

GAR CHALLENGING AND ENFORCING ARBITRATION AWARDS 2020

Ecuador

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Applicable requirements as to form of arbitral awards

1 Must an award take any particular form (eg, in writing, signed, dated, place, the need for reasons, delivery)?

According to article 26 of the Arbitration and Mediation Law (AML), to be valid an award must:

- be issued by majority of votes;
- all the arbitrators must sign the award;
- in case of a dissenting opinion, it has to be appended to the award; and
- the award and dissenting opinion have to contain the reasons for the decision.

Applicable procedural law for recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

The AML provides that any party may request the extension or clarification of an award. Such a request shall be made within three days of the notification of the award. The arbitral tribunal has 10 days to decide on this request.

Applicable procedural law for recognition and enforcement of arbitral awards

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

Under Ecuadorian law, it is not possible to appeal an award. Nevertheless, a party could request the annulment of an award based on the following grounds:

- If the defendant has not been served and the procedure ends in a default judgment. The defendant must prove that the lack of notification prevented him or her from presenting a defence.
- If one of the parties has not been notified with an order of the tribunal, and as a consequence the right of defence of that party has been impaired.
- If the tribunal did not decide on or declined to hear on material evidence, despite the existence of facts that need to be justified.
- If the award refers to matters not submitted to arbitration or granted beyond what was claimed.
- If the procedures for appointing the arbitral tribunal set forth either by law or contract were violated.

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

On 21 August 2018, the rule of the General Code of Procedures (GCP) that required the recognition procedure of international awards was repealed. As a consequence, former article 42 of the AML has re-entered into force. According to this article, international awards shall have the same effects and can be enforced in the same way as national awards, this is to say, without the need for recourse to a prior recognition process. A party seeking the enforcement of an award must resort directly to a judge of first instance for civil and commercial matters.

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under article I(3) of the Convention?

Ecuador became a party to the New York Convention on 17 December 1958. The date of entry into force of the Convention was 3 January 1962.

Ecuador made both reservations allowed under article I(3) of the New York Convention, which means the Convention will apply only to awards made in the territory of another contracting state and when they relate to commercial matters in accordance with Ecuadorian law.

Recognition proceedings

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

International awards do not need to obtain a prior recognition to be enforced. A party seeking the enforcement of an international arbitral award must resort to a judge of first instance for civil and commercial matters from the place where the defendant resides. If the defendant does not reside in Ecuador, the competent judge will be either that of the place where the assets that will be subject of enforcement are located, or that of the place where the arbitral awards must deploy its effects.

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

International awards do not need to obtain a prior recognition to be enforced. The requirements for a court to have jurisdiction for the enforcement of arbitral awards – regardless of whether they are domestic or foreign – are: an applicant (i) must file an enforcement petition, and (ii) it must do it before the judge of first instance for civil and commercial matters from the place where the defendant resides. If the defendant does not reside in Ecuador, the competent judge is, either, that of the place where the assets that will be subject of enforcement are located, or that of the place where the arbitral award must deploy its effects. The applicant has no obligation to identify assets at this stage of the proceedings.

8 Are the recognition proceedings in your jurisdiction adversarial or ex parte?

Recognition procedure is no longer required under Ecuadorian legislation.

9 What documentation is required to obtain the recognition of an arbitral award?

Recognition procedure is no longer required under Ecuadorian legislation.

10 If the required documentation is drafted in another language than the official language of your jurisdiction, is it necessary to submit a translation together with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

Recognition procedure is no longer required under Ecuadorian legislation, but article 200 of the GCP provides that all documents written in a language other than Spanish must be translated.

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

There are none.

12 Do courts recognise and enforce partial or interim awards?

Recognition procedure is no longer required under Ecuadorian legislation.

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under article V of the Convention?

Recognition procedure is no longer required under Ecuadorian legislation.

- 14 What is the effect of a decision recognising the award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?**

Recognition procedure is no longer required under Ecuadorian legislation.

