Arbitration Guide
IBA Arbitration Committee

ECUADOR

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I. Background

(i) How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?

Twenty years ago, the Arbitration and Mediation Law (AML) was enacted. Today, it can be safely said that arbitration has had relative success in Ecuador. Before the enactment of the General Organic Code of Procedures (COGEP) on May 22, 2015, arbitration has proven to be a faster and more efficient alternative to the judicial process, due to the inherent flaws of the judicial system. It is, however, only a 'relative' success because statistics show that the percentage of legal conflicts resolved through arbitration remains low although the number is rising in commercial disputes.

Currently, the COGEP establishes an oral system reducing the litigation time in order to improve the effectiveness of the Ecuadorian judicial system. This certainly imposes arbitrators an obligation to improve the arbitration time in order to be a faster and more effective method of disputes resolution.

(ii) Is most arbitration institutional or ad hoc? Domestic or international? Which institutions and/or rules are most commonly used?

Statistics show that most arbitration proceedings are institutional, administered by authorised arbitration institutions and mainly by the Arbitration and Mediation Centre of the Quito Chamber of Commerce.

Over the last few years limited international disputes have been administered by Ecuador's arbitration institutions, nevertheless, most of the institutional proceedings are domestic under the AML rules. In some recent State contracts, arbitration clauses included international arbitration administered by Ecuadorian institutions.

(iii) What types of disputes are typically arbitrated?

The disputes are generally of a commercial and contractual nature.

State-to-investor and investment disputes have not been arbitrated in Ecuadorian institutions.

(iv) How long do arbitral proceedings usually last in your country?

The AML determines that the tribunal shall render the award in a maximum of one hundred fifty (150) working days from the jurisdiction hearing. Pursuant to Article 25 of the AML, this period can be extended by the arbitral tribunal for 150 additional days.

Administered proceedings, however, last an average of 12 months from the time from which the statement of claim is submitted until the award is rendered.

Parties are allowed to agree on fast track proceedings that abbreviate procedures and deadlines.

(v) Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?

In the case of domestic arbitrations to be resolved at law, there is the general understanding that arbitrators must be lawyers authorised and registered in Ecuador's Bar. The same principle applies to parties' counsel.

However, in international proceedings seated in Ecuador, the arbitrators and legal counsel can be foreign nationals.

II. Arbitration Laws

(i) What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?

The AML, enacted in 1997, governs all arbitration proceedings seated in Ecuador, both domestic and international arbitrations. Enforcement of foreign awards in Ecuador is subject to the COGEP and the applicable international treaties ratified by Ecuador.

The AML took some of its provisions from the UNCITRAL Model Law, however, contains several variations including, for example, with respect to certain features of the arbitral proceedings, the grounds for the annulment of an award and the recognition and enforcement of international arbitration awards which is governed by the COGEP.

(ii) Is there a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?

The AML distinguishes between domestic and international arbitration. Article 41 AML determines that arbitration is international if: (i) there is a treaty to which Ecuador is a signatory, or (ii) in the absence of a treaty, if the parties have agreed that it is so, and if one of the following mandatory requirements is satisfied:

- the parties have their domicile in different states at the time of execution of the arbitration agreement;

- the award has to be executed in a different state to which one of the parties has its domicile; or

- the dispute is related to a cross-border or foreign trade transaction.

In other words, if there is no treaty (ie, a bilateral investment treaty) the determination of an arbitration as international requires the contract or subject matter to have a point of connection with a foreign jurisdiction or a case of conflict of laws. Nevertheless, as provided by the AML, an award resulting from an international arbitration will have the same effect and will be enforceable in Ecuador in the same way as a domestic award.

(iii) What international treaties relating to arbitration have been adopted (eg New York Convention, Geneva Convention, Washington Convention, Panama Convention)?

With regard to international arbitration, Ecuador began to adopt the main international instruments on this subject since the early 20th century as follows:

- 1928 Havana Convention on Private International Law;

- 1958 United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention') (on 19 August 1961);

- 1966 International Convention on Settlement of Investment Disputes between States and Nationals of other States ('Washington Convention') although on 6 July 2009 Ecuador denounced the Convention and such denunciation and withdrawal became effective on 10 January 2010;

- 1975 Inter-American Convention on International Commercial Arbitration ('Panama Convention') (on 6 August 1991); and,

- 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards ('Montevideo Convention') (on 11 May 1982).

