decision was handed down in the midst of previous rulings that seemed to point to the contrary and after a legislative amendment that sought to clarify this issue. Although the rights of the parties seeking annulment of the award may have been reinforced, the ruling may open the door for unnecessary litigation before ordinary courts.

Background

The Arbitration and Mediation Act 1997 contained some confusing rules on the annulment of arbitral awards.

Firstly, jurisdiction to rule on the nullity of an award was granted to the appeal courts of the district where the arbitration took place and not to the courts of first instance. This may explain why the act in some parts improperly characterized the petition to nullify an award as 'appeal for annulment', while in others referred to it as a 'nullity action'. If the petition to annul an award is characterized as an appeal, then the jurisdiction of the court is limited to a review on the merits of the request only, whereas a nullity action implies a full proceeding.

Secondly, the chief justices of the superior courts were expected to receive the docket from the arbitral tribunal where the petition had been filed and, upon receipt, would forward it to one of the chambers of the superior court. In some cases the chief justices have themselves ruled on the petition, dealing with the petition as if it were an appeal against a decision of a court of lower instance. In others, they have limited themselves to review only if the filing of the appeal had satisfied certain formalities; and if so, they allowed the petition to be heard by one of the chambers. Most chambers, on the other hand, handled the petition as if it were an appeal.

The Supreme Court, however, was reluctant to hear cassation appeals against rulings on the nullity of awards adopted by either chief justices of the superior courts or one of its chambers. One of the changes introduced by Congress through the Arbitration and Mediation Act in 2005 dealt with this issue. Congress made it clear that the petition to annul an award must be handled as an action, not as an appeal. Moreover, the chambers of the superior courts will no longer deal with these cases. Only the chief justices of the superior court have jurisdiction to handle this type of proceeding. The chief justice of the superior court must rule on the petition within 30 days.

Facts

The case involved a contractual dispute between Pacifictel SA, a telecommunications company fully owned by the government, and Negocios y Telefonía NEDETEL SA, an Ecuadorian contractor. Both companies were bound by an arbitration clause. On August 4 2006 an arbitral tribunal of the Guayaquil Chamber of Commerce ruled for Nedetel and ordered Pacifictel to pay \$11,633,897 in damages.

Pacifictel filed a nullity action against the award before the arbitral tribunal. The proceeding was heard by the chief justice of the Guayaquil Superior Court. According to plaintiff the award had to be declared null and void because the tribunal had ruled on matters outside its jurisdiction and had omitted to rule on others that were part of the controversy subject to arbitration.

The chief justice denied the petition to annul the award. He found no merits in the

arguments contended by Pacifictel. In dealing with the proceeding, however, he handled the petition as if it were an appeal, notwithstanding his characterization of the proceeding as an 'action'. By doing so he limited himself to reviewing the docket.

Pacifictel then filed a cassation appeal against its adverse ruling to the Supreme Court. The appeal was not registered because, in the opinion of the chief justice, the cassation appeal is available only against rulings that put an end to 'declaratory proceedings' - that is, rulings that declare the existence of a right upon one of the parties or finds that some of them are liable for any wrongdoing. According to the chief justice:

"In the nullity action of an arbitral proceeding what matters is to examine whether the award issued by an arbitral tribunal has failed to comply with some formalities contemplated in the law, and not to rule on the merit of the controversy."

Against this opinion Pacifictel then filed and obtained an extraordinary appeal to the Supreme Court.

Ruling

The appeal was heard by the First Chamber of the Supreme Court for Civil and Commercial Matters. In a split decision the chamber remanded the case to the chief justice of the Guayaquil Superior Court with the instruction to handle the proceeding as an action rather than as an appeal. The Supreme Court admitted that the Arbitration and Mediation Law does not contain specific rules as to how the action to nullify an arbitral award should be entertained. This gap, according to the court, is to be supplemented by the Code of Civil Procedure. Under the code, when Congress has not provided specific rules for a particular judicial controversy, that controversy will be heard according to the general rules governing 'ordinary proceedings'. The court held that the highly expeditious proceeding that the chief justice of the superior court of Guayaquil had adopted was without legal basis. It did not share his view that the 30-day period set in the Arbitration and Mediation Law as the period within which a ruling must be issued had created by itself a new type of summary action. The dissenting justice argued that Pacifictel should have filed an ordinary appeal against the ruling before one of the chambers of the superior court of Guayaquil rather than the extraordinary appeal of cassation. In his view, the cassation recourse should be available only against rulings of that chamber.

Comment

The ruling of the Supreme Court is the first to address the issue of the type of proceeding that must be followed in order to annul an arbitral award after the 2005 legislative amendments to the Arbitration and Mediation Law. While the clarification that the request to annul an arbitral award must be entertained as an autonomous action and not as an appeal was a welcome step, it did not regulate any aspect of this action. This left the door open for the application (as the Supreme Court did in the *Pacifictel* ruling) of the rules of the Code of Civil Procedure as a supplementary body of law. This certainly means that the rights of the petitioner will receive full protection. But the 'ordinary proceeding' under which the annulment of an award will now have to be processed is a lengthy one. Parties enjoy the right to file counterclaims and appeals against interlocutory decrees, and to introduce evidence. The judge even has the duty to set a hearing to encourage the parties to reach an amicable settlement. The defeated party in the arbitral proceeding may see this as an opportunity to delay the enforcement of the award, unless the bond it has to place to suspend its enforcement while its petition is resolved is high enough to discourage the use of this tactic.

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