- 15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?**

Recognition procedure is no longer required under Ecuadorian legislation.

- 16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?**

The AML does not explicitly prevent the enforcement of awards that are being annulled in the seat of the arbitration. It does not provide either that an enforcement proceeding should be adjourn while a decision over its annulment is pending. Nevertheless, there is a relative consensus that in order to enforce an award, it must put end to the controversy and have the effect of *res iudicata* under the law of the seat of the arbitration. To the extent that set-aside procedures do not limit the enforcement in the seat of arbitration, they can be recognised and executed in Ecuador. There is no case law reported in this matter.

- 17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?**

The AML nor the General Code of Procedure provide that an enforcement proceeding should be adjourn while a decision over the annulment of an award is pending.

- 18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? In case the award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?**

The AML does not explicitly prevent the enforcement of awards that have been annulled in the seat of the arbitration. Nevertheless, there is a relative consensus that to enforce an award, it must put end to the controversy and have the effect of *res iudicata* under the law of the seat of the arbitration. Nevertheless, there has been no case law reported in this matter.

In case the award has been set aside after the decision recognising the award has been issued, a party may try to file an *acción extraordinaria de protección* (constitutional injunction), by means of which the Constitutional Court could vacate the court's decision on the recognition of the award. There is no case law reported in this matter.

Service

- 19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?**

There is no regulation for the service of extrajudicial documents to a defendant in Ecuador. Conversely, the service of judicial documents is regulated by the General Code of Proceedings. In this case the court will receive a petition and will issue an order containing the details of such request. This order and the documents attached thereto will be served to the defendant's domicile on three separate days, unless the documents are received directly by the defendant, in which case the defendant will be deemed to be duly served.

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

Ecuadorian legislation does not provide for a specific regulation for service of extrajudicial and judicial documents to a defendant out of Ecuadorian jurisdiction. Nonetheless, as Ecuador is part of the Inter-American Convention on Letters Rogatory and the Vienna Convention on Consular Relations, the service of documents to a defendant out of Ecuador could be made in accordance with these instruments.

Identification of assets

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

Yes, property registrars provide public information regarding immovable property ownership. The National Transit Agency also provides ownership information regarding vehicles. The Superintendency of Companies has a shareholder's information database to which a creditor could resort. This information allows the enforcing party to determine a debtor's sizeable assets even before filing for the recognition of the award.

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

Article 365 of the CGP provides that judges may request public registrars or any other state entity, to provide information regarding a debtor's assets.

Enforcement proceedings

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

Yes, Ecuadorian law provides for specific rules concerning interim measures against assets, and it does not distinguish between assets owned by private parties or state entities. Nevertheless, article 46 of the Monetary and Financial Organic Code grants immunity from enforcement and encumbrance to deposits belonging to state entities made in accounts of the Central Bank of Ecuador. In general, a judge may grant interim measures when:

- the requesting party proves the existence of a credit; and
- the requesting party proves either:
 - (i) the debtor's assets are not enough to cover the credit;
 - (ii) the debtor could hide or make the assets disappear; or
 - (iii) the debtor is trying to dispose or sell the assets.

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings ex parte?

Interim measures may be requested from a court prior to filing a petition of recognition. After the request for interim measures has been filed, the court will summon the applicant to a hearing in which it will decide – ex and inaudita parte – whether the creditor's request complies with the above said conditions. If the conditions are met, the court will grant the interim measures.

25 What is the procedure for interim measures against immovable property within your jurisdiction?

Regarding immovable property, a debtor may request a court to grant a prohibition on transfer, sale or encumbrance. If such prohibition is granted, a notification shall be made to the Property Registrar who will take note of the court's order. Debtor may suspend the interim measures after posting security.

26 What is the procedure for interim measures against movable property within your jurisdiction?

When interim measures are granted against movable property, the judge will order its seizure. Once property is seized it will be delivered to a depository who has a duty of care and conservation of the asset until proper security is granted or until the end of the proceedings.