(iv) Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

In case of local arbitrations, the AML does not provide the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute. Generally, the applicable law of local arbitration would be Ecuadorian law.

If the parties to a local arbitration have agreed to arbitration at law, the practice is that the arbitration will have to follow general principles for legal and contractual construction, including the *iura novit curia* principle.

A different standard will apply to arbitrations in equity, in which the criteria for constructing the matters and principles are based on the reasoned judgment principle (*sana crítica*).

III. Arbitration Agreements

(i) Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?

It has been determined that amongst the requirements for the validity of an arbitration agreement is that the agreement must be in writing. However, a bilateral and written document is not the only valid one. Also sufficient are documents 'resulting from an exchange of letters or other written communications evidencing the parties' will to submit to arbitration'. Hence, the lawmaker's intention was to record the parties' unequivocal desire to resort to arbitration, no matter if their consent is expressed in one act or in several simultaneous or consecutive acts.

Furthermore, Article 6 of the AML requires that a *compromis* or arbitration agreement must be made 'in a document stating the name of the parties and an unequivocal definition of the legal transaction to which it refers'.

Finally, when the dispute involves civil indemnities for felonies or unintentional torts, that is, for extra-contractual liability, 'the arbitration agreement must refer to the facts with which the arbitration will deal'. (See Art. 6 AML).

In addition to the above requirements, if the arbitration agreement is within the context of public or administrative contracting regulations, where a public or state-owned entity participates or if a contract is entered into with an entity governed by private law where the State has some participation in order to purchase or lease goods, perform works and provide services, including consultancy, the Constitution, the AML, the Organic Law for the National Public Procurement System ('Law on Public Procurement'), and the Organic Law for the Office of the Attorney General of the State ('AG Law') set forth the following additional requirements for local and international arbitration:

1. The favourable opinion of Attorney General of the State must be issued before the execution of the contract containing the arbitration clause.

2. The express consent and endorsement of the highest authority of the respective institution must be obtained.

3. It must refer to a legal liaison of contractual character. Non-contractual matters cannot be arbitrated.

4. The process as to how the arbitrators are selected.

5. The contract must be executed by an authorised person to contract on behalf of the institution.

Lack of any of these requirements may deem the arbitration agreement or arbitration clause void or pathological.

The above-mentioned requirements for arbitration agreements are not applicable when there is an international treaty. In that case, the treaty requirements must prevail.

(ii) What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an arbitration agreement will not be enforced?

Article 190 of the Constitution imposes a parameter to define the arbitrability of disputes in Ecuador. Arbitration and alternative procedures for dispute resolution 'shall be applied pursuant to the law in such matters where, due to their nature, it is possible to settle'.

This precept is consistent with Article 1 of the AML. According to Ecuadorian law, therefore, it is possible to submit to arbitration only such matters that can be settled. In order to define the matters that are subject to settlement agreements, resort must be made to the Civil Code of Ecuador (Art. 2351 to 2361). The Civil Code lists those matters which cannot be subject to settlement, which includes: (i) criminal matters; (ii) matters which involve the marital status of persons; (iii) the right to receive alimonies (except approved by Family Court); (iv) inexistent rights or the rights of others; (v) rights obtained through fraud or violence, or by way of void title; and (vi) matters already resolved through a judgment passed with the authority of *res judicata* of which the parties had no knowledge at the time of the *compromis*.

Considering the aforesaid, the case law issued by the National Court of Justice states that agreements to arbitrate are not enforceable if they cover matters that are not subject to a settlement agreement or if the agreement is null due to non-compliance with the legal requirements relating to the form and content.

Regarding annulment of the arbitral award, see Section XII(i).

(iii) Are multi-tier clauses (eg arbitration clauses that require negotiation, mediation and/or adjudication as steps before an arbitration can be commenced) common? Are they enforceable? If so, what are the consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?

Yes, multi-tier clauses are frequently used, especially in public contracting and in major commercial transactions. The AML allow the parties to design and tailor-make arbitration clauses depending on the specific needs of each transaction or contract.

