

Arbitration - Ecuador

Welcome ruling on arbitration may open new questions

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Introduction

Ecuador's highest court has ruled that it will not hear cassation recourses against decisions of provincial courts on nullity actions against arbitral awards because of the nature of the cassation system and the nullity action itself. The opinion may help to shorten the period of uncertainty regarding the enforcement of arbitral awards. Moreover, in its ruling the national court made strong remarks as to the limited scope of the nullity action against awards. Notwithstanding the opinion's favourable remarks in defence of arbitration, the court may have opened new questions for the future.

Background

According to Article 31 of the Law on Arbitration and Mediation, the president of the provincial court where an arbitral award is rendered has jurisdiction to hear the nullity action against arbitral awards. The losing party may stay the enforcement of the award, while the proceeding goes underway, by posting a bond. The law sets a 30-day period for the judge to decide on the petition to annul the award. The grounds to nullify an award follow the United Nations Commission on International Trade Law model.

Despite its apparent simplicity, from its inception the nullity action set out in Article 31 has been the source of some uncertainty and controversy. The following three issues were the most problematic:

- the legal nature of the nullity action against an arbitral award;
- whether the provincial court's sentence was subject to appeal after the 2008 Constitution; and
- if the cassation recourse, which must be heard by the highest court, was available against the nullity action ruling it put an end to under Article 31.

First, the unusually short period in which the nullity action must be handled made it difficult to fit the proceeding in the categories of civil action established by the Code of Civil Procedure. While the 'ordinary action' – an action that seeks a declaratory judgment – was the most obvious candidate, it was virtually impossible to complete all the phases of such action within the 30-day period.

Second, the peculiar nature of the nullity action created some uncertainty as to whether the complaint's sentence was subject to ordinary appeal. The Law on Arbitration and Mediation is silent on this matter. Some provincial courts have interpreted the law as denying such appeal. Others have more recently taken the opposite view, especially since the 2008 Constitution guarantees all citizens the right to obtain a review of any decision affecting their rights.

Third, another question posed by Article 31 was whether the sentence deciding the nullity action was subject to cassation recourse. As a matter of procedural law, cassation recourse is available only to set aside sentences or judicial decisions that end proceedings where the parties seek a declaratory judgment. Proceedings for the collection of commercial instruments, or, in general, the enforcement of rights already determined, are excluded.

The courts have hesitated over whether to view the nullity action of Article 31 as an autonomous action with respect to the underlying controversy, in which case cassation

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recourse is available, or to regard it as a simple mechanism to determine whether one or more grounds of nullity has occurred without reference to the parties' dispute, in which case the cassation recourse must be denied.

The national court has approached these issues.⁽¹⁾

Facts

Stock corporation Inmodiursa SA and a limited corporation engaged in architecture services were both parties to an arbitration proceeding. The party unsatisfied with the outcome brought a nullity action against the award. In December 2012 the president of the Pichincha Provincial Court, the district where the award had been rendered, denied the recourse, invoking a 2004 decision of Ecuador's highest court. In that ruling the court had said that cassation recourses were not available against sentences issued under Article 31 because the nullity of an award is declared in an accessory proceeding to the decision adopted by an arbitral tribunal.

Inmodiursa then filed a complaint against the refusal of the provincial court to allow the cassation recourse to proceed. In May 2013 the chamber of admissions of the national court issued its decision.

Decision

In its sentence the chamber confirmed the provincial court's decision to deny the cassation recourse. However, the national court's ruling was based on different grounds.

For the national court, the provincial court ruling was not ready for cassation. According to the court, the plaintiff should have appealed that decision first, and then waited for the appellate decision before filing a request for cassation. The court thus took the side of those who argued that, according to the 2008 Constitution, the ruling of the provincial court under Article 31 is subject to a full review by way of an appeal. The court ruled that this appeal proceeding must be exhausted. Notwithstanding, it acknowledged that there is no specific legislation regulating this appeal. In its decision, the court said that cassation recourse is not technically an appeal because it is an *ex novo* process with limited and restrictive scope.

The court then said that it took the opportunity to reinstate its opinion that rulings issued under Article 31 are not subject to cassation recourse. According to the court, cassation recourses under Ecuadorean law are available only to set aside judgments of last instance lower courts which are declaratory in nature. A sentence dealing with the annulment of an arbitral award does not belong to this category. Its purpose is not to settle a dispute among contending rights invoked by different parties, which in essence what declaratory proceedings seek, but to provide control if the arbitration proceeding meets with certain requirements external to the dispute.

The court characterised the nullity action as an incidental recourse with regard to the arbitral process to which the parties bound themselves. For the court, the real declaratory proceeding is the arbitral process which takes place before the arbitrators and puts an end to the dispute by issuing a final and definitive judgment.

The court devoted the rest of its opinion to caution lower judges not to interfere with the arbitrators' decision through nullity action, including their decision on their own competence to rule on the controversy. Special reference was made to a 2009 ruling of the constitutional court which contributed to clarify the nature of the nullity action along the same lines put forward by the national court in the present case.

Comment

The ruling of the national court is a welcome development in the field of commercial arbitration. Its defence of arbitral autonomy is critical to prevent the interference of judiciary in arbitrators' decisions. However, despite the laudable aspects of the ruling, the court may have created some problems.

First, by assuming a literal interpretation of the 2008 constitutional guarantee – that all citizens have the right to obtain a review of any ruling affecting their rights – the court has created an appeal for the rulings issued under Article 31. In 2005 Congress eliminated this appeal in order to expedite arbitration. The new ruling may delay the enforcement of arbitral awards which are commonly suspended by posting a bond.

Second, the restrictive position that the court adopted on the scope of cassation recourse has the effect of excluding itself from reviewing the decisions on nullity actions. While this may reduce the level of judicial interference with arbitration, it leaves the highest court without a say on the ways in which the provincial courts handle such an important aspect of arbitration. This outcome may bring some uncertainty in the future.

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Endnotes

(1) National Court of Justice, the Chamber of Deputies Judges for the Contentious Administrative, May 13 2013, 173/2012.

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