27 What is the procedure for interim measures against intangible property within your jurisdiction?

According to the nineteenth general provision of the Organic Code of the Social Economy of Knowledge (Ecuadorian IP Act), intangible property is reputed to be movable for the constitution of encumbrances. For its seizure and auction, the procedures prescribed in the CGP shall be followed.

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings ex parte?

After the filing of the execution petition, the judge grants the defendant the opportunity to pay or to relinquish assets of its property to cover the amount due. If the defendant does not comply with the order within five days, the applicant has the right to decide which assets will attach for this purpose. The assets will be auctioned and the applicant will receive the collected amount. Attachment proceedings are adversarial by nature.

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

According to article 384 of the GCP, the attachment of immovable property starts with the order of seizure of the property and its registration on the respective Property Registry.

30 What is the procedure for enforcement measures against movable property within your jurisdiction?

According to article 381 of the GCP, the attachment of movable property starts with the order of sequestration of specific assets and its subsequent placing under judicial deposit to be actioned. If the attached assets are subject to registration, the order of attachment will be registered in the respective public registry.

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

According to the nineteenth general provision of the Organic Code of the Social Economy of Knowledge (Ecuadorian IP Law), for the seizure and auction of intangible property, the procedures prescribed in the CGP shall be followed.

Enforcement against foreign states

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

There are none.

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

According to article 61 of GCP, extrajudicial and judicial documents must be served to a foreign state through diplomatic note issued by the Foreign Minister of Ecuador.

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

Regarding deposits of foreign states made in accounts belonging to their Central Banks, under the principle of reciprocity, article 46 of the Monetary and Financial Organic Code grants them absolute immunity from execution. In reference to assets other than the afore said, since article 416(9) of the Ecuadorian Constitution recognises international law as a norm of conduct of the state,

principles of customary international law governing the immunity of jurisdiction of sovereign states and their property should apply. In this sense, it will be for the courts to apply the law of sovereign immunity of states and their property as portrayed by customary international law, and, consequently, to determine whether a particular asset owned by a foreign state is granted immunity from execution or not.

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

A state can expressly waive its immunity from enforcement provided that the requirements under customary international law have been fulfilled (eg, express consent by international agreement, by a declaration before the court, or by a written communication after a dispute between the parties has arisen; or if the state has allocated or earmarked property for the satisfaction of the claim that is the object of that proceeding, etc). It is worth noting that a waiver of immunity from jurisdiction does not entail nor imply a waiver of immunity from enforcement.



Eduardo Carmigniani
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As profiled by *Chambers and Partners*, Eduardo is considered as “one of the most important litigators in the country”. He advises local and multinational corporations in complex litigation (particularly in commercial, banking, civil and constitutional matters) and arbitration (both domestic and international). He regularly represents parties and sits as arbitrator in cases involving different rules and multiple jurisdictions. Eduardo Carmigniani is president of the Ecuadorian Arbitration Institute, director of the board of the Centre of Arbitration of the Chamber of Commerce of Guayaquil, Ecuador’s Representative to the ICC Court of Arbitration (2009–2015) and member of the ICC Latin American Group. Among his recent representations include: representing an Ecuadorian group in an ICC arbitration with seat on Mexico regarding a cross-border acquisition of a corporation in the dairy industry; representing a Mexican investor in an arbitration matter under the rules of the CIAM regarding the breach of a concession contract; representing an Ecuadorian company in a 28 US Code § 1782 action in the Courts of Florida; representing an Ecuadorian corporation in the successful negotiation regarding an exclusivity clause contained in a supply contract; representing a company in several constitutional challenges of legislative measures that levy a tax on telecommunication infrastructure on different municipalities.