The consequence of commencing arbitration in disregard of a multi-tier clause is the lack of jurisdiction of the tribunal since the dispute is not arbitrable until the mandatory will of the parties is fulfilled (that is, the multi-tier dispute resolution method).

Ecuador, as a national policy, and mainly regarding natural resources contracts, has implemented certain model clauses that have a combination of mandatory mediation, consultancy, and arbitration.

(iv) What are the requirements for a valid multi-party arbitration agreement?

Multi-party arbitration agreements must fulfill the same legal requirements as a bilateral arbitration agreement. See Section III(i).

(v) Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?

There are no provisions in the AML that allow a signatory to an arbitral agreement to pursue a claim against a party that did not sign the arbitral agreement.

(vi) May arbitration agreements bind non-signatories? If so, under what circumstances?

There are no provisions in the AML regarding the incorporation of non-signatory parties to arbitration. Also, the AML requires the execution of the agreement or the letters in which unequivocal consent is provided. Therefore, we may conclude that arbitration agreements can only bind signatory parties. We have not found previous cases of an arbitration agreement having a binding effect on a non-signatory third party.

IV. Arbitrability and Jurisdiction

(i) Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?

See Section III(ii).

However, given the principle of *competence-competence*, the tribunal shall decide if the dispute may or may not be arbitrated, being a matter of jurisdiction.

(ii) What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?

The AML states that if a party files a lawsuit in disregard of an arbitral agreement, the defendant shall challenge the court's jurisdiction arguing that a binding arbitral agreement must be enforced (Art. 8 AML and Art. 153.10 COGEP). Such argument must be resolved by the judge/court as a threshold matter in the preliminary hearing for ordinary proceedings or in the single hearing for summary proceedings, which will require both parties to submit evidence about the existence and/or application of the arbitral agreement without dealing with the merits of the case. If the court concludes that the arbitral agreement is valid, the lawsuit must be dismissed.

However, if the defendant does not challenge the jurisdiction of the court, and submit its statement of defense, then the court may understand that the defendant has waived its right to arbitrate the dispute.

(iii) Can arbitrators decide on their own jurisdiction? Is the principle of competence-competence applicable in your jurisdiction? If yes, what is the nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?

The principle of competence-competence is fully applicable in Ecuador and is consistently followed by local courts.

Article 22 of the AML determines that the first step that an arbitral tribunal must take once composed is to determine its own jurisdiction and that this provision must be followed by local courts.

V. Selection of Arbitrators

(i) How are arbitrators selected? Do courts play a role?

The AML allows the parties to determine the process of the selection of the arbitrators and the number of members in the tribunal (generally, one or three members). Nevertheless, if the parties agree on only the number of members of the tribunal but not on the way to select them, then the AML provides a mandatory proceeding:

- The parties can agree to select the tribunal.
- In the absence of a full agreement, the director of the arbitration institution shall send the parties a list of arbitrators from which it must designate by common agreement within a period of three days (see Art. 16 AML).
- If the parties fail to make the designation of one or more arbitrators, the director of the arbitration institution shall appoint the tribunal through a ballot (from the list of arbitrators submitted by the institution).

However, the AML allows the parties, by mutual agreement, to appoint arbitrators from outside of the list submitted by the arbitration institution.

In the case of an *ad hoc* arbitration, the parties shall appoint the arbitrators in accordance with the arbitration agreement.

Courts do not play any role in the selection of the arbitral tribunal.

(ii) What are the requirements in your jurisdiction as to disclosure of conflicts? Do courts play a role in challenges and what is the procedure?

Article 19 of the AML compels the arbitrator to reveal any reasons that might disqualify him or her from performing his or her functions due to the presence of a conflict of interest. This is an ongoing duty for the arbitrators as it is an ethical and mandatory legal obligation for arbitrators (Art. 19 AML).

Regarding the role of the courts, the AML contemplates a specific procedure for requesting the removal of arbitrators, but not for the appointment of a new arbitrator, if the existing arbitrator is shown to be unable to act due to the existence of a conflict of interest. In the case of institutional arbitration, the director of the arbitration institution must resolve this request. In *ad hoc* arbitration the request must be resolved by the other members of the tribunal or by the director of the closest arbitration institution to the domicile of the plaintiff.

Courts do not play any role in the selection of the arbitral tribunal.