Hugo García-Larriva
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Hugo García Larriva focuses his practice on complex litigation, domestic and international arbitration (commercial and investment matters) and public international law. He has experience in cases involving multiple jurisdictions and procedural rules and has participated in proceedings before ICC, ICSID and ad hoc UNCITRAL arbitral tribunals. Prior to joining Carmigniani Perez, Mr García Larriva worked in the international arbitration group of an international law firm in Paris. Mr García Larriva has also served as legal adviser to the Attorney General Office of Ecuador (Unit of International Affairs and Arbitration), and as director and deputy director of the most important Centres of Arbitration and Mediation in Ecuador. He is a lecturer and deputy director of the master’s degree in international litigation and arbitration at the Universidad San Francisco de Quito, and director and general editor of the *Ecuadorian Arbitration Review* and the *Ecuadorian Arbitration Gazette*. Mr García recent representations include: representing an Ecuadorian group in an ICC arbitration with seat in Mexico regarding a cross-border acquisition of a corporation in the dairy industry; the defence of a Latin American state in two ICSID Arbitrations, the representation of the Central Bank of Ecuador in a case before the Judicial Committee of the Privy Council (UK); the representation of Ecuador in two proceedings before the Andean Court of Justice regarding alleged restrictions to trade.



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Carla Cepeda focuses her practice on arbitration and litigation. She represents clients in disputes related to public, civil, commercial and corporate law matters. Carla has experience in ADR proceedings, corporate consultancy and domestic and international arbitration. Before joining Carmigniani Pérez, Carla worked as corporative and tax legal consultant in Moore Stephens Profile. Carla held internships in the Attorney General's Office of Ecuador (Unit of Mediation) and in the Ecuadorian-American Chamber of Commerce (Mediation and Arbitration Centre). Since 2012 she has been assistant professor at the San Francisco University of Quito in property law, private agreements/contract formation and inheritance law. Among her recent representations are: representing a Mexican investor in an arbitration under the rules of the Centre of International Arbitration and Mediation arising out of a breach of a concession contract; representing the defendant in an ICC arbitration with seat on Miami in a dispute about a settlement agreement and the restitution of industrial equipment; representing a Mexican investor in an arbitration under the rules of the Centre of International Arbitration and Mediation arising out of a breach of a concession contract; representing the defendant in an ICC arbitration with seat on Miami in a dispute about a settlement agreement and the restitution of industrial equipment; representing the defendant in a domestic arbitration at the Quito Chamber of Commerce (CCQ), arising about the performance of public projects.



Daniel Caicedo

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Daniel Caicedo is part of the Carmigniani Pérez litigation and arbitration team, specifically in the firm's office in Quito. His practice focuses on rendering advice to national and foreign clients in civil, commercial and labour arbitrations and litigation.

Since he joined the firm, he has successfully participated in arbitration proceedings related to the telecommunications sector.

Editor of the Legal Magazine and assistant professor of civil procedural law at the Catholic University Santiago de Guayaquil.

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Studies

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CARMIGNIANI PÉREZ
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Our law firm is praised for having a strong bench of well-known and sophisticated litigators and arbitrators. Despite being a full-service firm, our litigation and arbitration department is regarded as boutique. With a real and effective nationwide service (with offices in Guayaquil and Quito), we advise both local and foreign corporations, in a broad spectrum of disputes before domestic courts and arbitral tribunals. Our firm is known for its particular experience in domestic and international arbitration. The direct and deep involvement of partners from the early stages of cases, involving research and strategy definition, until the end of the dispute, is a guarantee of excellence and quality. The arbitration department is led by Eduardo Carmigniani, whose long-lasting experience as litigator and arbitrator (including an ICSID proceeding) is critical when dealing with complex cases. Hugo García is partner and head of the Quito branch. His abilities as an outstanding litigator exceed clients' expectations and are a guarantee of effective results. He has brought to the firm important experience in domestic and international arbitration, since he combines a strong academic background with skilful and sophisticated litigating. Roberto Carmigniani is one of the most talented litigators of his generation. He is known for having in-depth knowledge of the law and an impressive understanding of the judicial system. Daniel Dziouba and Carla Cepeda are considered to be promising litigators among his generation. The combination of a deep understanding of substantive law and extraordinary litigation skills make them key members of our group.

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