(iii) Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source and generally what are they?

Article 76(7)(k) of the Constitution of Ecuador provides that all persons are entitled 'to be judged by an independent, impartial and competent judge'. This rule represents one of the guarantees of due process and is applicable to all judicial and arbitral proceedings. For this reason, Article 19 of the AML compels the arbitrator to reveal any reasons that might disqualify him or her from performing his or her functions due to the absence of such qualities.

(iv) Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?

There are no specific rules or codes of conduct for arbitrators in Ecuadorian legislation. However, the arbitration institutions in Ecuador do follow the IBA Guidelines on Conflicts of Interest in their internal rules of procedure.

VI. Interim Measures

(i) Can arbitrators issue interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?

Article 9 of the AML empowers arbitral tribunals to grant interim relief. In accordance with Article 9, parties can include in the arbitral agreement a provision by which the arbitral tribunal can request the assistance of public officials (administrative and judicial employees, police) to enforce the interim relief granted.

(ii) Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court ordered provisional relief remain in force following the constitution of the arbitral tribunal?

Yes. Local courts can grant provisional relief in support of arbitration, as provided in Article 9 (2) of the AML, in accordance with the COGEP rules (Art. 124 COGEP).

Provisional relief can only be granted if the creditor can prove:

1. That there is debt.

2. That the debtor's assets are in such disrepair that they are not enough to cover the debt or such assets may be hidden or sold in order to avoid payment.

Courts can grant such measures after the constitution of the arbitral tribunal only if there is no specific provision in the arbitration agreement granting the tribunal exclusive powers to provide interim relief. Hence, courts can order that the provisional relief remains in force, following the constitution of the arbitral tribunal, if is not forbidden in the arbitration agreement.

(iii) To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?

In most cases, the tribunal will have sufficient power to obtain or order the parties to produce documents or submit evidence. However, a party may seek relief from local courts to obtain evidence in aid of an international arbitration as long as the relief that is being sought is not contradictory to the tribunal's orders. If the arbitration has not yet commenced or if the tribunal has not yet been appointed, the relief will be directed to the preservation of evidence. If the tribunal has been appointed, the aid of the local courts may be helpful to obtain any evidentiary information requested by the tribunal as long is such request is not a violation of *ordre public*.

VII. Disclosure/Discovery

(i) What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?

Article 120 of the COGEP establishes a discovery phase that is developed as preparatory diligence. Article 120 applies unless the parties have agreed otherwise. In any case, in the AML there is no procedure of disclosure established.

(ii) What, if any, limits are there on the permissible scope of disclosure or discovery?

The limits to disclosure are: (i) the privileged and confidential attorney/client communications; and (ii) marital secrets. Ecuadorian legislation also forbids compelling defendants to testify against themselves. The attorney work product principle is covered by the Criminal Organic Code.

(iii) Are there special rules for handling electronically stored information?

Yes. The handling of electronically stored information can only be done through court/tribunal appointed experts that are the only authorised people to qualify and have a technical opinion on the authenticity of that information.

VIII. Confidentiality

(i) Are arbitrations confidential? What are the rules regarding confidentiality?

Yes. Arbitrations can be confidential if the parties convey so in the arbitration agreement. Article 34 of the AML states that only the parties and their counsel can obtain a copy of the arbitration file or any information related to the proceeding or the award.

The general practice with respect to confidentiality is to include along with the *compromis*, a confidentiality clause between the parties.

(ii) Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?

There are no express provisions in the AML regarding trade secrets, only Article 34 that recognises confidentiality if the parties have so agreed.

(iii) Are there any provisions in your arbitration law as to rules of privilege?

No, there are no provisions in the AML as to rules of privilege.

IX. Evidence and Hearings

(i) Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration proceedings? If so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?

We are not aware of any arbitration proceeding in which the tribunal has adopted the IBA Rules on the Taking of Evidence in International Arbitration

(ii) Are there any limits to arbitral tribunals' discretion to govern the hearings?

Both judges and arbitrators have the discretion to manage the hearings, limited by the defense right of the parties. However, in institutional arbitrations, the tribunal will be limited by the rules of the arbitration institution.

(iii) How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?

Witness testimonies are presented through direct oral examination and cross-examination. The use of witness statements with cross-examination is common practice in Ecuador. It is a usual practice that arbitrators question witnesses, but this is at the discretion of the tribunal.

(iv) Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?

Yes, the COGEP establishes that every person is able to appear as a witness, except the following:

1. The absolute incapables;

2. Those who suffer a mental illness, being deprived of the capacity to objectively perceive or communicate the reality and;

3. Those who were under the influence of alcohol or drugs when the facts subject to the deposition took place.

If the tribunal determines that a witness has committed perjury or false testimony, then the witness statement shall be suspended and submitted to the public prosecutor in order to initiate a criminal action.

(v) Are there any differences between the testimony of a witness specially connected with one of the parties (eg legal representative) and the testimony of unrelated witnesses?

Under the provisions contained in the COGEP, which apply by default to arbitration proceedings, although specially connected witnesses can present testimony, the parties are allowed to object the answers of the witnesses when such answers are biased.

(vi) How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?

Expert testimony is presented through a written statement and the parties are allowed to examine and cross-examine the expert in an oral hearing.

The expert witness must be impartial and independent and is shall be appointed by the interested party.

Parties can, however, also submit private expert statements as documentary evidence.

(vii) Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?

Before the enactment of the COGEP in 2015, it was a common practice that arbitral tribunals appoint experts in order to obtain independent criteria on the claim. However, since the enactment of COGEP, parties are allowed to appoint expert witnesses. In case the tribunal has doubts about the conclusions of the experts, it is allowed to request a new expert report. To this end the expert shall be balloted from a list of experts previously registered before the National Judiciary Council.

The evidence provided by the expert appointed by the Tribunal shall be considered by the tribunal as a 'proof of acknowledgment', but can be challenged by the parties under the ground of essential mistake (*error esencial*) in the hearing or in cross-examination to the expert witness.

AML does not provide specific rules on the requirements to appoint experts from a particular list, however, the COGEP establishes that the expert shall be previously registered before the National Judiciary Council.

(viii) Is witness conferencing ('hot-tubbing') used? If so, how is it typically handled?

In case there is a divergence between the statements of the expert witnesses, the tribunal may start a debate between both expert witnesses, as per the 'hot tubbing' proceeding set forth in Article 225 of the COGEP.

If the tribunal remains doubtful after the debate, it is allowed to request a new expert report as per section IX (vii).

(ix) Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?

Yes. In the case of institutional arbitration, every tribunal must appoint an arbitral secretary from the list of secretaries of the arbitration institution.

X. Awards

(i) Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?

The AML states the following formal requirements for an award to be valid:

- the award must be issued by majority vote;
- all the arbitrators shall sign the award, except for those with a dissenting opinion;
- dissenting opinions shall be attached to the award; and
- the award and the dissenting opinion shall enclose a clear explanation of the issue that has been decided and the grounds or reasons for the decision.

(ii) Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?

If the award embodies a monetary obligation, post-award interest accrues until the sum is paid to the creditor. The award must establish the date from when interest applies and in the enforcement procedure the judge will order a liquidation of interest at the legal rate until payment is made.

Ecuadorian legislation does not allow punitive damages or compound interest and thus domestic awards cannot grant this relief.

(iii) Are interim or partial awards enforceable?

Yes. Interim or partial awards are enforceable under the AML. However, arbitral tribunals must specify if such interim or partial award has been endowed with or without prejudice.

(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?

Yes, arbitrators are allowed to issue dissenting opinions to the award. The dissenting opinion shall state the reasons and arguments of the arbitrator.

(v) Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?

Awards by consent are permitted in Ecuador. In order to proceed with such award, all the parties in the arbitration shall agree to end the procedure. Then, the tribunal will rule an award accepting the agreements of the parties.

Additionally, it is possible to withdraw the claim, in such case the tribunal may issue an order to the claimant to acknowledge its signature in the writ of withdrawal.

(vi) What powers, if any, do arbitrators have to correct or interpret an award?

The AML allows the parties to request the elucidation of the award on specific matters. Parties can also request the tribunal to resolve elements of the claim not satisfied in the award. Hence, the tribunal can correct and interpret the award.

XI. Costs

(i) Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?

There are no specific provisions in the AML regarding the party who bears costs. However, if a party has acted in bad faith, the COGEP allows the tribunal to sanction the aforesaid party by ordering payment of the arbitration costs. The unsuccessful party does not always bear the costs.

(ii) What are the elements of costs that are typically awarded?

Elements of costs usually awarded are:

1. Mediation fees (if any);
2. Arbitration fees;
3. Institutional fees of the arbitration centre;
4. Attorney fees of the counterpart.

(iii) Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?

No, in institutional arbitrations, the director of the arbitration institution decides on the cost and expenses of the tribunal once the claim is filed. Costs and expenses are decided on the basis of each institution's regulation on fees, taking

into account the amount of claim. This is mandatory, as set out by Article 40 of the AML.

(iv) Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?

Yes. The tribunal can allocate cost between the parties upon the rule of reason. There are no specific provisions in this regard.

(v) Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?

Courts do not have the power to review the tribunal's decision on costs. Such review could be understood as a review of the award and hence as judicial interference.

XII. Challenges to Awards

(i) How may awards be challenged and on what grounds? Are there time limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?

Besides the legal grounds established in the international conventions to which Ecuador is a party, the AML establishes a list of grounds for requesting the annulment of an arbitration award. In Ecuador, awards can only be challenged through an annulment action, which is a statutory right of the parties.

The reasons or causes for requesting the annulment of an award are restrictively determined in Article 31 of the AML, which includes the following procedural irregularities:

- failure to serve the claim to the defendant in a process heard and terminated *ex parte*, provided that it limits that party's right of defense;
- failure to serve the court's orders to the parties thus limiting or preventing their right of defense;
- failure to summon, notify or present evidence despite the existence of facts that must be justified;
- *extra* or *ultra petita* inconsistencies; and
- illegal composition of the arbitration panel.

In keeping with the international trend, it can be noted that the reasons for annulment have two fundamental features: (i) they are restrictive; and (ii) they refer to objective irregularities or errors *in procedendo*, and not to substantive irregularities or errors *in judicando*.

According to the AML, a party has 10 days from the day that the award ought to be enforced, to file, before the same arbitral tribunal, the claim for annulment of the arbitral award. Within three days, the tribunal must deliver the petition of annulment to the president of the provincial court in the respective jurisdiction who must adopt a decision within 30 days.

Additionally, whoever files an action for annulment may ask the tribunal to suspend the enforcement of the award by rendering a sufficient bond. Despite how brief the procedure for an action for annulment appears to be, the timeframe is hardly ever met and there are possibilities for appeal and other judicial actions.

(ii) May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?

In Ecuador, awards can only be challenged through an annulment action, which is a statutory right of the parties. Hence, even if the parties expressly waive their right to challenge the award, courts will admit the annulment action.

(iii) Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?

Awards cannot be appealed in Ecuador, thus is not possible to review the merits of an award.

(iv) May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?

Since there is no judicial interference in arbitration and awards cannot be appealed, the courts cannot remand an award to the tribunal.

XIII. Recognition and Enforcement of Awards

(i) What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court? Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?

Ecuador is a signatory of the 1958 United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (NY Convention) and thus is bound to apply the rules therein established for both recognition and enforcement.

However, the COGEP introduced a recognition procedure that must be initiated before the Provincial Court of the respondent's domicile. Pursuant to Article 104 of the COGEP, the Provincial Court shall verify the following:

1. That the award complies with the necessary external formalities to be considered as authentic in the country where it was issued;

2. That the award is final according to the laws of the country where it was issued, and that its annexes are dully legalized;

3. That the award, if needed, is translated;

4. The party who filed the request must demonstrate through documentation that the defendant was legally summoned and that due process was complied; and,

5. The claim must identify the place where the other party shall be notified.

According to Article 105, the respondent may oppose recognition. If the respondent opposes recognition, the court shall set a date for hearing. The recognition decision shall be issued in a 20-day term from the date of the hearing. Pursuant to the COGEP, it is not possible to stay the recognition and the enforcement. Once the award has been recognized, such award has the status of a national award, following the same procedure for its enforcement.

Additionally, if the award is against the Ecuadorian State, the party seeking recognition, besides fulfilling the aforesaid requirements, must also demonstrate that the award does not violate the Constitution or the law and that it was rendered in accordance with the ratified international treaties and conventions.

The enactment of these rules has created a debate towards the direct application of the NY Convention as COGEP creates a more burdensome process for the recognition and enforcement of the award. While it has been argued that the NY Convention can be directly applied for the recognition and enforcement regardless of the provisions incorporated in the COGEP, another position holds that the latter has modified the applicable regime and that the process established in the COGEP shall be mandatorily applied. This debate has not been yet resolved by local caselaw.

(ii) If an exequatur is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?

As per the AML, an international award that has been recognized, has the same effect as a final judgment rendered in local courts. Therefore, the enforcement of such award will follow the enforcement procedure under the COGEP for local judicial decisions.

The enforcement process begins with a written document wherein the interested party requests the judge to enforce the award. This request shall comply with the requirements required for claims before local courts to be valid. Once the court receives the petition, the judge shall appoint a liquidator, who will determine the total amount to be enforced (i.e. principal plus interests). Once the liquidation phase has been concluded, the judge shall release a writ of enforcement known as *mandamiento de ejecución*.

(iii) Are conservatory measures available pending enforcement of the award?

Yes, under COGEP rules (Art. 124 COGEP), conservatory measures are available pending enforcement of the award. Please see Section VI(ii).

(iv) What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Case law recognises the principle of *favor arbitralis*; thus, in general terms, courts have adopted a supportive attitude towards the enforcement of local awards.

There are no precedents regarding the possible enforcement of an award that has been set aside by courts at the seat of the arbitration.

(v) How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?

There is a five-year limit to seek the enforcement of the award under article 2415 of the Civil Code.

Upon the COGEP rules in accordance with article 32 of the AML, awards shall be enforced through the enforcement procedure. Usually, enforcement can take up to a year.

XIV. Sovereign Immunity

(i) Do state parties enjoy immunities in your jurisdiction? Under what conditions?

Yes. Under international law, State parties enjoy immunities. Although Ecuador is not a signatory of the United Nations Convention on Jurisdictional Immunities of States and Their Property, there is a general standard that is applied under international public law: i) Property of the diplomatic and consular missions are absolutely immune to measures targeting their execution; ii) Foreign State property and goods used for activities related to *iure imperii* are immune to

execution measures, however, when this property and goods are used for activities related to *iure gestionis*, such goods and properties do not enjoy immunity.

(ii) Are there any special rules that apply to the enforcement of an award against a state or state entity?

As per Section XIII(i) above, when an award against the State or a State entity is issued, the party seeking the recognition of the award, besides fulfilling the general requirements for the recognition to be processed, must also demonstrate that the award does not violate the Constitution or the law, and that it was rendered in accordance with the ratified international treaties and conventions. Failing to do so may provoke that the award is not recognized and therefore enforced.

XV. Investment Treaty Arbitration

(i) Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?

On 3 June 2009, the President of the Republic delivered a request to the Legislative and Auditing Committee of the National Assembly asking it to denounce the 1966 International Convention on Settlement of Investment Disputes between States and Nationals of other States, claiming that it infringed the interests of Ecuador and violated Article 422 of the Constitution. The National Assembly considered the request on 12 June 2009. Subsequently, the President of the Republic issued Executive Decree No. 1823 on 2 July 2009, where he resolved: 'To denounce and, therefore, to declare the termination of the Convention on Settlement of Investment Disputes ICSID'.

Notice of the denunciation was served to ICSID on 6 July 2009 and since 6 January 2010, Ecuador is no longer a party to the ICSID convention.

(ii) Has your country entered into bilateral investment treaties with other countries?

Yes, over the last decades Ecuador has signed over 20 Bilateral Investment Treaties with countries from all over the world. In the past years, there has been strong political impetus to have Ecuador withdraw from several bilateral investment treaties (BITs) through which Ecuador gives its consent to international arbitration. After a process in which the Constitutional Court has issued a series of decisions declaring several BITs unconstitutional and the National Assembly has approved denouncing several others, on 16 May 2017 the President of the Republic issued executive decrees denouncing and terminating each of the remaining BITs. This was done as part of a major scheme to withdraw

from the treaties because they are considered to be an illegitimate cession or waiver of sovereign powers, namely, the power of Ecuadorian courts to exercise their jurisdiction within the territory of Ecuador. Generally, termination will operate following a period of time after the notification of termination (Period Following Notification). This period generally lasts six to twelve months, depending on the BIT.

Please find below a list of the BITS entered by Ecuador and its current status:

No.	Country	Status	*Sunset* clause	Date of termination	Approval of denunciation by the President of the Republic
1	**Argentina**	In force	15 years		X
2	**Bolivia**	In force	10 years		X
3	**Canada**	In force	15 years		X
4	**Chile**	In force	10 years		X
5	**China**	In force	10 years		X
6	**Cuba**	Terminated	10 years	18/01/2008	
7	**Dominican Republic**	Terminated	5 years	18/01/2008	
8	**El Salvador**	Terminated	10 years	18/01/2008	
9	**Finland**	Terminated	10 years	09/12/2010	
10	**France**	In force	15 years		X
11	**Germany**	In force	15 years		X
12	**Great Britain and Northern Ireland**	In force	10 years		X
13	**Guatemala**	Terminated	(Text not publicly available)	18/01/2008	
14	**Honduras**	Terminated	10 years	18/01/2008	
15	**Italy**	In force	5 years		X
16	**Netherlands**	In force	15 years		X
17	**Nicaragua**	Terminated	10 years	18/01/2008	
18	**Paraguay**	Terminated	10 years	18/01/2008	
19	**Perú**	In force	10 years		X
20	**Romania**	Terminated	10 years	18/01/2008	

No.	Country	Status	*Sunset* clause	Date of termination	Approval of denunciation by the President of the Republic
21	**Spain**	In force	10 years		X
22	**Sweden**	In force	15 years		X
23	**Switzerland**	In force	10 years		X
24	**United States**	In force	10 years		X
25	**Uruguay**	Terminated	(Text not publicly available)	18/01/2008	
26	**Venezuela**	In force	10 years		X

Despite the recent denunciation of the BITs, the *sunset clause* of each BIT which protects the investments performed shall be taken into account.

XVI. Resources

(i) What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?

Unfortunately, there are very few commentaries and treatises on arbitration in Ecuador and none in particular deserve any recommendation. Generally, practitioners rely on publications and commentaries on the UNICTRAL Model Law.

(ii) Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they and when do they take place?

Yes, major arbitration events and conferences are held every year in Ecuador, including the International Conference of Arbitration and the Ecuadorian Conference of Arbitration. Also, events as the ICC YAF (Young Arbitrators Forum) have been held in Ecuador.

XVII. Trends and Developments

(i) Do you think that arbitration has become a real alternative to court proceedings in your country?

Arbitration is a real alternative to court proceedings in Ecuador in certain legal matters. Most commercial contracts include an arbitration clause, due to the backlog of court cases and delays in the proceedings. In administrative contracts, the inclusion of an arbitration clause has become one of the most important

considerations in order to enter into a contract with the State since investors are not willing to submit the dispute to a local court that gives no guarantee of independence.

There is still much work that needs to be done to raise the awareness of alternative dispute resolution (ADR) mechanisms in Ecuador in order to further develop and spread the use of arbitration for regular conflict resolution.

One of the major setbacks for the advancement of arbitration in Ecuador is the widespread lack of experience in the field, which is evident when it comes to drafting arbitration clauses in agreements. Often, this provides great difficulties for arbitral tribunals in that they cannot declare their jurisdiction over the matter.

Other difficulties arise from the lack of knowledge concerning the differences between the arbitration and the judicial systems.

(ii) What are the trends in relation to other ADR procedures, such as mediation?

It is very common to set forth multi-tiered clauses establishing an initial mediation phase followed by national or international arbitration depending on the quantum of the disputes.

On State contracts, certain model clauses have a combination of mandatory mediation, consultancy, and arbitration.

Additionally, on large projects, especially in the construction sector, the use of dispute boards is more common, given the advantages that such ADR provides to the parties and to the continuity of the project.

(iii) Are there any noteworthy recent developments in arbitration or ADR?

Ecuador is passing through difficult times with respect to international arbitration. The previous Government has denounced the ICSID Convention and all BITs. The advice to foreign clients is to include arbitration clauses in all contracts to be executed with the State and be aware that local laws that regulate the main economic sectors are constantly in change.